January 2004

ETNO Reflection Document on Consultation Document: Draft Joint ERG/EC Approach to Appropriate Remedies in the New Regulatory Framework

Summary:

ETNO is concerned with the joint ERG/EC Consultation document on remedies, since the chosen approach remains by and large theoretical and is not linked to many of the real issues governing the telecommunications market. The document's focus is largely on a "behavioural approach". This may be suited to *ex-post* competition law treatment but, if applied to an *ex-ante* approach may fail the principle of proportionality and would not target the actual competition problem.

ETNO has serious concerns with issues such as the emerging markets concept/first-mover advantages, *ex-ante* assumptions on incumbents' behaviour, persistence of remedies, the concept of ladder of investment, asymmetrical termination obligations and the use of burdensome and detailed price squeeze tests for bitstream.

In order that the Consultation document provides substantial guidance to NRAs to ensure harmonisation and proportionate regulation, modifications to the document are needed as proposed by ETNO.

ETNO expects the draft joint ERG/EC document ('the document') on remedies to play a crucial role in the correct implementation of the new regulatory framework. This document will be critical to ensure that:

- Implementation takes place in a harmonised manner;
- NRAs adhere to the principles of proportionality and a targeted application of remedies in cases where competition is not found to be efficient in relevant markets[1].

[1] This principle corresponds well with the Commission's understanding of the new Regulatory Framework: *"Under European competition and communications policy rules, **regulators should forbear from intervention** except in these conditions because, whilst regulation can act as a proxy for competition where effective competition does not exist, it is not a perfect proxy and so is likely to result in a sub-optimal outcome. Even where regulation is necessary, **sector specific forms of regulation are undesirable if general competition law is adequate to deal with the problem**. General competition law is appropriate to deal with most competition problems except where there is some structural market defect which requires application of bespoke* ex-ante *forms of regulation – for example, regulation to ensure non-discriminatory access to bottleneck facilities controlled by*

We appreciate the consultation document's overview of situations where lack of efficient competition may occur, as well as its examination of potential remedies. However, we also feel that in certain instances the document is in conflict with the purpose of a goal-oriented, proportionate use of regulatory remedies.

We will discuss a number of these examples in our answers to the questions posed by the ERG. We suggest that the ERG/EC take them into account before the final document is released. We are confident that the document will then better reflect not only theoretical assumptions but also realities in the market place.

The ERG's chosen approach remains largely theoretical--an academic text with no real links to most of the actual issues in the communications market. It thus risks missing the point and failing to deliver the expected positive outcome for players and regulators.

Although the document repeatedly states that "*The remedy selected must be based on the nature of the problem identified,*"[2] the chosen approach focuses on potential theoretical abuses (i.e., standard competition problems) and tries to anticipate these competition problems so as "*to identify the incentives of an SMP undertaking to engage in anti-competitive behaviour*". Such a heavy "behavioural approach" may be suited to *ex-post* competition law treatment but this is not what is normally understood regarding an *ex-ante* approach. As the Commission explains:

"*General competition law is appropriate to deal with most competition problems except where there is some structural market defect which requires application of bespoke ex-ante forms of regulation – for example, regulation to ensure non-discriminatory access to bottleneck facilities controlled by dominant incumbent networks*" .[3]

These measures are supposedly transitory ones intended to pave the way for effective competition as opposed to behavioural remedies, which are likely to remain.

Below we present our detailed comments on the ERG questions (except no. 10), with recommendations in grey. ETNO is available to discuss these issues further.

ETNO's major concerns are:

- **Emerging markets concept/first mover advantages**: Although the Framework Directive says emerging markets should not be regulated in order to stimulate the continuous growth of the sector, the document's executive summary (p.12) indicates that an emerging market will be extremely difficult to define. At the same time, it says first mover

dominant incumbent networks [our emphasis]. Contribution by the European Commission to ITU SG 3 meeting, June 2002, COM 3-D 24-EMay/2002.

[2] For instance, see Document p. 57, par. 3.2 or p. 62, par. 3.2.3: "…*the basis of the problems identified in the market analysis and to allow competition to emerge*".

[3] *Op.cit*.

advantages will be curtailed (p. 13, bullet no. 3), so the regulatory forbearance in emerging markets may be lost.

