January 2006

ETNO Reflection Document on the revised draft ERG Common Position on the approach to appropriate remedies in the ECNS regulatory framework

Executive Summary

The ERG policy recommendations in the field of remedies have so far proven inadequate to ensure a proportionate level of regulation for the fast-moving EU electronic communications sector undergoing a process of convergence with neighbouring industries. The impact of the ERG remedies common position on NRA work moreover varies widely within the EU.

The revisions to the CP as proposed by ERG in the present consultation will in ETNO's view not contribute to a more focussed, proportionate and consistent regulatory approach to remedies under the NRF.

Whatever the final outcome of the current ERG consultation, ETNO calls on the European Commission, national policy makers and individual NRAs to continue to actively address the issue of the application of proportionate remedies under the NRF both in principle and practice, bearing in mind the general objective to achieve better regulation in the EU.

It remains crucial for a successful implementation of the current regulatory framework that the proportionality of remedies under the NRF is assessed on a case-by-case basis based on national market conditions, subject to Commission comments under Art. 7 (3) Framework Directive and subject to effective judicial review.

I. General Remarks [1]

1. ERG guidance on remedies

With a view to the results of previous ERG consultations on the matter, ETNO doubts that the process of drafting and of consulting on two consecutive ERG remedies papers will result in a meaningful limitation of regulatory intervention in the EU.

[1] BT not subscribe to this document.

Criticism and suggestions after the adoption of the first ERG common position (CP) on remedies expressed by industry, including most mobile and fixed network operators, focused on five main aspects:

- **"Behavioural" approach:** The analysis of potential abusive behaviour of SMP-operators is not an element of the EU Regulatory Framework and cannot replace the assessment of proportionality of individual ex-ante remedies.
- **Proportionality** should be put at the heart of Recommendations on remedies to ensure light-touch approach throughout the EU, e.g. by increasing the role of regulatory impact assessments / cost-benefit analyses.
- **Emerging markets:** concept defined overly narrowly – the linkage to market definition leaves little scope for application.
- **Ladder concept:** the ERG should introduce dynamic aspects, incorporating newer work on the ladder, and abandon 'easy access' policy.
- **Termination:** abandon asymmetry in favour of entrants, towards reciprocal termination rates f-f and m-m.

The ERG proposals for a revision of the remedies paper include no progress or even change for the worse on four of these points and some, yet insufficient, progress on the fifth (termination). As such they appear inadequate to ensure a proportionate level of regulation throughout the EU and in some cases move even further away from the objectives of the (New) Framework Regulatory Framework (NRF) than the original CP.

ETNO moreover observes that the impact of the first ERG remedies common position on the imposition of remedies has varied widely in different Member States. The CP so far has not produced conclusive guidance for NRAs in the field of remedies.

Irrespective of the result of the current ERG consultation, ETNO therefore calls on the Commission, national policy makers and national NRAs to continue to address the lack of meaningful, consistent and proportionate guidance for the application of remedies both in principle and practice. Moreover, the proportionality of remedies under the NRF should continue to be assessed on a case-by-case basis based on national market conditions, subject to Commission comments under Art. 7 (3) Framework Directive and subject to effective judicial review.

2. Principles for imposition of remedies under the NRF and the ERG approach

2.1 Benefit of the end-user and proportionality

In many of the revised parts of the paper, the ERG consequently adopts an entrant's perspective which is not in line with the objectives of the imposition of remedies under the EU regulatory framework, namely to impose regulatory remedies where this is proportionate and necessary to

remedy a specific market failure in the interest of the end-user, cf. Art 8 (3) AID, Art. 8 FWD. For example,

