

## Explanatory note on the 2005 Work Programme consultation and hearing

This note summarises the contributions of the public consultation and comments of the hearing concerning the ERG-IRG 2005 Work Programme (hereafter *the WP*) and explains how these contributions can be taken into account in the drafting of the final 2005 WP (see boxes in the written comments section). The main comments of stakeholders have been divided into topics.

Comments of substance on particular topics, such as market analysis methodology and outcome or discussions on appropriate regulation, are not included in this note.

### Summary of the hearing

A hearing on the WP was held on the 14th of January 2005 in Brussels. The ERG Chairman who in addition gave an introduction to the background of the proposed WP and its main features led the meeting.

### General

*ETNO* welcomed the more focused nature of this year's WP, stating that it was a big improvement from last year. *ETNO* asked for clarifications on the differences in status of deliverables such as Common Positions and Opinions. *ETNO* also requested a further development towards openness with more consultations.

### Comments on specific items

#### Remedies

*Tiscali* questioned the need to review of the Remedies document while it is still very young and since it is well done from the beginning.

*ETNO* stated that ERG should better incorporate network developments in their regulatory guidance. It said that the revision of the Remedies paper should include a systematic assessment of the proportionality principle based on the experience gathered so far in the regulatory process. It remarked that non-discrimination should not be widely interpreted as such interpretation may delay or prevent new services. It proposed that the review of the remedies paper be postponed because of delays in the analysis of relevant markets in Member States. *ETNO* added that two items should nevertheless especially be included in the review of the remedies paper: how regulation can be rolled back according to the intentions of the authors of the Regulatory Framework, and how to deal with new or emerging markets.

*DT* seconded *ETNO*'s position on remedies. It added that the conception of some issues needed to be developed further; in particular an effective mechanism needs to be put in place for making sure that new services are not prevented from being offered. *DT* agreed that the need is clarification and development rather than revision.

**Time Warner** agreed with Tiscali's comments, highlighting the need for clarity about where to make new investments and that a changed policy could damage investment incentives.

### **Voice over IP (VoIP)**

**ETNO** stated that ERG's proposed approach with leniency for smaller operators threatens to undermine legal certainty, as the concept has so far been expressed vaguely and to ETNO's knowledge lacks legal basis.

**Tiscali** remarked that VoIP interconnection is not merely a future issue but an issue today for alternative broadband providers who have invested in VoIP.

**Time Warner** agreed with Tiscali's comments, while being reassured that a too heavy burden would not be placed on small operators in the VoIP marketplace. It added that call termination issues are critical.

**Vodafone** considered it discouraging that the regulators consider *facilitating* Voice over IP, as it could be questioned whether such a policy role is within the scope of the ERG.

### **Other comments**

**Vodafone** added that it must be clarified whether ERG is a public policy group that has the role of developing certain technologies, Vodafone itself considering that such a role is for the industry and entrepreneurs, or rather a group for the application of the Regulatory Framework.

**Vodafone** also asked whether it should be ERG's role to regulate *potentially* excessive termination fees, and again whether the Group should assume this extensive public policy role.

**BT** commended ERG's commitment to harmonisation and encouraged the Group to continue its work towards more harmonised outcomes. It welcomed the fact that it is a joint ERG-IRG WP, but added that it was discouraged by the fact that an item on market definition was last year assigned to the IRG, and that it would like to see visibility on work with geographical markets.

**BT** also expressed concern that work on national appeals procedures and regulatory effectiveness has been put on hold and wished for it to be back on the agenda. It reminded the Group of the fact that long appeal procedures will create uncertainties and therefore should be addressed by it.

**Cable and Wireless** stated that the WP had the right scope in general, but asked why SMP is not mentioned at all given the upcoming relevant markets review and the joint dominance issues that are now in focus. **Cable and Wireless** also asked if there would be any dealing with the detail of regulation, and in particular avoiding the very detailed regulation of the type seen in the UK, drawing from experiences there.

## **Responses from the Chairman**

### **Remedies**

Regarding the need for a revision of the remedies paper, the Chairman responded that if such a full review was to be undertaken at this point it could indeed create legal uncertainty. In order to avoid such uncertainty the aim is only an adjustment based on experiences gained, rather than a complete change of the document.

### **VoIP**

The Chairman expressed his happiness over the clear support for high prioritization of VoIP, adding that he will take that with him back to the Group. He clarified that as regarding what should be shorter- and longer term VoIP issues, there will be an ongoing process over the next year where long-term issues are successively addressed. He added that it was not for him to say when the first outcome will be made public, but that the ERG is very concerned with the issues and that this will be reflected in the WP.

Regarding leniency for smaller operators or new entrants the Chairman expressed his conviction that such operators will get precisely the regulation which is appropriate according to the Regulatory Framework.