- **Ex-ante assumptions on incumbents' behaviour**: The focus on expected behaviour of dominant players--even where no endogenous barriers can be found--appears very theoretical and may lead to over-intrusive interventions.

- **Lack of criteria for assessing the effect of remedies other than rearrangement of market shares**: It is not clear how the impact of remedies is monitored other than via extensive market analysis. This is particularly relevant if the remedy is ineffective and imposes undue costs on the regulated company. In such instance, further cost-benefit analysis of the remedy's impact --within a defined timeframe to assess its success/failure--is needed.

- **Persistence of remedies**: The document suggests remedies for "*persistent*" barriers. The remedies will as well be 'persistent'. Such an application of persistent remedies has been broadened to include a much wider range of services than if applied in accordance with, for example, an essential facility criterion that otherwise could justify durable remedies.

- **Asymmetrical termination obligations**: If, regarding *"termination"*, the remedy *"price control"* is applied, then apparently a lack of scale advantage is handed to new entrants whereas their new technology advantage is considered irrelevant. This suggests that the conditions for termination under the NRF and the Recommendation have not been fully understood.

- **Price squeeze**: Regulation of retail prices is seen as a possible relevant remedy to deal with price squeeze. But this ignores retail price regulation's detrimental impact on competition for all players in the retail market.

Comments on the ERG questions

Chapter 1: Typology

1. *Do you agree that the description of the competition problems provides the requisite level of detail? If not, please highlight areas where you would like more detail to be included in the final document*.

The document defines a competition problem as any practice by an incumbent operator aimed either at driving competitors out of the market (or preventing them from entering the market) or exploiting consumers (p.24). We assume that the document refers to SMP operators, and not 'incumbent' operators. The document also refers to the competition problem in terms of the behaviour of one or more undertaking(s) with market power (p. 25).

-> The document's implied relationship between SMP operator behaviour and market failure is not clearly determined and should be elaborated.

Concerning the problems related to "*termination*" (p. 40), the passage's description is inadequate. See our reaction in Q12.

As for "*first mover advantages",* the document provides no examples so it is difficult to judge whether the document's assumption about undue market foreclosing advantages is reasonable. This is also discussed below (Q7).

-> We suggest that the document recommends NRAs to proceed with caution when considering application of remedies to first mover type of problem.

When considering the effects of competition problems, the document also views "*welfare effects"* (p.44) as part of the competition problems. While at a theoretical level this may justify interventions to ensure competition, it is a difficult concept to justify as an argument for regulatory interventions in a market where no direct impact on competition is apparent, i.e. "*not targeted towards competitors"* (p. 44).

Moreover, this could prompt NRAs to assess the efficiency of the players. On page 52 the document refers to Article 8 of the Universal Directive and its obligation to promote efficiency. How an undertaking's efficiency will be assessed remains unanswered. To do so could be counterproductive since it is unlikely a public authority will be particularly suited to assess the efficiency of private companies -- a task that is normally left to shareholders and the market.

-> We recommend that chapter 1.5 be reconsidered as it may lead to regulatory intervention beyond the minimum necessary and, moreover, could imply disproportionate regulatory costs as discussed below. Where efficiencies have to be assessed we recommend applying the same methodology as in the merger and/or Article 81(3) procedures in order to be consistent with EC Competition law.

Among the behavioural problems it examines, the document looks at "delaying tactics" in the form of "*pretended technical problems"* (p.34). The assumption seems to be that "technical problems"' in reality are non-existent and are simply used as excuses. Regardless of whether such behaviour may take place, the role of the document is to provide NRAs with a methodology for identifying exactly where this really is the case.

For example, the document appears to ignore that:

- alleged delays may also arise from lack of capabilities to utilise the access from the access seeker(s);
- regulatory measures related to access requirements may induce technical problems whose complexity requires a lengthy time to resolve.

-> Considerations of "pretended technical problems" should be substantiated or modified.

2. *Are there relevant examples of competition problems that are not covered by this framework? If you believe that there are, please provide details.*

It will always be possible to find another case, but one of the unavoidable flaws of any shopping list is that it is bound to overlook something. Also, including a given item is subjective if its impact is not carefully assessed. Aiming at comprehensiveness, such an approach fails to address adequately the costs and benefits of the selected remedies. At the same time, it risks overlooking the crucial issue of the timeframe (reviews, assessment and sunset clauses).