- the revised text finds that "*the best business plan for a new entrant is to enter the market at a point on the investment ladder lower than the point to which the entrant aspires*"[i]. This may well be the case. Both the point of entry that the entrant aspires and the point where it wishes to enter the market are not decisive for regulatory purposes, however, as long as there is no market failure in a corresponding end-user market which justifies mandating access to a specific facility of the network of an SMP-operator in the first place. This may be justified, where, for example, a regulator finds that control over a non-replicable legacy facility impedes competition on a downstream market.
- Also in the context of the ladder, the ERG describes a situation where operators rely on the local loop for broadband offers in some areas and argues against regional differentiation of bitstream access remedies: "*Nevertheless, this does not imply that geographical limitation of the bitstream remedy would be appropriate as different players may be relying on national availability*". The text lacks any reference to the necessary assessment whether the end-user (still) relies on operators requiring national availability of bitstream access for low prices, choice and innovative service offers. Where this is not the case, any imposition of an according bitstream access remedy would be disproportionate.
- On removal of remedies, the text concludes that „*before concluding that an existing SMP remedy should be removed or replaced by a different one, NRAs should consider the disruptive effects on the market players of changing remedies. If the benefits arising from the change do not clearly outweigh the costs of such disruption, NRAs should be cautious about proceeding with such a change.*" In other words, unless it is demonstrated that the benefits of deregulation clearly outweigh the costs, regulation should stay in place because of "disruptive effects" on new entrants, an approach that derides the principle of proportionality of regulatory intervention.

ETNO is concerned that the principle of targeted and proportionate remedies to remedy market failures in the interest of the end-user is abandoned by ERG in favour of a of an ill-defined approach of facilitating market entry, reflecting, if any, only one of a number of goals of the Framework.

By apparently focusing on competitors, ERG moves further away from the focus of competition policy which should be on the consumer. This focus was summarised with regard to Art. 82 EC-Treaty in a recent speech by the Commissioner for Competition, Nellie Kroes:

"I like aggressive competition – including by dominant companies - and I don't care if it may hurt competitors – as long as it ultimately benefits consumers. That is because the main and ultimate objective of Article 82 is to protect consumers, and this does, of course, require the protection of an undistorted competitive process on the market."[ii]

2.2 Regulatory Options Assessment

One instrument to ensure proportionality is the use of 'Regulatory Impact Assessments' or 'Regulatory Option Assessments' to identify the least intrusive intervention to remedy an identified market failure.

In this context, the ERG has stipulated in the 2004 remedies CP that NRAs should conduct a regulatory options assessment (ROA) in which they weigh the net benefits which implementation of the obligation would bring to the national economy against the cost of implementing the measure. The ERG states:

"*in order to assess whether a remedy is proportionate and justified in the light of the objectives set out in the Framework Directive, NRAs should balance the burden of the remedy imposed on the undertaking with SMP and other costs which the imposition of a remedy may entail against its prospective benefits. Both assessments are already required by some national systems of administrative law and form part of the proportionality assessment under Community law. However, in order to make the choices involved more transparent, NRAs may carry out an assessment of the regulatory options available, including a qualitative assessment of the anticipated benefits and potential costs of the option selected ("regulatory options assessment").*"

As the text suggests, an NRA should favour the least onerous obligation, which will deal with the problem identified and which is proportionate to the aims pursued.

However, other elements of the ERG CP appear to encourage NRAs not to individually assess the adequate and appropriate remedy, let alone to undertake a regulatory options assessment in each relevant case. In a number of fields, the imposition not of one but of multiple remedies appears as the standard Recommendation. Given that some NRAs use or refer to the ERG Recommendations in their national decisions, the wording of the ERG remedies CP should be extremely careful to not imply a short-cut to specific regulatory obligations for NRAs.

Against this background, the "behavioural approach" of ERG already adopted in the first remedies CP remains a problem. Instead of focusing on an identified market failure which harms the consumer or – as in competition law – focusing on an actual abuse of a dominant position, the draft CP lists all kinds of theoretical potential competition problems as consequence of an SMP position. As a result, in many cases the full set of available remedies is deemed necessary. ETNO wants to stress that the summing up of an exhaustive list of all theoretical abuses that are deemed possible as justification to impose a matching set of remedies does not constitute meaningful guidance for NRAs when considering remedies and applying the concept of proportionality.

The need to undertake a regulatory options assessment should be stipulated in the document with regard to every decision on remedies which potentially burdens the regulated undertaking.

2.3 Remedy of "wholesale equivalents" / "additional wholesale inputs" is disproportionate

In the context of proportionality, ETNO would like to draw attention to the fact that in several EU jurisdictions (e.g., the UK, Denmark, Ireland), in addition to facing the obligation of non-discrimination, SMP operators are mandated also to supply "wholesale equivalents" and "additional wholesale inputs." ETNO maintains that these remedies are disproportionate.

