



# **EUROPEAN REGULATORS GROUP**

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## **I. Introduction by the Chairman**

The European Regulators Group (ERG) – comprising the European national telecoms regulators (NRAs) – can look back at an intense and successful year. The overriding regulatory topic in 2009 was the adoption of the revised European regulatory framework for electronic communications networks and services by the Council and the EP at the end of November. This provides a future proof framework adjusted to the rapidly changing market conditions following evolving communications technologies that bring innovative services for the benefit of the European citizens as well as European business increasing productivity of the economy as a whole. All of this had to be seen against the background of the financial and economic crisis.

ERG continued to provide professional input to the legislative process and developed into a decisive driver for regulatory change. With the adopted telecoms package we will see the next step of successful cooperation as it includes the creation of BEREC – the Body of European Regulators for Electronic Communications – giving a stronger legal basis to ERG with professional and administrative support from a separate Office. This reliance on the group of NRAs clearly shows the increased importance of the ERG's work and the NRAs' role of acting collectively on the European level to develop the internal market for electronic communications services further through a consistent application of the framework.

### **Reflection on the Work Programme 2009**

2009 was 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, regulators need to start preparing for the implementation of the revised framework to be ready for its application after the transposition in 2011. Thus managing today's market conditions requires bearing in mind the changes stemming from the revised framework too.

Clearly NGN/NGA was one of the priorities in 2009 as it 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 asking for a more differentiated regulatory approach to properly take account of national circumstances as particularly with NGA roll-out there is no one-size-fits-all solution and regulators need to carefully tailor their interventions to national market situations to maintain the level and intensity of competition reached so far mainly with the access to the unbundled local loop.

Regulation may therefore become more complex in the coming year/s before it can be phased out later once SMP positions have disappeared and more mature markets may no longer be susceptible to ex-ante regulation. Despite network deployment being in its relative infancy in Europe, the discussion surrounding NGA regulation shows 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. In particular in NGA regulation the time horizon need to be extended to take account of long term investment and regulation needs to be predictable for all market players when taking strategic investment decisions.

The I/ERG Work Programme 2009 was therefore 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 key issues are grouped into the following themes:

- Framework Review,
- Emerging challenges in the market,
- Further harmonization of the internal market.

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 harmonization. Finally the I/ERG's work on consumer empowerment was continued and broadened.

### **Developments in light of the adoption of the electronic communications package**

2009 saw the discussions on the regulatory reform for the EU telecommunications sector continuing. ERG gave professional and evidence-based advice to the Commission and the legislative institutions. Especially with regard to the proposed new European institutional design of telecommunications regulation, the ERG's proportionate, reasonable and evolutionary approach based on the principle of independence received an open ear in Brussels ultimately resulting in setting up a novel type of body combining greater cohesion between NRAs while leaving the ultimate decision-making to them. BEREC and the Office (supervised by the Management Committee comprised of 27 EU NRAs and one high level representative from the Commission) are fully under the control of the NRAs.

In line with a balanced approach to regulation, the ERG successfully promoted the principles of proportionality and subsidiarity in European telecoms regulation. We continue to believe that harmonisation is best achieved '*bottom-up*' through effectively regulated national markets with NRAs following best practice principles of regulation laid down in common positions. An important factor is the monitoring of the compliance of NRAs with the common positions when taking national decisions. This 'cooperative approach' is strengthened through the establishment of BEREC which is assigned an important role in the new so-called co-regulation procedure of Art. 7/Art. 7a amended Framework Directive.

In another important area – the revision of the Roaming Regulation – ERG equally provided input to the European Commission, both with extensive collection and analysis of data as well as with comments and recommendations on necessary actions to further strengthen competition and drive down prices. ERG will continue the data collection which will also comprise SMS data, which was included in the revised Roaming Regulation that entered into force on 1 July 2009.

## **Overcoming the economic and financial crisis**

Clearly 2009 was marked by the economic and financial crises and a lot of questions are asked regarding the best way to regulate in these times. However we observe that the telecommunications sector and more generally network industries are less affected by the financial and economic crisis than other sectors due to the fact that, to a certain extent, regulation helps stabilize them and shelters them from the effects. Thus, we may say that the crisis should not fundamentally change the outcome of market developments; although “shaky” or outdated business models may disappear faster than without the crisis. This also implies that no fundamental change of regulation is required. Rather the opposite is true: the objectives of promoting competition to the deepest level possible (i.e. the principle of the “ladder of infrastructure” investment), to encourage efficient investment and promote the benefit of consumers remain valid. In particular as competition is driving investment, following these regulatory principles will help to overcome the crisis. Thus we should see the crisis as an opportunity as the developments (including market exits) would happen sooner or later anyway, and the crisis only speeds up the restructuring (including to a certain extent consolidation) process of the sector which is driven by technological convergence and the emergence of new technologies and equipment pushing the arrival of innovative services and changing market definitions and conditions.

The most important step for regulators everywhere is indeed to provide a predictable and stable environment as investors and network operators need confidence in the regulatory environment. This is particularly the case at the beginning of an investment cycle, which is currently seen with the roll-out of next generation core and access networks. NRAs should therefore commit to a regulatory strategy early on and announce it publicly, allowing market players to take decisions on a reliable basis and with reduced uncertainty. Regulation may need to be adapted to the situation, but not overhauled substantially and it is certainly useful to handle the regulatory tools in a flexible manner and adjust them to the needs of NGA infrastructure roll-out.