Chapter 2: Remedies

3. *Do you agree with the description of remedies provided, in particular, does it provide the requisite level of detail?*

It is essential that deregulation is driven by analysis of competition which is based on an appropriate level of granularity.

-> The document should give better guidance on the use of geographical variations in remedies within a national market.

Chapter 3: Principles for imposing remedies

4. *Are there any further principles, in addition to those set out in Ch. 3, that you wish to propose? If so, please justify them on the basis of the Directives.*

First, we refer to the issue of regulatory costs discussed below in Q16.

The document quotes the necessity of cost/benefit analysis as an issue raised in the public consultation, but it does not support this as a principle to be followed in the decision-making process.

According to the SMP guidelines (point 118), proportionality implies that the means employed to achieve the aim must be both necessary and the least burdensome, i.e. **the minimum necessary** to achieve the aim. This implies pursuing a cost/benefit analysis of the different options. Every intervention in the market implies costs, and these have to be counterbalanced against the benefits the obligation will imply for end users.

The cost analysis has to include the direct costs that it implies for the regulated company, as well as the costs that the obligation implies regarding market distortion, particularly when price regulation is being considered, since this has a direct effect on business plans of all companies.

-> To comply with the application of the principle of proportionality, the document should give guidance on the cost-benefit analysis of intended remedies.

5. *Looking at the objectives in Article 8(2) of the Framework Directive, what are your views about how NRAs can balance short term and long term objectives?*

Mandated access must be confined to a limited set of products. Micro-management by NRAs, if insisting that SMP operators provide a very wide range of wholesale products, will be highly damaging to investment, particularly if accompanied by ill-defined margin-squeeze tests applied to a wide range of final and intermediate products. Where justified, margin squeeze tests should be applied only to a limited set of products in a clearly defined way. In view of innovation and technological uncertainty, margin squeeze tests are likely to distort markets.

Emerging markets (see our comments re: Q7) may provide some examples of the potential dilemmas, especially regarding "*first mover advantage*". The real question for an NRA is to determine whether the first entrant (often an incumbent) is actually triggering market growth--thereby giving benefit to other players-- or foreclosing it. This should be assessed on a case-by-case basis, taking into account market dynamics. NRAs should not simply opt for a preventive ban on new products because this is likely to delay the introduction of innovative products.

6. *Do you think that there are any trade-offs between short-run service competition and long run infrastructure competition? If yes, please highlight potential areas and provide relevant examples. In this context, what are your views on the approach that NRAs should take in relation to (short term) business failures*?

There is little evidence that infrastructure competition emerges from the application of remedies to resolve competition problems if these remedies focus on creating service competition in the form of access obligation and price control such as wholesale line rental or bitstream access. We provide also further comments on this below (Q16). In any case, unnecessary tiers of access obligations should be avoided.

The problem is that remedies which enable service competition often lead to introduction of business cases (type 'reseller') that heavily rely on exactly these regulatory remedies intended to remove the competition problem in the first place. This suggests that the idea of a ladder of investment/infrastructure-based competition (e.g. p.15 and 62) is not convincing. If this is to work, remedies have to be applied in a way that offers direct incentives for infrastructure investments. This has been attempted by some regulators whereby the price control (e.g. of LLU) gradually changes, at least initially, within a pre-defined timeframe. Otherwise there isn't much evidence that competition changes from service- to infrastructure-based competition.

The weakness of the 'ladder' concept is illustrated by the declared policy of such an important reseller as Tele2. The company notes that the current regulation favouring service-based competition provides benefits primarily for end-users in the form of decreasing prices, whereas no investment or

service development (which should be the next step on the ladder) appears to be the outcome:

Tele2 is a driver of innovative service development. Via the group company 3C Communications, Tele2 operates credit card-based telephone kiosks and Internet terminals in hotels, restaurants and other well-frequented locations throughout Europe. The kiosks and terminals are also a base for adding WLAN Hot Spots. Tele2 also offers the Voice over Internet Protocol, VoIP, telephony via the Internet.(p.5)[4]

Important in this respect may be the introduction of a time-out mechanism so that players understand that, after a certain time (e.g. 1-3 years), regulation introducing service-based competition will automatically be withdrawn, thus allowing sufficient time to develop and redefine the business case.