The EU Access and Interconnection Directive (AID) states that NRAs may impose obligations on SMP operators to

"*meet reasonable requests for access […] inter alia in situations where it considers that denial of access or unreasonable terms and conditions having similar effect would hinder emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest.*"

Article 12 AID then states:

"*2. When national regulatory authorities are considering whether to impose the obligations referred in paragraph 1, and in particular when assessing whether such obligations would be proportionate to the objectives set out in Article 8 of Directive 2002/21/EC (Framework Directive), they shall take account in particular of the following factors:*
(a) the technical and economic viability of using or installing competing facilities, in the light of the rate of market development, taking into account the nature and type of interconnection and access involved;
(b) the feasibility of providing the access proposed, in relation to the capacity available;
(c) the initial investment by the facility owner, bearing in mind the risks involved in making the investment;
(d) the need to safeguard competition in the long term;
(e) where appropriate, any relevant intellectual property rights;
(f) the provision of pan-European services."

An NRA's unconditional regulatory obligation for "wholesale equivalents" and "additional wholesale inputs" would be counter to Article 12 (2) AID in that it would require an SMP-operator to supply wholesale services even where:

- it would be technically and commercially feasible for alternative operators to provide such self-supply such services;
- the SMP operator's investment in wholesale facilities (and its investment risk) and its need to make a reasonable return on capital employed;
- the SMP operator's and others intellectual property rights might be violated.

ETNO could not accept such regulatory obligation in the absence of a strict proportionality test to clearly justify the obligation of "wholesale equivalents" and "additional wholesale inputs." in each individual case in

view of the competitive situation on the relevant retail market. ETNO members would also expect NRAs to undertake a reasonable demand test in which a the expected demand for a particular wholesale service was demonstrated explicitly and in which prices for such a wholesale service include the development costs spread over the reasonably expected demand.

2.4 Positive aspects

Having questioned the value of ERG Recommendations on remedies and voiced our concern over the ERG approach to basic principles of the EU NRF, ETNO also would like to point to positive aspects of the revised draft:

- A new passage entered on p. 60 of the revised document rightly warns against regulatory micro-management in the context of the ladder[iii] and acknowledges the objectives of the regulatory framework, namely to provide consumers with good choice in quality and price, stating that "*anything over and above this aim is outside the scope of regulators and must be left to policy makers.*" ETNO supports this passage which is in contrast with many other parts of the revised CP by adopting a more modest and realistic perspective of the role of NRAs.
- Also, clarifications on possible asymmetries of termination rates, while not going far enough, are pointing in the direction of a more rational approach to remedies for termination under the Framework than the previous version (s. below, II. 5.).[2]

II. Changes to the remedies document proposed by ERG

1. Emerging markets and treatment of new and upgraded infrastructure

Our comments will address the two aspects described in the revised paper in the textboxes under point 1.2.1 and under point 2.6.1 together as they are closely linked.

After the adoption of the first remedies common position, ETNO was among those who called for further work on the subject as ETNO Members were concerned that the concept was too narrowly defined to play a significant role in the regulatory practice and contribute to legal certainty for investment in new networks and services.

Since then, considerable academic work has been carried out on the concept of emerging markets in an attempt to make the concept workable and ensure that the idea underlying the introduction of the concept in the framework – to stimulate the development of new and emerging markets by refraining from ex-ante intervention - can be safeguarded in everyday regulatory decisions.[iv] ETNO would in particular like to point to a study by DIW commissioned by Deutsche Telekom and a paper presented by Indepen and Ovum commissioned by the Dutch regulator OPTA. [v] Each of

[2] ONO does not support this view.

these studies, while having its individual strengths, results in a regulatory approach that deals with the question of investment risk in the context of the new and emerging markets concept. ETNO notes that the two concepts are not discussed by ERG, though some basic aspects of categorisation in the revised paper appear to have been inspired by the Indepen/Ovum approach.

1.1 ERG approach to emerging markets

The proposed revised ERG approach runs contrary to this thorough academic work and urgent requests of large parts of industry following the adoption of the first remedies CP to allow the concept to have a real impact. It would have as a result that the new and emerging market concept *de facto* is denied any relevance for regulation in electronic communications markets.[vi]

Two aspects newly introduced in the text box on emerging markets under point 1.2.1 are, taken together, suited to make the concept largely meaningless. The text states, referring to "*the Commission's view*", that the assessment of the three criteria was sufficient to ensure that new and emerging markets are not subject to inappropriate regulation and adds that the NRF did not require NRAs to assess whether a market is emerging.