Effective regulation is only possible when regulators enjoy full independence to properly perform their tasks. That is why such independence is a key principle underlying the ERG’s work. As important as independence is, a sufficient staffing to professionally perform the work is also essential. ERG therefore welcomes the strengthening of the NRA’s independence in Art. 3 of the amended FD.

As the Chairman of ERG, I am honoured to present the Group’s annual report for 2009. I would also like to wish my successor, Mr. John Doherty, every success in chairing ERG and its successor BEREC during 2010.

**Matthias Kurth, *ERG Chairman 2009***

## II. Overview

The European Regulators Group for electronic communications networks and services (ERG) was set up with a Decision of the Commission in July 2002 to help implement the telecommunications regulatory framework. The ERG is composed of the 27 heads of the independent national telecoms regulatory authorities of EU Member States, with observers from the four EFTA states and three EU candidate states, making it the largest network of regulators worldwide.

At the same time, the ERG is more than the sum of its parts: the Group is the primary forum in Europe for developing regulatory best practice and advising on regulatory issues in the EU Member States working towards solutions for the European telecoms market and for better addressing the needs of EU citizens for communications services.

The ERG's strength is to combine and harness the expertise of its Members to promote the EU single market further for the benefit of EU consumers and operators.

The ERG's primary aims are:

- To promote competition and the development of the internal market for electronic communications networks and services as well as to encourage efficient investment and promote the benefit of European citizens
- To ensure consistent application in all Member States of the 2002 regulatory framework for electronic communications networks and services established in accordance with European Parliament and Council Directives
- To advise the European Commission on a broad range of issues affecting the EU telecoms market and assist with implementation of EU regulatory decisions
- To encourage cooperation and coordination between key stakeholders in areas where the regulatory framework gives considerable discretionary powers in application of the rules.

In 2009 the ERG's Work Programme was designed along three pillars:

1. The Framework Review;
2. Emerging challenges in the market; and
3. Further harmonisation of the internal market Response to emerging challenges to the development of the internal market.

Major results have been achieved in these three areas.

### 1. Framework review

The ERG followed closely the legislative discussion on the telecoms package providing input and expertise to the European Institutions. Among other activities, the ERG, represented by its Chairman, met with the Czech and the Swedish Presidency as well as with several Rapporteurs. In particular the ERG analyzed the proposals for

the future institutional set-up (EECMA, BERT, GERT, BEREC) and its interaction with the proposed changes in the Art. 7 Framework Directive procedure.

ERG strongly advocated the maintenance of the current regulatory balance in relation to remedies and did not support any extension of the Commission's veto powers. Even though the new co-regulation procedure of Art. 7 / Art. 7a is more complicated, the task assigned to BEREC to provide opinions on notifications by NRAs will provide greater alignment of regulatory decisions and consistent application of the framework while leaving the ultimate decision making power with the individual NRA, which is most familiar with the necessities of the national market. In the course of the year, the Group published 3 statements on the review welcoming the progress made.

Aside from the Framework review, the Roaming Regulation was also amended and adopted in 2009. After the ERG had published its views on the Commission's proposals, some of which had been taken over to the final Regulation, the Group developed Guidelines on how to deal with the new rules. In addition the ERG kept monitoring the implementation of the Regulation by the mobile network operators in its two "International Roaming Reports".

## **2. Emerging challenges in the market**

Beyond short-term issues the Group took on a pro-active role on several forward-looking challenges.

The ERG focused on NGA developments and the regulatory challenges stemming from the roll-out of NGA infrastructure. Besides providing a response to the Commission's consultation on its draft NGA recommendation, it produced a Report on "NGA Economic Analysis and Regulatory Principles". It continued its work on IP-IC focusing on future charging mechanisms and Long term termination issues and published a consultation on "Draft Common Position on NGN Future Charging Mechanisms / Long Term Termination Issues".

Several reports dealing with the impact of convergence, bundling margin squeeze etc. were published, such as the "Report on Fixed-Mobile Convergence: Implications on Competition and Regulatory Aspects", the "Report on the Discussion on the Application of Margin Squeeze Tests to Bundles" or the "Report on Price Consistency in Upstream Broadband Markets".

The ERG continued its cooperation with the Radio Spectrum Policy Group (RSPG) on spectrum usage, one of the most important issues in the future development of telecommunications.

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

The ERG shows a strong commitment to putting in place Common Positions (CPs) which make a real contribution to consistent application of the regulatory framework. A programme of monitoring conformity with agreed Common Positions (CPs), backed up by remedial action to address non-conformities which cannot be justified, provides

an effective mechanism for promoting uniformly effective regulation throughout Europe, while allowing for differences in national circumstances.

In 2009 the ERG published two updated timetables making sure that adopted Common Positions (CPs) are regarded by the NRAs as a guideline for their regulatory actions. A deeper understanding and an outlook on future harmonisation between the European NRAs was taken in the “Report on the Elaboration and Monitoring of Common Positions”.

Another issue that was picked up by the ERG was discussed in the “Report on the Regulation of Access Products Necessary to Deliver Business Connectivity Services”. As business customers throughout Europe are increasingly moving towards trans-national companies, a harmonised approach to services that are necessary for such customers to be successful across the internal market must be effective and efficient. The consultation on this Report closed on the 1<sup>st</sup> February 2010, and the comments received are currently being evaluated.

### III. Main activities

The ERG carried out its work in 2009 with the contribution of expert Project Teams (PTs, see chapter IV for the PT structure 2009). Preliminary positions were reached at a PT level through the contribution of technical and professional teams of experts from the National Regulatory Authorities (NRAs) which form the foundation of ERG's work and "bundles" the professional expertise of all regulators. The Contact Network (CN, comprised of senior advisors) then conducted assessment and provisional approval with the resulting work submitted to the Plenary, which comprises the Heads of all member NRAs. The plenary provides the final approval of the documents in its quarterly meetings (see Annex A and Annex B).