-> The 'ladder' concept should be deleted because it could be abused to justify competition engineering, especially where an NRA drives the business cases of market players and will have to repair the business case in the event of a regulatory failure or unanticipated market development.

7. *Do you agree with the proposed treatment of emerging markets? If not, please provide details.*

In line with the Framework and Access Directives, the document generally does focus on the need to ensure investment and innovation, and to avoid regulation of emerging markets. However, in its treatment of the concepts of *"emerging markets"* and *"first mover advantages"*, the document seems to imply that these concepts offer another opportunity to foreclose markets:

If the SMP player misses the deadline, it would be liable not only to compensation (as described in the previous paragraph) but also to a prohibition on providing any relevant wholesale input to itself until such time as the requested wholesale service had been made available to others. This would mean that it would not be able to obtain a 'first mover advantage' by supplying its retail product while denying others the ability to compete by withholding the necessary network inputs. (p.69)

In the telecommunications market, most new products and services are inevitably related to--or dependent on--existing products/network elements. A potential innovation may often consist in combining or integrating existing network elements to form new services. Products/services that constitute potential emerging markets almost always rely to some degree on legacy networks. In other words, the document's approach to the use of remedies in an emerging market does not give players an investment incentive to take risks to explore new opportunities.

[4] "The Monopoly Challenger: Presenting Our Views on Fixed Telephony Subscription, Carrier Pre-selection, MVNO and ADSL", presentation on 26 September, 2003 to Erkki Liikanen, European Commissioner for Enterprise and Information Society.

The application of remedies in the form of access highlights the problematic assumption of *"delaying tactics"* (Q1) since access to the new function, inevitably, will not be straightforward.

Furthermore, the document notes that, when introducing new technologies to provide existing regulated services, SMP players have to design the technology to accommodate access seekers. This goes beyond what could be required from "*legacy infrastructure*", and does not take into account all the wholesale regulation for the provision of existing services. This is already more than enough to ensure a level playing field.

-> If innovation is the pursued objective, the document should make clear **that new investment in new technology or services should not immediately be presumed to be subject to *ex-ante* regulation**. By contrast, the document leans the other way by opening up possibilities for regulation of all types of investment (including legacy infrastructure and new elements). The principles for application of remedies to emerging markets in chapter 3 clear the way for intervention: wherever elements of legacy infrastructure are involved, regulation is possible. The elements involved in "*legacy infrastructure*" are not clearly defined, nor is the "*necessary input*" as considered in point 3.3.2.

8. *Are there any special considerations which should be taken into account in designing appropriate and proportionate remedies for the markets in accession countries?*

ETNO is aware that the state of markets in several new member states may deviate from those in current member states. In some of them, the market for wholesale broadband access may not yet have emerged, for example. However, their risks/incentives for investment may differ significantly from those in current member states due to the newcomers' far lower Internet penetration rates, lower disposable incomes and degree of urbanisation. Furthermore, the degree of substitution between fixed and mobile services has, in many cases, progressed faster than in current member states.

The accession countries' profile underscores the need to introduce positive incentives to further promote the deployment and upgrading of their infrastructures.[5]

However, the principle of proportionality is central to the application of remedies under the NRF and is meant to reflect national differences/particularities in an enlarged EU as well. NRAs have a legal obligation to impose proportional remedies on SMP operators after analysing the competition situation in relevant markets, end-users' interests, initial investment by the facility owner, the risk of investing and the need to safeguard competition in the long term.

[5] BT and TDC wishes to stress the need for such incentives to be in the context of a proper application of the market review process.

The definition and analysis of national markets is, therefore, where the characteristics of accession countries can enter the picture.

Then, based on the outcome of this analysis, remedies should be applied in a harmonised and proportionate manner taking into account all relevant circumstances such as the cost situation of CEE fixed line operators. This is compulsory for any cost analysis according to Art. 13 paragraph 3 of the Access Directive. Thus the higher unit costs of CEE fixed line operators--resulting from lower penetration, density of population and urbanisation and stagnating or even decreasing traffic volumes compared to the average EU markets--should be reflected. Thus benchmarks, for those cases where operator's costs cannot be proven, are only acceptable if benchmarks refer to comparable markets.[6]

Chapter 4: Matching problems and remedies

9. *Do you agree with the description of problems and related remedies? If not please provide an alternative analysis.*

The document clearly states that its aim is to identify "*standard competition problems"* in order to match these problems with the requested remedies (see Executive summary p.4). This appears to be in line with the idea of applying competition law directly whenever possible, or indirectly via an assessment of the competitive level of a market. However, identification of "*market failures"* (p.18) is also an aim, and remedies are meant *"to redress a market failure"* (p.21).