ETNO maintains

- that in order to respect and implement the concept of new and emerging markets introduced by the Framework Directive in regulatory practice, NRAs which carry out the market analyses on national markets have to be in the position to apply it and
- that - to our knowledge - there exists no official Commission view as referred to by the ERG: the Commission has, in particular, never expressed the view that the three criteria test at EU level is sufficient to identify new and emerging markets and NRAs should not apply the concept. This would not only frustrate an effective implementation of the Directives themselves but also result in a potential conflict with the regulatory regimes in a number of Member States which have duly taken over the notion of newly emerging markets in their national law for application by their National Regulatory Authorities.[vii]

ETNO maintains that the NRF obliges NRAs to assess in each case whether the individual national market they analyse is new or emerging in order to ensure that new and emerging markets are not subject to inappropriate regulation as required by the Framework Directive.

NRAs may do so in the context of an analysis whether the three criteria for applying ex-ante regulation are fulfilled at national level. The three criteria test is carried out for markets which are not included in the set of markets recommended by the Commission and in ETNO's view should be obligatory for NRAs throughout the EU also for markets listed by the Recommendation, subject to Commission review under Art. 7 (3)

Framework Directive. Such analysis is already carried out in certain EU Member States.[viii]

1.2 Approach to investment in new services and infrastructure

As stated above, ETNO would find it more appropriate to discuss these topics under the heading "new and emerging markets" even if in some of the cases discussed by the ERG the new service and/or infrastructure may not constitute a distinct market. The economic rationale for a particular regulatory treatment of new and emerging markets is related to the increased risk of investment in such new services and infrastructure, given the uncertainty over development of demand and supply. The two chapters therefore address the same considerations as, for example, is reflected in the discussion on p. 118 on the regulatory treatment of new services markets provided over an emerging or new infrastructure, a sub-set of emerging markets.

1.2.1 Regulation of end-user services

Under the heading "remedies associated with new or upgraded infrastructure", the ERG partly addresses the regulation of new services (cf. 3rd -6th para on "*substitute products delivered over new technology*" on p. 117). ETNO will, in its forthcoming response to the Commission call for input, ask the EU Commission and regulators to abandon regulation of end-user services altogether. Voice services, cited as an example by the ERG, no longer warrant inclusion in a revised Recommendation on relevant markets. New technologies used to deliver "existing" services typically result in a further lowering of entry barriers on retail markets, alleviating the need for ex-ante intervention.[ix] No remedies should therefore be applied to end-user services delivered over new infrastructure / technologies. Potential competition problems in this area could, if necessary, be addressed at wholesale level or be subject to review under competition law.

NRAs should in any case refrain from imposing SMP-regulation in an innovative market segment in order no to impede innovative service offers.

1.2.2 Regulation of wholesale inputs for new services

It is useful to distinguish two cases in this context, the provision of new services over existing infrastructure and the provision of a new service over a new infrastructure.[x]

- The first case, a newly emerging services market running over an existing infrastructure, is not specifically addressed by the ERG paper. Products/services constituting potential emerging markets will, however, often to some degree rely on legacy network elements which in turn are being used for existing services also. Regulation of existing wholesale inputs should take great care that there is no distortion of competition by regulation of wholesale inputs for an otherwise competitive new retail service. Potentially, existing regulation of

wholesale inputs has to be rolled back to provide incentives for a sustainable competitive provision of the new service.

- Where a new service constituting a new or emerging market is provided over a new infrastructure, no ex-ante regulation should apply. To cover this specific situation, Recital 15 of the Recommendation on relevant markets states that

"New and emerging markets, in which market power may be found to exist because of "first mover" advantages, should not in principle be subject to ex-ante regulation."[xi]

ETNO notes that the ERG is not yet decided to adopt a consequential approach to new and emerging markets even in these cases and that it seems to conclude that regulation may apply if only it is "well designed". ETNO contests that NRAs will succeed in adopting such "well-designed" access pricing, precisely forecasting and balancing the incentives for long-term infrastructure investment of different players in the market.

ERG moreover states that where "early replication" of underlying infrastructure is unlikely, regulation is more justified.[xii] This position is of major concern to ETNO Members. It is worryingly biased towards short-term considerations, ignoring the decisive role of innovation and dynamic competition in increasing consumer welfare in the long and medium term.