In 2009, there were four regular plenary meetings that took place respectively in Berlin (ERG28 hosted by BNetzA), Prague (ERG29 hosted by CTU), Lucerne (ERG30 hosted by BAKOM) and Warsaw (ERG31 hosted by UKE). The main issues dealt with by the ERG in 2009 on the basis of the Work Programme are summarised below.

#### 1. Next Generation Access Networks and IP interconnection

In the field of Next Generation Access Network (NGA) the ERG published the "**Report on NGA – Economic Analysis and Regulatory Principles**" in June 2009. As the implementation of NGA networks keeps gaining speed, this report analyses whether the findings of the 2007 "ERG Opinion on Regulatory Principles of NGA" are still valid.

The ERG's economic analysis makes clear that the expansion of NGA networks is most likely to strengthen the relevance of economies of both scale and density. Thus it is possible that competitors will find it increasingly difficult to roll-out their own networks; this results in reducing replicability and reinforcing enduring bottlenecks. The regulatory analysis shows that the concept of the "ladder of investment" and the principle of stimulating competition to the deepest possible level remains valid, as well as the differentiation between market 4 and market 5<sup>1</sup> of the Commission Recommendation.

Regarding price control, NRAs have to be able to apply appropriate approaches when it comes to the principles of cost accounting. Furthermore a consistent application of cost methods and pricing principles is essential for avoiding margin squeezes. A risk-adequate return on capital is necessary to foster investments. In addition regulatory actions must be predictable, as this facilitates investments, e.g. by openly communicating regulatory strategies and a fixed duration of regulatory periods.

The implementation of NGA networks entails – as any other investment – certain risks, such as uncertainty of future demand or shortfalls in payment. It must be born in mind that the influence of regulation is limited, and also investors are ultimately

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<sup>1</sup> Market 4 refers to the market for wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location. Market 5 refers to the market for wholesale broadband access.

responsible for trying to minimize these risks. Bundling of demand, one-off fees, a step-by-step implementation of NGA networks or co-investments might be helpful in mitigating some of this risk, to some extent. In order not to distort the investment decisions, the regulator has to be as risk-neutral as possible.

Eventually the ERG's report showed that the principles set up in the current European regulatory framework can still be applied to face the challenges of the development towards NGA networks.

In July 2009 the ERG responded to the European Commission's "**Consultation on Regulated Access to Next Generation Access Networks**". It supported the objectives of the draft Recommendation and agreed with the Commission that it was important for NRAs to provide regulatory predictability, because this will have a positive effect on investment in NGA infrastructure as it reduces uncertainty through the announcement of e.g. regulatory guidelines before the investment decision is taken.

However the ERG expressed its concern that the Recommendation as drafted remained too prescriptive. This means that NRAs would not be provided with sufficient discretion with regard to the choice of remedies to deal with the complexities of NGA market.

In October 2009 the ERG published its Draft Common Position on "**Next Generation Networks Future Charging Mechanisms / Long Term Termination Issues**" for consultation with stakeholders. This document specifically assessed Bill & Keep (BaK) as an alternative to the currently used regime for voice in Europe: Calling Party Network Pays (CPNP).

The last few years have seen a lively debate on charging mechanisms for interconnection of communication networks at the wholesale level. Currently interconnection payments at the wholesale level in PSTN/ mobile and IP- networks are typically governed by different charging mechanisms. As separate networks are expected to converge towards a multi-service (including voice) NGN IP network such differences may not be sustainable or efficient in the long run. This convergence is considered an important factor driving the need to assess which interconnection regime is appropriate for the long-term.

This document is a follow-up document of the Common Statement on IP-IC/NGN Regulatory Principles for NGN Core<sup>2</sup>, where the ERG concluded that BaK has a number of attractive properties, but needs further study. The issues to be discussed 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. Taken together these convergence developments require a technological neutral and consistent regulatory regime.

Weighing the pros and cons the ERG proposed the following conclusions. The expected higher usage and lower price under BaK outweighs the cons in general if BaK is introduced gradually through a sufficiently long glide path. The lower regulatory cost and uncertainty is an extra benefit of BaK. This is the more relevant in the longer term where the cost per minute decreases, the difference in effects of CPNP and

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<sup>2</sup> See [http://erg.ec.europa.eu/doc/publications/erg\\_08\\_26\\_final\\_ngn\\_ip\\_ic\\_cs\\_081016.pdf](http://erg.ec.europa.eu/doc/publications/erg_08_26_final_ngn_ip_ic_cs_081016.pdf).

BaK decrease and the cost of determining a cost oriented tariff becomes relatively more important. However, some of the cons could justify continuation of the CPNP regime at least for the short and medium term. Especially in countries (1) where CPS operators are important for competition (moving to BaK could be more complicated in that case, because of the possibly appropriate mark-up on voice originating), (2) that have a significant percentage of traffic to neighboring countries that use CPNP regime (which means BaK introduces a subsidy to the CPNP domain). Also the uncertainty about the effects could be a reason to be cautious, possibly keep the CPNP regime in place and monitor the effects of lowering terminating rates under the CPNP regime first, before the step to BaK is made.