We question if the two concepts--*"competition problems"* and *"market failures"*--are truly equivalent or partially overlapping or simply confusing. Both in practical and theoretical terms, they deal with different issues.

For example, only three out of the four cases (vertical and horizontal leveraging, single market dominance) are true "standard competition issues". The last one--"termination"--is a clear case of market failure even if the identified competition problems dealing with this case (tacit collusion, excessive pricing, price discrimination, refusal to dial/interconnect) are standard competition issues.

Market failure is often associated with "bottleneck" issues and may require specific remedies not necessarily found in the usual "tool kit" of competition law. Such overlapping may require clarification. It may result from an attempt to blend sector and competition law, or stem from the lingering question of SMP as sheer dominance, requiring remedies instead of the usual competition law approach (i.e., intervention only in cases of abuses). The document acknowledges that the approach chosen is not fitted to some

[6] TDC, Telenor and VIPnet do not support the last paragraph as the internal production costs of an SMP operator such as unit costs should not have any relation or impact on the selection of a remedy to be applied on the SMP operator in a given relevant market to meet the identified competition problems. To do so would be a misinterpretation of proportionality.

of the listed cases, especially for case no. 3: "…*such cases may have to be dealt ex-post"*![7]

->The overlapping treatment of "competition problem" and "market failure" should be clarified.

10. Do you agree that the document offers sufficient guidance concerning the approach on remedies to be taken by NRAs? If not, please highlight those areas where you would wish to see more guidance provided.

11. Does the document provide sufficient guidance on which particular cost accounting methodology would be appropriate for those competition problems for which NRAs may consider price regulation? If not, please highlight those areas where you would wish to see more guidance provided.

ETNO refers to the discussion of the LRIC methodology, e.g. in the report by CASE[8].

How much consistency in regulatory accounting obligations that is achieved under the new Directives will be a key indicator of the new framework's effectiveness. Concerns about continued existence of major problems in this area are signalled in authoritative documents such as the Commission's implementation reports and the July 2002 report prepared for the Commission by Andersen Consulting.

A level playing field in regulatory accounting is essential for the development of a single market in electronic communications. Furthermore, a harmonised level of publication of regulatory cost information across Europe is essential. NRAs and the Commission must pay attention to this issue. When applying cost benchmarks NRAs should justify why they consider that costs presented by a regulated firm are not sufficient. Moreover, industry benchmarking should be based on a representative and comparable sample of data.

12. Is sufficient guidance provided in relation to mobile call termination in chapter 4? If not, please outline what issues would require further elaboration. Please express your views on the principles that should guide NRAs in dealing with new entrants and/or smaller players in mobile termination markets.

ETNO considers the document's treatment of competition problems regarding "termination" (including fixed) to be superficial and insufficient.

One of the document's shortcomings is that it does not elaborate the specific situation for F2F termination and the possibility of anti-competitive behaviour by new entrants. The CASE report analyses the relevant economic implications[9] that should be reflected in the joint paper. The

[7] 4.4.4 p.113
[8] CASE: "Remedies Under EU Regulation of the Communications Sector", , June 2003, pp. 27-30.
[9] CASE, *Op. cit*. pp. 39-45.

ERG/EC document reiterates the assumption of the Commission Recommendation on relevant markets that operators are likely to have SMP in their individual markets for call termination. However, regarding possible regulatory obligations and cases where price control is considered an appropriate remedy, the document proposes an asymmetric application of remedies:

In the case of new entrants, however, NRAs may set prices other than cost-based, as cost-based prices are likely to be very high given the large fixed costs and the small scale of the entrant. (p. 16 and p. 120)

Such asymmetric regulation would engender anti-competitive consequences. Why? Because the document suggests that SMP-identified operators ('incumbents') should bear price controls in the form of cost-plus (LRIC), while allowing new entrants/smaller operators to escape the same requirement due to smaller scale advantages.[10].

