

January 2005

ETNO Reflection Document on the proposed European Regulators Group Work Programme 2005

Executive Summary:

ETNO welcomes the more focussed approach of the ERG's Work Programme for 2005 compared to last year's. For the sake of harmonisation ETNO is concerned that the ERG's guidance to NRAs comes after several individual NRAs have already made a number of important decisions regarding market definitions, SMP assessments and application of remedies. Among the topics in the Work Plan, ETNO wishes to comment on non-discrimination, the proposed report on market experience and on the revision of the ERG CP on remedies. In addition, ETNO is particularly concerned over the proposed work on VoIP where the ERG already takes a position in favour of 'more lenient regulation' of only some players.

The European Regulators Group (ERG) has invited contributions from interested parties on the ERG priorities for 2005 focusing on areas where there is a need of harmonisation of regulatory measures taken by national regulatory authorities in Member States.

ETNO welcomes this consultation and we will like to submit the following comments on the proposed ERG Work Programme (WP) for 2005.

The draft 2005 WP benefits from being more focussed than the 2004 WP. ETNO also find that a clarification on the scope and the possible options of the regulatory outcome envisaged by the ERG at this initial stage of its work would be appropriate to grant the correct level of interactions with the relevant industries.

ETNO has no comments on the structure (3 types of priorities) of the WP as such. However, we do not fully understand the difference in the status of on the one hand CPs which describe the regulatory approach to be taken by ERG members and on the other 'reports' which in the case of '*a) Report on the broadband market*' appear to be dealing inter alia with essential conceptual and economical questions related to so-called 'unbundled bitstream'. On these questions, consultation with industry is crucial and an

ERG report should not pre-empt an open debate on the topic at European level.

General remarks

ERG has been in function under the NRF for more than one year. Looking at the experience so far, ETNO has made the following observations concerning the ERG guidelines (primarily CPs) but also concerning the IRG PIBs belonging to the 3rd type:

- These guidelines (1st type CP) are in some respect flexible and provide different options. However, this flexibility at the same time may weaken the role of the guidelines to support a desirable level of harmonisation. Examples of this can be found in the ERG CP on remedies which opens the way to price regulation and multiple accompanying remedies for most market problems. This is linked to concepts such as the ladder of investment without providing guidance on when to refrain from price regulation, e.g. in order to promote infrastructure-based competition, and without clarifying criteria e.g. concerning the underlying notion of replicability.
- At the same time the ERG guidelines may be too restrictive in the regulatory options provided if they don't fully reflect the development of markets and technologies. One prominent example of this is the ERG CP on BSA which could be interpreted in a way that restricts innovation (such as the introduction of IP based transport to replace ATM based solutions).
- To avoid that the ERG guidelines primarily reflect decisions already made by several NRAs which then set the standard for others by a first-come-first-served principle. Other NRAs (than the first-comers) may have a different approach and should be able to reach different solutions if developed without prejudice to decisions already taken.

With this in mind 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. Even if experiences from as many NRAs as possible should be taken into account, timely provision of guidelines is also an important issue to impact the progression of market analysis and decisions on remedies.

Specific priorities

Regarding the specific priorities of the WP, ETNO wishes to comment on the following:

- Voice over IP

In particular ETNO would like to question ERG's approach on VoIP where 'lenient regulation' of smaller operators is suggested. This would not only undermines legal certainty as envisaged through the NRF, as "lenient regulation" is a new concept without any basis in the NRF, but also an encouraging environment for further innovations.

- As regards public policy obligations under the Directives, e.g. those linked to the status of PATS-operator such as the provision of emergency services, a more 'lenient' regulation of smaller operators (what is a "small operator"?) would amount to a discrimination of other operators for which there is no basis in the Directives.
- As regards SMP-regulation, there is a clear lack of bottlenecks and market entry barriers for the provision of VoIP services. Against this background, there is no legal or economic basis to justify asymmetric regulation.

The ERG should avoid already in its WP suggesting ill-founded solutions and jeopardizing - through asymmetric intervention as well as through a prolongation of regulatory uncertainty - further investments from network operators needed for innovation. Any decision that is regulatorily burdensome only for a certain class of operators should be avoided.

- Report on experiences with market definition and market analysis and applied remedies

ETNO suggests that an overall systematic assessment of the principle of proportionality with regards to the application of remedies should be included in the WP. This assessment should be coupled with the evaluation of the remedies implemented in connection with the regulatory objectives pursued by each NRA to verify the consistency of the approach with medium and long term objectives in the different Member States.

A greater level of certainty and transparency during the process of assessment of this issue by the ERG should be granted in order to allow the industry to interact in due time for the appropriate implementation of the new Framework on these crucial items.

- Revision of CP on remedies

Because of the delayed analysis of the relevant markets in several Member States the overall revision of the CP on remedies may be postponed until further experience has been gathered. Two of the items identified in the work programme should be further elaborated independently in a decisive and timely manner. Priority should 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. Work on emerging markets should also include the issue of how to protect new investments. The concept of emerging markets should not constitute an overarching tool to regulate new services. This issue has not been successfully tackled in the ERG CP on remedies. As mentioned,

these concepts are very important to the practical application of remedies and should be submitted for a timely public consultation to ensure industry viewpoints are taken into account.

- Non-discrimination

ETNO will, besides the item of termination, draw the attention to 'non-discrimination' where we are concerned that the market definitions in conjunction with the provisions of the IAD (Article 12) may open the way for a very wide interpretation of what 'non-discriminatory' access means in particular regarding access to network elements/components related to new services. In order to avoid an interpretation which will delay or prevent the development of new services it is important for ETNO to provide examples and guidance to the ERG work.

- IRG PIBs on Retail minus and current cost accounting

Any 'set of principles' in this context has to be assessed and weighed against national particularities. We emphasize the need to avoid a simplified and/or misleading application of the concepts of 'retail minus' and 'price squeeze'. In any case, the ERG has undertaken a good amount of work during 2004 on cost accounting, including the issue of current costs. It is difficult to see the need to continuously work and develop this issue particularly as some stability would be required.