Therefore, in this Draft CP the ERG found that BaK was more promising than CPNP as a regulatory regime for termination in the long term, and depending on national circumstances (including legal issues) NRAs could set a glide path to BaK within the regulatory period related to the next market analysis they carry out for voice termination. However, for the short and medium term CPNP could also be an appropriate choice based on national circumstances, so NRAs could also continue the CPNP regime at least in the next regulatory period.

The conclusions of this Draft CP are still subject to the outcome of the consultation.

## 2. Convergence and economic analysis of market developments

In March 2009 the ERG finalized its **“Report on Fixed-Mobile Convergence: Implications on Competition and Regulatory Aspects”**. Convergence at the network level can be understood as being able to offer a customer mobile and fixed (or fixed-like) services seamlessly by integrating fixed and mobile networks. However, convergent products exist also where there is no convergence at the network level; “fixed-like” services can be provided when end users are connected via a particular cell defined as the “home cell” or “home zone” typically coinciding with the 2G or 3G cell.

The paper presented different architectures to deploy Fixed-Mobile Convergence (FMC) services and also considers substitution trends between fixed and mobile traffic services across European countries. The data presented shows that, besides the retail price, several other factors need to be considered, for example culture, habits, Quality of Service, telecom development in each EU-Country, percentage of bundled offers available, etc.

The Report showed that, in principle, there could be some relevant differences between the difficulties that mobile and fixed operators face in entering on the FMC market. Mobile operators have access to regulated offers, mainly cost oriented ones, with some enhancements being considered by some NRAs to include functionalities such as QoS in bitstream offers. Fixed operators have only access to commercial wholesale offers from mobile operators, which they could in principle refuse to provide them or could propose high prices, thus blocking the entrance of new competitors in the FMC market.

However, the majority of the NRAs that contributed to the paper remarked that there is no *ex ante* regulation imposed in the access and call origination on mobile networks (M15). In general, NRAs have not clearly stated that ex-ante regulation is re-

quired so as to ensure that wholesale agreements with MNOs can be achieved; particularly, only a few NRAs clearly indicated that fixed operators may face difficulties so as to obtain wholesale agreements with the appropriate level of functionalities.

As a consequence, only few NRAs indicated that fixed operators are disadvantaged against mobile network operators in offering fixed mobile convergent products since the MVNO agreements do not necessarily meet requirements for functionalities, cost and time to market. These NRAs pointed out the fact that apparent asymmetry between mobile and fixed termination rates can lead to differentiated margins and affect profitability, and thus should be investigated as fixed mobile convergent services become more widely adopted. For example, “fixed-like rate” services provided by MNO are possible due to the lower fixed termination rates that MNOs have to pay, which allows them to offer nearly unlimited calls towards fixed numbers when the user is located at home.

The “**Report on the Discussion on the Application of Margin Squeeze Tests to Bundles**” was also published in March 2009 as the application of margin squeeze tests in regulated industries has received considerable attention. This is particularly the case in electronic communication markets, usually characterized by the presence of a vertically integrated network operator providing access to its competitors.

In this report, the ERG stated that, as convergence makes bundling more likely, the consideration of margin squeeze for bundled offers will become more prominent. As a wholesale SMP operator may use bundles to margin squeeze competitors at the retail level, assessing whether there is a MS on bundled offers can be important under the current regulatory regime. Yet, the analysis of margin squeeze for bundles is complex because it may require the allocation of a common margin to bundled parts, involve several wholesale services, and span regulated and unregulated services. The analysis is information intensive and data availability is likely to be a challenge.

Given these difficulties, NRAs may find it useful to complement the use of the test with other indicators linked to the likelihood of an anticompetitive effect. For example (but not exclusively), the existence of demand complementarities, whether the price is of a permanent nature, or whether the bundle is targeted to a key demand segment. There are a number of approaches for allocating margins to bundle parts. However, whichever rules are used, NRAs may need to ensure consistency between the methods to allocate costs and the ones used to allocate revenues.

In June 2009 the ERG released a “**Report on Price Consistency in Upstream Broadband Markets**”. It deals with potential issues arising from regulatory intervention in wholesale broadband markets. In particular, the setting of prices could imply competitive risks either when it is the NRA or the vertically integrated incumbent operator which determines them. For this reason the document was divided in two parts, given that the regulatory tools were different in these two cases, depending on whether one of the price components was set by the vertically integrated incumbent operator or not.

The ERG’s Report found that consistency in wholesale prices was of critical importance in the context of broadband services. Prices should be set so as to enable efficient operators to compete in the retail market, in order to translate the benefits of competition to end consumers. At the same time prices should provide correct incen-

tives to operators to climb the ladder of investment, in such a way that sustainable competition can be achieved in the long run. NRAs should monitor consistency of prices regardless of the means through which *ex ante* regulation takes place. The regulatory approach may shift from an incentives policy - where NRAs directly regulate prices - to margin squeeze surveillance where competition is already in place.

NRAs are regulating prices at several steps of the broadband value chain (Local Loop Unbundling (LLU) and bitstream services). In this case, prices should be designed to ensure that operators substitute in an efficient manner the services available on a lower step of the ladder of investment by others closer to the customer premises (in particular, LLU). This would imply setting the prices of bitstream services taking into account the costs of an efficient operator, as otherwise it would not find this substitution economically efficient. This situation was different from the one where the downstream market is not regulated (at least, with regard to prices). In such a case, it was clear that the incumbent could affect competitive conditions through the margin allowed between two levels of the value chain.