This assumption bears no relation to economic reality since the scale advantages of the smaller operator/entrant for call termination are uncertain. Indeed, the entrant normally has advantages in the form of a more efficient network. The type of remedy should not depend on the size of the parties concerned: the fixed line incumbent operator has no way to exercise countervailing buying power[11] because of the obligation to terminate calls at LRAIC regulated charges.

The prices of a LRAIC-regulated company should be seen as the reasonable benchmark to be imposed on the entrant; this has been done by OFTEL[12] and by the Commission in its recent Article 7 comments on FICORA[13].

To the contrary, the approach proposed in the document to "subsidise" new entrants through higher termination fees (e.g., "delayed reciprocity"

[10] *When setting the access price, NRAs should take into account that, in the short term, new entrants do not benefit from economies of scale (and possibly scope) to the same extent as the incumbent. Analogous to the point made above in the context of retail-minus, NRAs may decide to allow smaller networks to cover their (statically) inefficiently high costs wherever the dynamic advantages from competition are likely to more than outweigh the short-run disadvantages. (p. 115)*
In cases where SMP on individual call termination markets is found, therefore, an obligation to interconnect together with an obligation to set prices at cost-oriented levels appears proportionate and justified. In the case of new entrants, NRAs may decide to leave termination charges unregulated or set them by means of benchmarking, as a cost-oriented termination price is – given the small scale of the entrant – unlikely to lead to a reasonable outcome. (p.124)

[11] CASE, *Op. cit.*, , p. 41.

[12] OFTEL: Review of fixed geographic call termination markets**,**28 November 2003:
4.14 For interrelationships with BT, Oftel believes that charges for call termination should be based on BT's charges. This would prevent the terminating PECN from setting excessive call termination charges and it also sends out correct signals in terms of efficiency. However, Oftel does not intend to review the reciprocal charging call termination agreement. This was a commercially negotiated settlement.
4.15 Condition BC1 requires charges to be "fair and reasonable". It does not mandate that charges should be based on BT's charges. Any PECN could therefore set other charges if it believed that they were "fair and reasonable". But Oftel's view is that charges that were not based on BT's are unlikely to be "fair and reasonable". Nevertheless the Director would need to consider any dispute about its relative merits. In any case, charges would have to be competitively neutral

[13] *In particular, to the extent that it would be considered disproportionate to impose costly cost-orientation and cost-accounting obligations on a small operator, the Commission is of the view that Ficora could consider other forms of price-control for such operator such as benchmarking against the bigger operators who are under a cost-orientation obligation.* FI/2003/0031 : Market for voice call termination on individual mobile networks. Comments pursuant to Article 7(3) of Directive 2002/21/EC1, 17.12.03.

approach) - as recognised by the document itself – is arbitrary and does not promote efficiency.

If the intention is to promote efficient infrastructure-based competition, regulators should instead implement an investment-friendly regulatory regime (see comments on Q 6 and 7).

-> We suggest that the document's treatment of remedies, particularly for F2F termination, should be revised in accordance with the guidance referred to.

13. *Does the document provide sufficient guidance with the text boxes on bitstream, re-selling access lines and international roaming in Ch. 4?*

Concerning bitstream ETNO has provided the ERG with extensive comments[14] on its consultation on the bitstream access working document.

We note that the document still expresses some uncertainty as to whether bitstream access is a market or a remedy (e.g., p. 59)--uncertainty that can be traced to the draft Recommendation on relevant markets:

..to impose an access obligation acc. to Art. 12 AD and mandate a bitstream access product as a proportionate remedy (p.88).

However, we understand that bitstream access is the market for wholesale broadband access, which means that application of remedies shouldn't go beyond what is needed to resolve structural competition problems in the retail market as defined by the Recommendation.

We see no evidence that bitstream is a step on the ladder to infrastructure investment (as claimed on p. 65; see discussion under Q6).

Concerning wholesale line rental obligation, we see even less evidence that this will offer a step to further investment (see comments on Q6 and Q16 regarding dependency on remedies)--particularly if this is seen as merely a resale of subscriptions.

-> ERG should be ensure that only retail minus is applied as this model is the one to stimulate investment in a way that allow the access provider to further develop services and makes the entrant invest in own facilities. A sunset clause for this remedy is essential if it is meant to support infrastructure competition.