The Chairman added that he did see it as the role of ERG to facilitate the development of VoIP and any other communications so that consumers could reap the maximum benefits from the communications sector. He remarked that the role of regulators is all about meeting the needs of consumers, in particular through the creation of sustainable competition.

## ***Summary of written responses***

### **Contributors**

The following have filed responses in the public consultation on the 2005 WP.

COLT  
Deutsche Telekom  
ETNO  
France Telecom  
GSM Europe  
INTUG  
ISPA (Austria)  
mobikom austria  
O2  
Tele2  
Telecom Italia  
Telefonica  
Telegate

### **General**

#### **Scope of the Work Programme**

A vast majority of the respondents welcomes and supports the Work Programme and its focus on core topics.

**COLT** strongly encourages the ERG to give substantial attention to the issue of spectrum regulation, as it is identified at EU level as an important matter and subject at present to various consultations by NRAs.

**ETNO** suggests that for the 2005 WP the ERG considers how to better incorporate the actual development of networks and thereby contribute to a better assessment of the decisions on remedies in their regulatory guidance.

**INTUG** notes that although ERG has indicated the importance of harmonisation it has proposed no measurements of that nor does it have any plans to develop metrics. Neither, **INTUG** notes, does it indicate how its work is related to the achievement of the Lisbon goals.

**mobikom austria** would like to see the ERG/IRG work not so much on the harmonization of the general rules of regulation (e.g. for market analysis or remedies obligations) but focus its work more on the goal of a factual harmonization of the rules of play for operators within the Common Market (e.g. termination rates).

**Tele2** would like to see a greater focus on competition problems experienced in markets where new entrants' services are dependent on legacy networks and wholesale input from the fixed network. In particular, **Tele2** would appreciate harmonisation work on a wholesale line rental obligation, an

obligation to negotiate MVNO access, and the regulation of costs and switching procedures involved in carrier preselection.

**Telecom Italia** considers that the scope of action as an advisory body under the European Commission should be quite narrow, and suggests that the Work Programme and the correspondent deliveries should provide an assessment on the objectives of the ERG initiatives.

**Telegate** reminds the IRG that they supported its work in 2004 regarding the analysis of the supply and pricing conditions for the development of a competitive directory services market and provided comprehensive input for the work. It states that it has not heard from IRG since providing its input in June 2004 and consequently was disappointed and concerned not to find the issue in the draft 2005 WP.

#### ***Adjustments regarding the scope of the Work Programme***

*Given that there seems to be widespread acceptance and understanding of the Group's need to scale down and focus on core topics, no additional work items are added to the WP. IRG will consider whether to make the IRG Report/analysis of the supply and pricing conditions for the development of a competitive Directory Services Market public.*

#### **Role of ERG and IRG**

**Deutsche Telekom** asks for a clear distinction between the role of ERG and that of the Commission. The Commission itself in order to steer the debate with the market should carry out consultations and a possible call for input on a Commission Recommendation. **Deutsche Telekom** considers that ERG should not be burdened with drafting policy guidelines in the place of the Commission, as has recently been the case.

**GSM Europe** still sees the relationship between the IRG and ERG as unclear, as the groups are almost identical in their composition and in their functions but have different rules of working. It finds it surprising that IRG fully shares the ERG responsibilities and tasks without legal basis in the regulatory framework. GSME considers that, for the benefit of clarity and transparency, there should be only one entity with responsibility for these matters.

**O2** remains puzzled and a little concerned that national regulatory authorities still find it necessary to work through two distinct bodies at the EU level, and that since the formation of the ERG it is unclear what useful role a separate body such as the IRG retains.

**Telefonica** has difficulties understanding the need for maintaining two organisations that review and analyse similar aspects, as this arrangement does not provide more clarity or greater transparency and dilutes the responsibilities of each body, without the role of the IRG in the process being clearly understood. It encourages ERG/IRG members to reach a solution that will allow the consolidation in one single group.

### ***Adjustments regarding the role of ERG and IRG***

*Individual Work Programme items will specify the envisaged involvement of the Commission, if any. The Group will continue the process of integrating ERG and IRG with the goal of merging the two organisations.*

### **Transparency**

**COLT** regrets that, contrary to the consultation document of last year, the draft WP does not offer transparency as regards the proposed deadlines for the various deliverables listed in the document.

**Deutsche Telekom** would welcome an early involvement by market participants where the ERG has identified priority issues ('first-category items') since comments by stakeholders are harder to integrate at the stage of draft Common Positions than in the drafting phase. **Deutsche Telekom** proposes that ERG could use industry to contribute to the debate within ERG itself, i.e. by inviting industry to work-level meetings.