In the Report it had been argued that NRAs may also want to monitor these situations, although the objectives may be different from those referred to above. In these instances, operators were already active in both levels of the value chain, so incentives were not so relevant anymore. Therefore, the focus of NRAs should be whether alternative operators could act in a profitable manner allowing the maximum benefit to end consumers. For this reason, in cases where competition was in place, NRAs may consider applying cost standards that minimise the gap that was required to the incumbent operator between upstream and downstream levels.

The “**Report on Transition from Sector-Specific Regulation to Competition Law**” was published by the ERG in October 2009 focusing on situations in which the transition from sector-specific regulation to competition law takes place. The role of transition, and its effects on the market, is likely to become more prominent as, on the basis of the 2007 Commission Recommendation the list of markets that are candidates for *ex ante* regulation has been significantly reduced.

A number of indicators that may be of assistance to NRAs when determining what constitutes an appropriate period of notice in a context of the withdrawal of SMP obligations were provided by the Report. With regard to the second issue, the Report referred to a number of instruments that were available to NRAs (such as information rights, symmetric obligations or voluntary commitments), if necessary and if appropriate, to deal with a potential need for market monitoring, in the specific context of transition from *ex ante* to *ex post* regulation. The Report explored for instance the possibilities of enhanced co-operation between NRAs and National Competition Authorities (NCAs) to ensure the expedient application of the competition law rules to the electronic communications markets.

In addition the Report also noted that it could not be ruled out that future developments in a deregulated market may lead NRAs to consider re-imposing remedies on the basis of an SMP finding in the future, an occurrence that is provided for within the European regulatory framework. Nevertheless it was noted that such re-imposition of remedies was only likely to happen in exceptional cases.

In its paper on the “**Replicability of Bundles from the Perspective of the Availability of Wholesale Inputs and Access to Content**” (published in December 09) the ERG analyses specific regulatory issues regarding replicability of bundles by alternative operators from the perspective of the availability of wholesale inputs and access to contents. It dealt with, e.g. the evolution of bundled offers, the drivers for NRAs intervention regarding replicability of bundles, the obligations imposed in the different markets regarding technical replicability of different services bundled and addressed the issues related to the impact of access to contents on replicability of bundles.

The analysis showed that the most relevant regulatory issues arising when dealing with technical replicability were interventions by NRA to reduce potential damage to the market in case a bundled offer was not technically replicable, the imposition of wholesale access obligations to assure replicability by alternative actors, potential competition problems related to replicability of bundles and, in the case of bundles including TV services, impact of access to contents on replicability issues.

According to the paper most NRAs were well aware of issues related to the replicability of bundles and that they intervened on their own initiative before receiving complaints mostly based upon the obligation for operators to communicate *ex ante* retail offers to the NRA. Near half of NRAs imposed obligations on operators to communicate retail offers before the commercial launching. In addition more and more NRAs were already considering bundles or multiple-services in their market analysis. The main competition problems in connection with the replicability of bundles that were encountered during market analysis refer to technical features of wholesale services and service levels (QoS) of wholesale services.

### 3. Harmonisation

In its 2009 Work Programme, ERG has again given a central role to harmonisation. In this sense, ERG has committed to continue the intensive work on the delivery of ERG opinions, ERG reports and ERG common positions, continuing the cooperation among its member NRAs and with the European Commission in the promotion of the internal market for electronic communications.

As a consequence and as the ERG is of the opinion that consistent regulatory approaches are effective means to foster the European telecommunication markets, it committed itself in a report published at the beginning of 2008 by the ERG (“Monitoring of Conformity with ERG Common Positions: Lessons Learned from Broadband Questionnaires and Next Steps”), to publish a timetable for the conduct of future monitoring exercises covering a wider range of ERG Common Positions.

In 2009 the ERG issued two updated timetables identifying topics that should be assessed, such as the “Conformity with the VoIP Common Position”, “Practical implementation issues regarding geographic differentiation” or the “Monitoring of conformity with Broadband CPs”.

In October 2009 the ERG finalised the “**Report on the Elaboration and Monitoring of Common Positions**” that outlines the ERG’s necessity to produce high-quality work and fulfil its role more efficiently as the market situation becomes more complex

both as a result of the increase in competition, and as NRAs gain experience in regulating their national markets. As a response to this, ERG had focused its attention on how to harmonise more effectively, robustly and in a more targeted manner, through increasing the number and improving the quality of Common Positions, which adequately respond to the specificities of this complex environment.

In this context, the Report presented how the ERG would elaborate and monitor ERG Common Positions. It describes procedures intended to ensure that none of the essential components of any such exercise are overlooked, thereby ensuring better and more effective harmonisation. The Report described model procedures which ERG would use in future as the basis of its work on the elaboration of Common Positions and to monitor the extent of conformity of national regulatory approaches with those Common Positions

The paper also explained by means of a diagram how both procedures were integrated in the “ERG Harmonisation Cycle”, highlighting the fact that the regulatory activity of ERG consists of a continuous cycle rather than a series of static pictures, where common positions are required to be adapted to the changing competitive situation of the markets in question (ensuring the maximum possible match between market needs and regulatory responses). This is achieved through the periodic review of common positions, taking into account the results of the monitoring exercises. These will be used in particular to reveal those areas where there may be good reasons for individual NRAs to depart from a CP in some respects or to demonstrate that a CP is no longer fully in line with market realities.

Finally in December 2009 the ERG held a public consultation (followed by a public hearing on 29 January 2010) on the **“Report on the Regulation of Access Products Necessary to Deliver Business Connectivity Services”**. In this report the Group wanted to find out if “high end” business users were well served in terms of good choice, quality, price etc. as these customers are in need of services of higher technical specifications than those aimed at the mass market. Some services are classically sold almost exclusively to businesses (leased lines, ISDN 30) whereas others (DSL-based broadband connections) may have “standard” and “high end” variants. Business customers often show a preference for purchasing a national network from a single supplier.