First-mover advantages, resulting in a temporary position of dominance on a new market, would immediately be "regulated away", a result which the Framework explicitly seeks to avoid. Such approach would dramatically diminish incentives for investment in new infrastructure needed for a high-quality and sustainable competitive e-communications environment. Subsequently, the prospect of regulated access would diminish the likelihood of replication of such infrastructure ultimately leaving the NRA with the most unattractive prospect of long-term regulation of an enduring bottleneck.

ETNO acknowledges, in accordance with both Baake et.al., and Indepen/Ovum, that the potential existence of long-term, insurmountable entry barriers in the context of new or upgraded infrastructure remains a relevant consideration, also in the context of new and emerging markets.

However, instead of subjecting new investment to the threat of regulatory intervention wherever alternative entry is not expected in the short-term as proposed by the ERG, no regulation should apply also in cases where it is uncertain whether alternative entry in the medium to long term will occur. This would also increase the incentive of both innovator and entrants to seriously engage in voluntary access arrangements where these are in the interest of both the network operator and potential service providers and give a strong signal to potential investors other than the first mover that they will find favourable conditions for infrastructure investment, encouraging the emergence of true inter-platform competition.

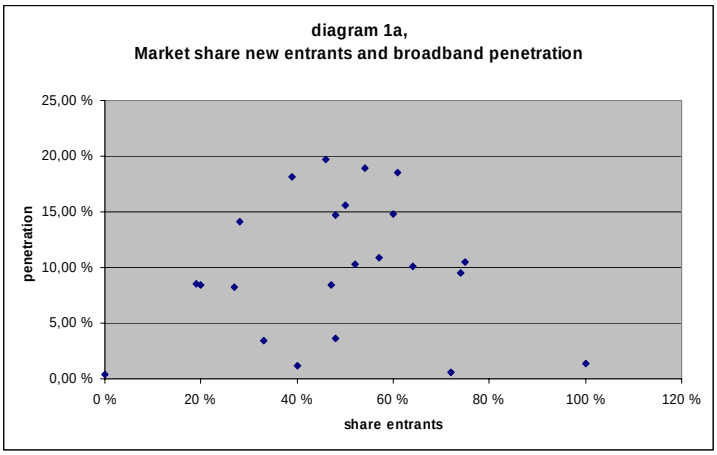
2. Supporting feasible infrastructure investment - ladder of investment, pt 4.2.3

2.1 ERG approach to ladder of investment

The revised document has introduced some changes to the chapter on the ladder of investment. ETNO would like to recall its position on the ladder concept[xiii], and underline that the concept does not provide a sound basis for intervention in today's broadband markets.

The revised remedies document has incorporated some of the ideas of the ERG market competition report.[xiv] ETNO has in detail challenged the conclusions of the report some of which were contradicted by data gathered in the Annex to the report itself.[xv]

For example, the ERG report claimed that "*Competition is pushing broadband penetration as countries with more competitive markets (measured by market share of new entrants) tend to have a higher broadband penetration as well as a faster growth.*" The data provided by ERG did not support this claim. A simple regression analysis indicates that the data collected by ERG demonstrates the opposite, namely that it is not possible to find any relation between the market share of new entrants and broadband penetration. Diagram 1a in ERG (05) 23 is reproduced below:



Regression analysis reveals that there indeed is no tendency of countries with high market share entrants to have high penetration rates. The effect is not significant at any reasonable level (e.g. the data in diagram 1a yields an estimated coefficient of 0.015 with standard error 0.064). Furthermore the data in diagram 1b on page 4 of the report, dealing with the relation of new entrant market share in DSL and broadband penetration, yields a negative estimated coefficient. Thus if one is willing to base conclusions on insignificant estimates, the conclusion based on the data in table 1b would be that a high new entrant market share was hampering DSL penetration as countries with a higher proportion of market share of new entrants based on DSL tend to have a lower broadband penetration.

2.2 Focussing access regulation to non-replicable legacy assets

The ERG broadband competition report as well as the draft CP point to an alleged need for a 'consistent pricing regime'. In this area, the revised text underlines the importance of setting the right prices for all products, with all prices satisfying a margin squeeze test in each rung, and setting the right distance between rungs "*..in order to incentivise new entrants to reach the highest point of the ladder at the maximum speed consistent with efficient investment by both incumbent and new entrants*"[xvi].