**France Telecom** suggests that the WP would have to mention the foreseen public consultations relative to some topics, as this is of a great interest for the sector in order to anticipate answers.

**GSM Europe** is of the opinion that there is a need for the ERG to continue to improve its level of transparency. It considers it beneficial to establish more informal cooperation between ERG and the sector, believing that these exchanges of opinion could only benefit ERG work and the European market development. It would like to see more transparency of the work done in subgroups.

**GSM Europe** adds that there are no closing dates mentioned for every report covered in the 2005 ERG work plan, and that an indication of even an approximate date for the conclusion of every item would give more transparency to the ERG tasks and would also indicate what the priorities are for the ERG.

**Tele2** supports the creation within each NRA of an "Interconnection and Access Committee", which, in consultation with the carriers, would be responsible for following up on market analyses applying the electronic communications directives and the choice and implementation of remedies. The conclusions of these committees would be forwarded to the ERG, which could conduct and publish international comparative studies on the concrete effects of the remedies.

**Telefonica** has comments similar to GSM Europe's regarding transparency, adding that it could be beneficial for ERG's work to include industry in some work-level meetings. It has similar comments as GSM Europe regarding the inclusion of dates for the conclusion of work items, adding that the timetable would be an excellent opportunity for specifying the proposed interaction with the industry, which would significantly help increase the value of the WP as a reference document.

### ***Adjustments regarding transparency***

*The WP will for each work item indicate*

- whether the deliverable is envisaged to be made public and, if so, whether it will be subject to public consultation,*
- estimated date of finalisation.*

*The usefulness of open calls for input, public seminars or other forms of retrieving information from stakeholders in the early stages of projects should be individually considered within each Project Team.*

## Proportionality principle

**ETNO** (*Telecom Italia* and *Telefonica* having similar comments) suggests an overall systematic assessment of the principle of proportionality with regards to the application of remedies, coupled with the evaluation of the remedies implemented, verifying their consistency with regulatory objectives.

### *Adjustments regarding the proportionality principle*

*Considering that the assessment of the principle of proportionality is highly dependent upon the circumstances of the individual case, all individual WP work items will include an appropriate assessment according to the proportionality principle. The differences of national and market-specific circumstances combined diminish the usefulness of a generic proportionality principle exercise in view of the scarcity of available resources.*

## Comments on specific items

### Remedies

**COLT** agrees with the approach taken by the ERG, which considers that the items listed under this heading do not induce the need for a “review” of the Common Position, but simply the issuing of additional guidance.

**Deutsche Telekom** asks that guidance be provided in particular regarding the ladder of investment and replicability in order to create a common understanding of a one-way-access regime that encourages infrastructure competition, and emerging markets, including the issue of the definition of an emerging market. In addition, *Deutsche Telekom* mentions the issue of regulation of different operators on the same market or in termination as highly important.

**ETNO** considers, due to the delayed analysis of the relevant markets in several Member States, that the overall revision of the CP on remedies may be postponed until further experience has been gathered. Priority should nevertheless be given to further work on one-way access, in particular how price-regulation of replicable assets can be rolled back in order to create an enabling framework for infrastructure competition, and work on emerging markets with focus on protecting new investment.

**O2** submits that the ERG should not look again at the Common Position until at least the majority of market reviews have been completed. It also deems it premature to think about revising the document until there is some experience of the results of remedies.

**Tele2** would like to see ERG intervention in the area of bundling of products and services not open to competition and/or not regulated and services and products that are subject to competition. Such

intervention is according to *Tele2* particularly important since today's competition law, being an ex post regulation, is a too slow measure regarding bundled products.

#### ***Adjustments regarding remedies***

*The WP text on this work item will clarify that only an adjustment, mainly by the introduction of additional text on some key topics, is planned for the Common Position on remedies.*

#### **Wholesale international roaming**

**France Telecom** welcomes the working process adopted for this relevant market, and considers it a good approach consistent with harmonisation. It adds that this kind of approach should be replicable even if the market has a national scope.

**GSM Europe** states that the deployment of traffic direction mechanisms, together with the evolution of roaming tariffing strategies and recent market developments such as the launch of strategic alliances and new, competing technologies has resulted in significant competition in the market. In view of such rapid changes taking place, *GSM Europe* strongly believes there is no need for the ERG's Work Programme to address this market in 2005.

**Telecom Italia** would like some indications on the extent of the cooperation with Commission Services.

#### ***Adjustments regarding wholesale international roaming***

*The WP text on this work item will clarify the extent of cooperation with the Commission in the WIR project.*

#### **Broadband markets**

**ETNO** does not fully understand the difference in the status of on the one hand Common Positions which describe the regulatory approach to be taken by ERG members and on the other 'reports' which in the case of the Report on the broadband market appear to be dealing inter alia with essential conceptual and economical questions.