Consequently, in this Report, ERG has investigated whether there is scope for NRAs to do more to increase competition at the “high end” of the market, while recognising that any adjustments to regulatory approaches would be likely to have wider impact. Despite the ever-increasing importance of mobile usage to this segment, the focus of the Report was on fixed networks as, in practice, regulation of mobile networks was relatively limited under the Framework.

Thus the ERG investigated the NRAs approaches and experiences to business needs taken in Market Reviews as well as the evidence gained from disputes and complaints. In addition the SMP remedies actually imposed and experiences of individual end users were taken into account as well. Such experiences showed that business customers often face problems such as an insufficient choice of supplier. Especially in the case of companies needing trans-national networks the problem arises that they cannot always obtain specification to their satisfaction. Network pro-

viders believe the reasons for such problems lie in gaps in wholesale access remedies and geographic segmentation of the market.

The Report found that NRAs have generally not given detailed examination to special high-end business needs in conducting market reviews. Instead there often was a view that large companies could look after themselves whereas residential consumers could not, or that companies were well served by a range of “business only” products, such as leased lines and ISDN 30. On the other hand it must be considered that often such issues are very complex and the market data received was insufficient to differentiate the needs of different market segments. Nevertheless, indications from recent reviews showed that business user needs might be getting more attention.

#### 4. International roaming

In 2009 the ERG continued its monitoring of the implementation of the Regulation on international roaming services publishing two “**International Roaming Reports**” in January and July 2009, following on from the first two Reports that had been written in 2008.

January’s Report, covering the period from April to September 2008 and for the first time a typical summer travel season in Europe, showed that all consumers had access to a voice Eurotariff with capped maximum rates and that average wholesale charges (set between operators) were also in line with the regulated cap. The active provision of tariff information through “push” SMS services and the ability to receive personalised tariff information through a free-of-charge phone number had been implemented successfully by all providers.

However, the Report also stressed that was an indication that Eurotariff voice minutes billed exceeded actual elapsed minutes by a significant margin (typically 25% at the retail level for calls made and 19% for call received) as a consequence of the practice of many providers of using charging intervals of more than one second. At the wholesale level, voice minutes billed exceeded actual elapsed minutes by around 23%. These results were broadly consistent with those previously reported.

For voice there was limited evidence of market forces at work. Prices were rather stable and mostly clustered just below the respective caps. For SMS, market forces were even less in evidence, given the stability of the prices in almost all countries surveyed. The picture was however very different for data roaming. The average unregulated wholesale and retail charges fell significantly between the fourth quarter of 2007 and the third quarter of 2008. However, while the European averages had fallen over this period, there was also significant price variation across Europe for which an objective explanation was not apparent.

The fourth International Roaming Report highlighted the situation between October 2008 and March 2009. The data collected for this Report suggested that the trends that ERG observed in the previous rounds of data collection had continued with no significant changes. As it followed the drafting and subsequent adoption of the amended roaming Regulation in June 2009, the ERG had chosen to limit this Report

to a more basic form, which mainly includes the collected data and refrains from a more in-depth analysis.

In the course of the adoption of the amended roaming Regulation the ERG published revised “**International Roaming Regulation - ERG Guidelines**” giving advice on the correct implementation on both consumer and wholesale level to NRAs and mobile providers.

On the consumer level the Guidelines clarify, among others, specifications on tariff changes or the bundling of regulated roaming tariffs with other consumer tariffs. They also sum up the information that the personalised pricing information must provide, such as maximum charges while in the visited country for roaming voice calls made back to the subscriber's home country and within the visited country, for sending regulated roaming SMS, and for using regulated data roaming services, including charges for sending a roaming MMS. Providers must also send information on maximum charges for calls received and for MMS received that the customer will pay under his or her tariff scheme. Furthermore the consumer must be informed of the possibility of accessing the emergency services by dialling 112 free of charge and of a free phone number from which the customer can obtain more detailed personalised information on voice, SMS, MMS or data services and information on the transparency measures in the Regulation, by means of a voice call or an SMS.

The Guidelines also put stress on the new rules concerning data roaming. According to the Regulation from March 2010, providers have to make available to their customers one or more financial or volume limits for data roaming use during an agreed specified period, subject to the customer's consent. This is intended to enable customers to avoid running up bills that are higher than intended or expected. The Guidelines state that, for the default financial limit, providers must make the customer aware in advance of the corresponding amount in volume terms. For the default volume limit, providers must make the customer aware in advance of the corresponding amount in financial terms.

When a financial or volume limit is in operation, the Regulation requires providers to send the customer a warning when they have consumed 80% of that limit. The overall policy aim of the limit is to enable customers to monitor and control their expenditure. As the ERG became aware of the fact that the type of handset or other device, data service, and content can all affect the speed with which the notification can be sent, and with which it can be received and acted upon by the customer, the Guidelines covered this issue as well. For example, accessing audiovisual content will generally cause 80% of the limit, and the limit itself, to be reached much more quickly than reading e-mails. Thus ERG considered that providers should set up the sending of notifications so that the customer has time to use the notification to make an informed decision about their expenditure before the final limit is reached. Where there is variation from 80%, providers should seek as a matter of good practice to ensure that the customer receives the message before they reach 80% of their limit rather than after.