14. *Do you agree that the principles developed also apply in cases of joint dominance? Do you have observations regarding specific remedies that may be appropriate in situations of joint dominance?*

[14] ETNO Reflection Document RD179 on ERG Consultation on Bitstream Access, August 2003.

Joint or collective dominance is an economic concept applied in EC competition law. The standard of proof as required by the EC Courts is demanding. This means that, in practice, only a few cases occur where the concept is applied.

15. *Do you think that the discussion in Chapter 4 will assist NRAs in achieving a consistent application of the framework? In particular, is it sufficient to focus on harmonisation of outcomes or should there also be harmonisation of regulatory approaches?*

The document does not address how to approach markets where there are differences in the level (and prospects) of competition in different regions of Europe.

Other comments

16. *Please provide a concise description of any other issues that you believe the document should address or a critique of any other aspects of the document that you consider relevant. In doing so please refer to actual or potential problems encountered in electronic communications markets, as well as to relevant case law and other precedents.*

- Greater consideration should be given to the impact of economics of network density regarding an entrant's business model when an NRA determines the feasibility of replicating assets. Clearly, an entrant aiming at mass markets should be able to replicate all aspects of a network in due course, provided interconnection prices are not set too low.

The document examines competition problems on a primarily theoretical basis - endogenous as well exogenous (p.74) - as summarised in chapter 4. Based on economic theory, the draft paper assumes that incumbent players notified as SMP will act in an anti-competitive manner whenever one of the described situations of potential horizontal or vertical leverage occurs, and therefore remedies should be imposed on the operator:

not because proof of the existence of such abuse is necessary to impose remedies, but because remedies must provide adequate forward-looking protection of the market process where incentives to engage in such abuse exists (p.22 also p. 121).

This *ex-ante* assumption is put forward without any evidence to justify *ex-ante* application of remedies to obviate expected behaviour.

Of course this approach reflects the NRF's rationale but the wording raises two problems, namely:

- Theoretical bias: It is a theoretical approach, thus any guidance should reflect realities in the market. For example, regarding partially substituting products, this makes the expected anti-competitive behaviour inefficient in practice, even if the market in question has been defined in a way that does not include the partially substituting products.

One illustration is the market for leased lines (trunk) where the market definition *ex-ante* forbids the inclusion of potentially substituting products such as transmission capacity on other networks but not delivered in the form of LL (as defined by ETSI). Another example is the markets for fixed PSTN call origination/transit where the presence of partially substituting mobile products dilutes the potential for leverage significantly.

- Duration of remedies: The generic competition problems outlined (see fig. 1a and 1b, pp. 29-30) which the application of remedies should counter are typically well-known problems from competition cases. However, the problems in these cases are either proven instances of abusive behaviour or demonstrate possible instances of expected abusive behaviour (merges). As the document itself explains, 'remedies' should address the strategic variables, primarily to prevent foreclosure in the form of behaviour (p. 74).

  This is not necessarily the case under the NRF since remedies will be applied even if no abusive behaviours have been proven. Here the document lacks guidance regarding the exact identification of a problem and particularly the timeframe during which the imposed remedy is expected to take effect.

  Thus the danger exists that a remedy will be applied to a persistent problem --with or without any evidence of actual effect. This would inadvertently widen a remedy's scope (e.g., access requirement), making it part of the problem rather than the solution.

  This means the document fails to acknowledge cases where the entrant's business model is permanently dependent on regulation (i.e., resale business based on price control/access obligations such as wholesale line rental). It carries an *a priori* choice of *ex-ante* regulation regarding market failure instead of relying on a full appraisal to determine if competition law is sufficient and/or if minimum regulatory requirements should be chosen.

  The document's approach may lead to misleading assumptions about the type of remedies to be applied. Although it undertakes a regulatory options assessment (ROA), its one-sided understanding, as described above, only recognises the possible benefits of remedies related to competition problems but ignores the regulatory costs.

- Finally, if the ladder concept should be applied in a meaningful manner, it should be done in a more sophisticated way. NRAs should avoid intervening thereafter in attempts to respond to problems with particular business models and cases.

-> Regulatory costs can be significant[15], detrimental to the development of the market and damaging to the companies directly affected. These costs should have been explicitly included among the principles for application of remedies.

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[15] CASE, *Op. cit.*, pp. 12-20.