**Telecom Italia** states that the description of the broadband Report does not clarify if it is a mere comparative assessment of the legislation applied so far or if it will provide guidance to NRAs on the regulation of broadband access for new services, in particular for VoIP.

**Telefonica** considers that the Report on the broadband market has a mandate and a scope that is not very clear.

#### ***Adjustments regarding broadband markets***

*The mandate and scope of the Report on the broadband market will be clarified. The results of this Report will i.a. be used as input for the review of the Common Position on remedies.*



## VoIP

**COLT** considers that the issue of IP interconnection should not be pushed back to the “long term” and therefore not urgent topics’ list. Discussions such as those currently taking place in the UK are a matter of immediate importance. The critical issue of the number and type of points of interconnection requires specific work by the regulators aimed at avoiding structural reduction of interconnection possibilities, and stranding of investments in interconnect capillarity. **COLT** also reminds the ERG that both the residential AND the business segments need to be examined

**Telecom Italia’s** opinion is that any ERG activity on the subject should be primarily focussed on understanding the characteristics and implications of the different new VoIP applications and Services, and only afterwards on elaborating regulatory options.

### ***Adjustments regarding VoIP***

*The work examining IP interconnection issues will be begun as quickly as possible within the relevant project.*

## Article 5.1 AID

**O2** states that is not aware of a legal requirement on the Commission to examine the practical scope of Article 5.1 of the Access Directive. It further states that if the intention is to clarify the interpretation of Article 5.1, this is not something that the ERG is best placed to do. If, according to **O2**, the ERG intends to give its opinion on what powers it believes regulators should have to ensure end-to-end connectivity, this is a question of changing the law, in which case the timing of the work item seems premature since the Directives are only due for review by July 2006.

### ***Adjustments regarding the work item on Article 5.1 AID***

*Having further discussed the issue with Commission Services, the Group will not include this item in the WP. The decision may be re-evaluated as part of the planned midterm review of the WP.*

## Cost accounting

**ETNO** states that the ERG has undertaken a good amount of work during 2004 on cost accounting, including the issue of current costs, and that it is therefore difficult to see the need to continuously work and develop this issue particularly as some stability would be required.

### ***Adjustments regarding the work items on cost accounting***

*As the IRG sees continued need for the work indicated, all proposed work items are planned to be carried out.*

## ***Conclusions and summary of proposals for adjustments***

### **General**

There seems to be widespread acceptance and understanding of the Group's need to focus on core topics.

Contributions generally reflect substantial market knowledge and contain critical viewpoints on the execution of work items of a nature that should or could not best be taken into account at the stage of drafting the WP. It is important that project teams executing the work will take appropriate account of the industry comments on individual topics provided in the responses to the 2005 WP consultation. In addition, in line with what has been suggested by several contributors, the usefulness of open calls for input, public seminars or other forms of retrieving information from stakeholders in the early stages of projects should be individually considered within each Project Team.

Bearing the above in mind, no additional work items be added to the WP. With some preliminary results of work on the deliverables as a basis, a midterm review of the scope and scale of the WP is planned for May 2005.

### **Summary of proposed adjustments**

#### **Transparency**

In line with several industry comments, the WP for each work items will indicate

- Whether the deliverable is envisaged to be made public and, if so, whether it will be subject to public consultation,
- [- Estimated time period for each consultation] (??)
- Estimated date of finalization.

#### **Application of the proportionality principle**

Several contributors suggested an overall systematic assessment of the principle of proportionality and evaluation of proposed remedies' consistency with regulatory objectives. Considering that the assessment of the principle of proportionality is highly dependent upon the circumstances of the individual case, all individual work items related to remedies will include an appropriate assessment according to the proportionality principle. The differences of national and market-specific circumstances combined diminish the usefulness of a generic proportionality principle exercise in view of the scarcity of available resources.

#### **Voice over IP**

The work examining IP interconnection issues will be begun as quickly as possible within the relevant project.

### **Directory services**

IRG will consider whether to make the Report/analysis of the supply and pricing conditions for the development of a competitive Directory Services Market public.

### **Wholesale international roaming**

The extent of cooperation with the Commission in the WIR project, for example in terms of any relation with DG Competition's ongoing investigation, will be clarified as much as possible.

### **Broadband markets**

The mandate and scope of the Report on the broadband market will be clarified.

### **Article 5.1 AID**

Communication between the Commission and the Group subsequent to the public consultation of the 2005 WP has resulted in the understanding that work on this issue is not of high priority and the agreement to not include it the Work Programme. The decision may be re-evaluated as part of the planned midterm review of the WP.