The Guidelines explain and advise on the calculation of the caps at the wholesale level, set up by the new Regulation. The ERG asks the network operators to enter into early bi-lateral negotiations in good faith with a view to adjusting the contractual pricing provisions as soon as possible. The result of such negotiations should provide

assurance on both sides that the limits in the Regulation would be respected over the applicable compliance period. According to the Guidelines, such negotiations should be completed 6 months after the Regulation had come into effect for both wholesale voice and data roaming.

With reference to the new rule that regulated roaming retail voice calls made and received must be charged on a per second basis (with an exception for calls made, which allows operators to extend the initial charging period up to a maximum of 30 seconds), the Guidelines state that at the wholesale level operators must also bill on a per second basis, subject to a minimum initial charging interval of up to 30 seconds. As for Eurotariff revenues, compliance with the wholesale cap would be assessed by dividing the relevant revenue received by the amount of time billed.

Furthermore the Guidelines cover topics such as wholesale billing for SMS; charges for voicemail messages, charges in other currencies than the Euro, value-added services, machine to machine communications and the geographical scope of the Regulation, including a possible application in EEA Member States.

## 5. ERG-RSPG Cooperation

In 2009 work started in 2008 in the ERG-RSPG PT continued and two Reports were published in June after finalization: **“The ERG-RSPG Report on transitional spectrum issues”** and **“The ERG-RSPG Report on radio spectrum competition issues”**. The ERG-RSPG Report on transitional spectrum issues dealt with competition issues arising from the transition towards more flexible spectrum management for electronic communications networks and services. The second Report on radio spectrum competition issues looks in particular at radio spectrum management to avoid anticompetitive hoarding.

Also in June the ERG published a statement on the digital dividend **“The Digital Dividend – a once in a lifetime opportunity for Europe”** where ERG expresses its strong support for a series of initiatives to ensure the EU makes the best of the digital dividend, the spectrum frequencies made available by the switch from analogue to digital broadcasting.

## 6. Consumer Empowerment

The ERG finalized **“The ERG Report on Transparency of Tariff Information”** which was published after the first Plenary. The report deals with the question of how to inform consumers so that they can make best use of the offers from operators and providers. The objectives of this report are to analyse the end-user information transparency problem and draw an inventory of the practices used to inform end-users by service providers, NRAs and third parties focusing in particular on the transparency of tariff information. In general a wide range of methods and tools are used by operators, NRAs and third parties alike to ensure consumers can take informed decisions.

Providers of electronic communications services use a mix of static and interactive instruments to inform end-users, on either a mandatory or a voluntary basis.

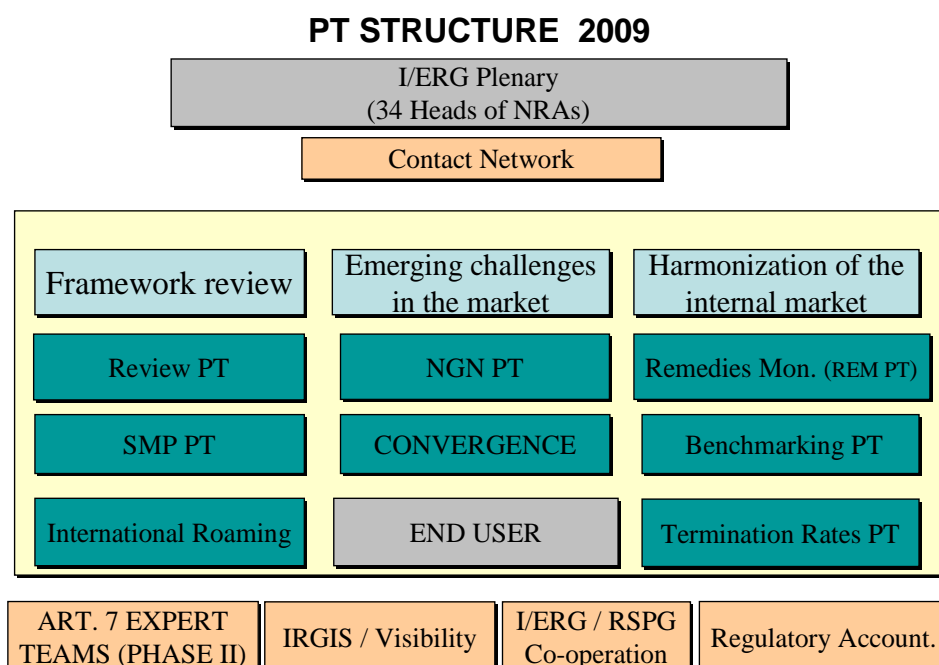
NRAs too have put in place a variety of methods and tools to inform end-users. The approaches include static and uni-directional, dynamic and uni-directional, and dynamic and bi-directional or interactive. Finally third parties may also be useful in developing complementary initiatives to those deployed by providers of electronic communications services and NRAs in their effort to inform end users. Positive experiences as far as third-party action is concerned were reported in some ERG countries, including the provision of reliable information and advice on consumer issues by associations which are widely known and trusted by the public.

The topic is relevant also in the coming years given the emphasis the revised framework puts on consumer transparency.

## IV. Organisational developments

The ERG needs to be in a position to take fast and effective joint decisions. The Group has therefore strengthened its operations by setting clear internal procedures, making decision-making processes more efficient and, crucially, enabling the Group to more systematically implement its common positions by taking into utmost account their contents in the national sphere. This is achieved by monitoring the adherence to the common positions.