ETNO would like to stress that given the dynamic character and complexity of today electronic communications markets, a regulatory design of the ladder such as that foreseen in the document is not feasible and would inevitably lead to micro-management of the market[xvii], with business plans and investment decisions primarily influenced by regulation. Experts have repeatedly raised concerns over the feasibility of a full-fledged 'ladder' and described how a long-term policy of 'easy access' to various elements of the incumbent's infrastructure can lead to under-investment and long-term reliance on arbitrage-based, non-sustainable competition.[xviii]

As set out in our earlier position on the subject, it would be far more feasible and appropriate to provide access to the long-term non-replicable legacy asset in a given market (s. below) while leaving replicable and non-legacy assets free from regulation. Such approach would encourage:

- Acceleration of investments in new generation access networks that would bring new capabilities leading to the creation of new services, growing demands and consequently welfare gains (which naturally would exceed short-term gains derived from price reductions).
- Investments in new alternative access networks, wired and wireless, that facilitate efficient entry of new market players insofar as the returns are competitive and proportionate to the risk incurred.
- Creation of a healthy market with sustainable competition that promotes investments and innovation and disincentivises business models based on regulatory arbitrage.
- Alternative business models and new forms of competition, many of which are difficult to envisage at this moment, and that make a more dynamic market.

This approach would also alleviate the need for a complex "consistent pricing regime". Care should be taken, however, that the access price for the non-replicable legacy asset, if any, is set at an appropriate level to encourage investment by the network owner and not rule out the possibility for potential replication on the basis of long-term (technological, demand- etc.) developments.

2.3 Flexibility for entrants and complementarity of access products

The ERG cites three reasons for a parallel availability of several price-regulated access products, namely that

- Commercial considerations may mean that the best business plan for a new entrant is to enter the market at a point on the investment ladder lower than the point to which the entrant aspires
- Entrants may make different rational decisions on what would be the economically efficient level of investment
- Entrants may need complementary access products.

In view of these considerations, ETNO would like to recall that the New Regulatory Framework is neither designed to as good as possible accommodate business models of new entrants, nor to provide access to products which entrants may find useful. It is designed to remedy a specific market failure in a given relevant market susceptible to ex-ante regulation. As in many other parts of the revised paper, the arguments put forward by ERG appear very relevant as a new entrant's 'wish list' and of far less use as impartial guidance on the application of remedies to address a specific market failure.

As a starting point, NRAs will have to analyse whether the consumer does not derive full benefits in terms of price, choice and new and innovative services in an appropriately defined relevant broadband market. In that case, regulators may decide to impose one or more remedies in corresponding wholesale markets.

According to the proposed revised common position, more than one rung of the ladder may be necessary to be used complementarily, and the ERG for the above-mentioned reasons does not consider that geographical limitation of the bitstream remedy would be appropriate as different players may be relying on national availability.

However, a player relying on wholesale services for providing broadband access to retail customers, does not need more than one wholesale product in a certain area or switch. Once a provider is using LLU in a certain area or switch, this implies that the only non-replicable asset is the copper local loop. Regulation of the other rungs of the ladder will then have to be reviewed. This does not mean that bitstream access will necessarily disappear, as it can still be offered on a commercial basis.[xix]

If the obligation to offer bitstream access on a regulated basis depends on the existence of some providers still using the service, it would imply the perpetuation of bitstream access regulation even in cases where there is only one provider using it for a few final users, while other providers are already using LLU – a result which would clearly not meet the requirement of proportionality.

Furthermore, in cases where new entrants are using LLU, the market demonstrates that in many cases commercial bit stream access offers arise

by the providers using LLU, and regulation of the initial steps of the ladder becomes obsolete.

Finally, this maintenance of regulation of bitstream access products does not seem to be consistent with the ideas expressed in other parts of the revised document, where it says that where replication is possible, "*NRAs may signal in their reviews that they view some remedies as bridging a gap and/or consider adopting dynamic access pricing rules in order to promote investment*".[xx]

3. Equivalence of input, non-discrimination and complementary measures, pt. 5.2.3 and 5.2.5

ETNO invites ERG to re-assess its policy Recommendations on non-discrimination obligations.