The Project Team structure has been streamlined and adjusted to the main themes of the WP 2009. It was structured as follows:



In order to make the management of daily functioning even more smooth and professional, the Board of Directors (with 5 members) guides the activities and its members support the Chair in representing ERG on conferences and in meetings with the European institutions speaking on behalf of ERG, a permanent IRG Secretariat with directly employed staff members (1 senior and 2 juniors, plus 1 administrative assistant) provide support to the Chair in the preparation of the plenary meetings and to the PT Chairs by hosting PT meetings in the Brussels Office regularly from 2008 and serve to support the members.<sup>3</sup>

<sup>3</sup> The Secretariat is financed with the contributions of IRG's 34 members.

The first year with the Secretariat of full time employees further improved the professional running of the Group and its strengthening as an organization. The Group provides not only expert advice on all the relevant dossiers at stake of the European telecommunications sector but also supports consistent implementation and application of the framework by each of its members.

In order to ensure full transparency, the ERG regularly holds debriefings after each plenary meeting to inform stakeholders on the outcome and publishes press releases.

In 2009 the ERG carried on with its international cooperation strategy to facilitate the sharing of regulatory experiences between different regions. The Group held the VIII IRG-Regulatel-SUMMIT in October in Capri hosted by AGCOM and a workshop was organized by Regulatel (the group of Latin American Telecommunication Regulators) and CMT in Cartagena/Columbia. An informal network, the Euro-Mediterranean network of Regulators (EMERG), set up in 2008, met for its first "Contact Network meeting" with its EU counterparts on 29 April 2009 setting out the work plan for 2009 and 2010 to enhance the cross-Mediterranean regulatory co-operation.

By ensuring that the Group's daily work and its views are known and understood not only by telecoms stakeholders, but also by the media and the general public, the ERG has continued to strengthen its efforts in communication in 2009, positioning itself with an image as a balanced, efficient, reliable and expert body. This enhanced visibility has reinforced the Group's position by making it a key point of reference and central stakeholder for the EU telecommunications sector. This will be developed further with the successor of ERG BEREC in preparation of the application of the revised framework in 2011.

## Annex A: Meetings of the Group

The Group held four Plenary Meetings in 2009. The agendas and conclusions are available on the ERG's website (the table below provides links to the agendas and conclusions of the meetings).

| Date           | Place   | Agenda  | Conclusions   |
|----------------|---------|---|---|
| 26/27 February | Berlin  |    |    |
| 28/29 May      | Prague  |    |    |
| 08/09 October  | Lucerne |    |    |
| 03/04 December | Warsaw  |  |  |

## Annex B: ERG documents published in 2009

### Work Programme:

|                 |   |
|-----------------|---|
| ERG (09) 42rev1 | I-ERG/ERG Work Programme 2010                         |
| ERG (09) 42b    | Report of the Consultation on the Draft I/ERG WP 2010 |

### Reports:

|                 |   |
|-----------------|---|
| ERG (09) 52     | Updated timetable for monitoring of conformity with ERG CPs   |
| ERG (09) 49rev1 | Report on replicability of bundles from the perspective of the availability of wholesale inputs and access to content |
| ERG (09) 41     | ERG Report Regulatory accounting in practice 2009   |
| ERG (09) 40     | ERG Report on the transition to competition law   |
| ERG (09) 36     | Report on the elaboration and monitoring of common positions  |
| ERG (09) 31     | 4th International Roaming Report  |
| ERG (09) 24     | International Roaming Regulation Guidelines   |
| ERG (09) 24b    | International Roaming Regulation Guidelines Consultation Rep.   |
| ERG (09) 22     | ERG-RSPG Report on radio spectrum competition issues  |
| ERG (09) 21     | ERG Report on price consistency in upstream broadband markets   |
| ERG (09) 17     | Report on NGA - Economic Analysis and Regulatory Principles   |
| ERG (09) 07     | Report on the Discussion of the application of Margin Squeeze tests to bundles  |
| ERG (09) 06     | Report on Fixed-Mobile Convergence  |
| ERG (09) 05     | Updated timetable for monitoring of conformity with ERG CPs   |
| ERG (09) 01     | 3rd International Roaming Report  |
| ERG (08) 60rev1 | ERG-RSPG Report on transitional spectrum issues   |
| ERG (08) 59rev2 | ERG Report on Transparency of Tariff Information  |

### Other:

|                 |  |
|-----------------|--|
| Warsaw Plenary  | IRG welcomes the adoption of the revised regulatory framework (Dec 09) |
| Prague Plenary  | I/ERG Statement on the Review (June 09)                                |
| Berlin Plenary  | I/ERG statement on the review (Feb 09)                                 |
| Capri Summit    | Joint Declaration of the VIII IRG – REGULATEL Summit (Oct 09)          |
| ERG (09) 16rev3 | I/ERG response to the draft NGA recommendation                         |
| ERG (09) 26     | ERG Statement on the Digital Dividend                                  |
| ERG (09) 19     | VoIP Action Plan   |
| ERG (09) 35     | MTR snapshot, July 2009  |
| ERG (09) 23     | MTR snapshot, Jan 2009   |

**Drafts publicly consulted:**

|             |  |
|-------------|--|
| ERG (09) 51 | ERG Report on the regulation of access products necessary to deliver business connectivity services                |
| ERG (09) 34 | ERG Draft Common Position on Next Generation Networks<br>Future Charging Mechanisms / Long Term Termination Issues |

**Art 7 Phase II Expert reports:**

|               |  |
|---------------|--|
| Expert Report | Phase II Case Austria - Wholesale broadband access |
| Expert Report | Phase II Case Spain Market 5                       |
| Expert Report | Phase II Case Slovenia (ex) Market 15              |