Many of the measures proposed in this chapter could create disproportionate regulatory costs [xxi] and raise concerns in view of the proportionality of the measure as the insufficiency of existing obligations for non-discrimination is not substantiated.

Where the provision of a specific wholesale product is required to remedy a market failure, ETNO maintains that the remedy of non-discrimination in many cases would by itself be a proportionate remedy related to this wholesale product, that is, the least onerous obligation that will deal with a problem identified and that is proportionate to the aims pursued.

The ERG appears to consider non-discrimination insufficient in most cases, advising the imposition of price control obligations[xxii] and /or additional obligations to complement a non-discrimination obligation.

In this context, the draft revised common position talks about "attendant difficulties" over the interpretation of an obligation not to discriminate and in the following mentions "equivalence of input" as an alternative, more intrusive form of remedy.[xxiii] Internal ETNO monitoring of NRF implementation across Member States and markets has shown, however, that the obligation of non-discrimination is widely applied by NRAs, especially on relevant wholesale markets in the fixed network. These obligations are monitored by NRAs and subject to independent appeal if competitors consider the obligation or its implementation as insufficient. The possibilities for enforcing non-discrimination may have given rise to particular problems in one or more Member States due to legal particularities limiting, *de jure* or *de facto,* the powers of the NRA to control non-discrimination. If such circumstances exist, they should be addressed by a correct implementation of the Regulatory Framework in that particular country.

ETNO questions that under the NRF any stricter interpretation of the non-discrimination obligation is admissible or indeed necessary. The application of non-discrimination to an upstream access product allows competition at the downstream level which is typically intended by

imposing the non-discrimination remedy. Any additional obligations can be challenged on the grounds of proportionality,

In this context, ERG rightly points to the increased costs incurred by an "equivalence of input" obligation. This includes compliance costs of the SMP-operator and, more importantly, a loss of economies of scope removing the benefits of vertical integration and typically slowing down innovation. The additional costs of equivalence of inputs would not only be to the detriment of the SMP provider, but also against the interest of users which would have to bear higher costs. This would contrast with the objectives of the Framework Directive to promote user benefits and innovation.

Moreover a combination of any "equivalence of input" obligation with an exemption in special circumstances as mentioned by ERG is not suited to reduce costs of the imposition of such obligation as the set-up costs incurred and the massive interference with internal processes of the regulated undertaking would be identical.

On the aspect of unreasonable terms of supply, ETNO observes that the proposals made meet major concerns with regard to their necessity and proportionality. The SMP-operator should be in the position to negotiate contract conditions for its regulated wholesale offers which also cover its risks. For example, forecasting of demand is a crucial element to spread the risk adequately between access seeker and network operator.

4. Network Migration, pt. 5.2.5.7

ETNO maintains that the NRF provides for obligations to be imposed on operators with SMP *on* defined markets. The framework does not provide for obligation to be imposed *across* different market segments. As the ERG CP section on "Network Migration" concerns a number of distinct relevant markets identified under the NRF and related remedies (e.g., CPS, WLR, bitstream and LLU) would therefore cut across markets, it does not appear possible to impose new obligations on SMP operators to provide the forms of access described in this section[xxiv].

In this regard, the Access and Interconnection Directive provides as follows:

Article 8 (2) AID

"*Where an operator is designated as having significant market power on a specific market as a result of a market analysis carried out in accordance with Article 16 of the Directive 2002/12/EC, national regulatory authorities shall impose the obligations set out in Article 9 to 13 of this Directive as appropriate.*"

Article 15 (1) AID

"*Member states shall ensure that the specific obligations imposed on the undertakings under this Directive are published and that the specific product/service and geographical markets are identified.*"

The fact that the framework does not envisage the interweaving of SMP obligations imposed on discrete markets is confirmed by the express objective of the NRF to move from sector-specific regulations to competition rules and to remove obligations from SMP operators as soon as possible.

In addition, the ERG Recommendations appear difficult to reconcile with the finding of different markets for different wholesale products along the 'ladder of investment'. The justification advanced for proposing the network migrations is that entrants need to be able to migrate from wholesale services to LLU. In other words, this implies that entrants would pursue a dual strategy of building a customer base using SMP operator's wholesale services and then converting those customers to LLU, or "moving to a different rung of the investment ladder". Implicit in this argument is that bitstream and LLU (and WLR and LLU) are substitute products from the perspective of an entrant. While that might support the ERG and its member NRAs' current proposals on network migration, it is directly contrary to the market analysis findings that provided the justification for mandating SMP operator's portfolio of regulated wholesale services. Indeed, it is ETNO's view that the premise underlying the "Network Migrations" remedies recommendations – a finding that bitstream and LLU are used as substitute products – undermines the market analysis process to the point of calling into question the justification for in parallel imposing these access obligations on SMP operators in the first place (s. also arguments on ladder of investment above).

5. Variations of remedies - termination

ETNO notes the revised Recommendations on termination constitutes a step in the right direction as they envisage the reduction of asymmetries in termination rates between smaller and larger operators.

ETNO maintains that where such asymmetries exist today, they should diminish and eventually be abolished over a short time-period. The paper should include a clear statement that the glide path envisaged for existing asymmetries in termination rates between smaller and larger operators will lead to an adapting of entrants' rates to the level of the larger operator.[3]

New entry should not be assisted by higher termination rates for smaller players. In mobile markets, retail markets are competitive and any distortion of investment incentives by regulation at wholesale level in order to foster further entry would be unjustifiable.

An approach which still fostered entry by asymmetric termination rates would not provide real solutions for a market where limited replicability is technically and economically inherent: even under the assumption that there are "n" providers with their own access and that the service "termination" is sold at a uniform competitive level, following such approach the conditions for market entry and the issue of replicability

[3] ONO is of the opinion that asymmetric LRIC-based termination rates might be necessary to encourage efficient investment in alternative infrastructure.

remain problematic for the "n+1" provider. Regulatory intervention derived from such an approach would inevitably lead to a dead end, promoting asymmetric cost and inefficient networks/providers. The model of a glide-path at a uniform price (m-m and f-f) is therefore the most suitable, rewarding the provision of efficient infrastructures and eliminating inefficiencies and cross-subsidisation that would be supported otherwise.

Generally, as highlighted in earlier ETNO positions and a study on appropriate remedies under the New Regulators Framework carried out by Case Associates for ETNO in 2003, regulators should aim for a reciprocal outcome of termination rates for fixed-fixed and mobile-mobile termination to ensure an efficient and reasonable termination regime.[xxv] The potential advantages of new technology for new entrants should be fully taken into account when examining whether asymmetric termination rates can at all still be justified.

The ERG proposal for a revised remedies paper appears to distinguish between fixed and mobile termination with regard to the length of a possible asymmetry of termination rates. With regard to mobile it finds that any asymmetries should be limited in time. The paper should state equally clearly that existing asymmetric termination rates for fixed alternative network operators should, if at all justified, be limited in time. ETNO would like to recall the Commission finding in a recent Art. 7 case that incumbent operators are unable to exercise countervailing buyer power in the field of fixed termination due to termination obligations imposed on them.

Equally no new "entry assistance" in form of asymmetric termination rates should apply in fixed markets. Market entry has taken place and will increasingly take place based on various business models which are independent from termination charges for voice calls.

5. 'Price discrimination' in termination, pt. 5.5.3

ETNO contests that the issue of different on-net and off-net pricing for termination raised by ERG in this context is an issue of "price discrimination".

The variation of prices for different types of services within an overall tariff bundle is a usual sign of competition. In the competitive mobile retail market, operators are adapting to different customer demands. All operators offer a variety of different tariffs with specific elements being priced lower to target a specific customer group. Different prices for on-net calls – between different tariff packages of the same operator and regarding on-net and off-net termination – reflect e.g. different price elasticities of different customer groups. Regulation should not impede or distort competition by intervening in competitive pricing schemes as these pricing schemes are a crucial characteristic of competitive markets.

6. Removal or replacement of remedies, pt. 5.6.2

ETNO agrees with the ERG finding that it would not be appropriate to remove obligations which are a pre-requisite for competition in a related downstream market.

However, the ERG in the Following proposes an "inverted" cost-benefit-analysis for any removal or change of remedies:

"*Before concluding that an existing SMP remedy should be removed or replaced by a different one, NRAs should consider the disruptive effects on the market players of changing remedies. If the benefits arising from the change do not clearly outweigh the costs of such disruption, NRAs should be cautious about proceeding with such a change.* "

In other words, regulation should apply, unless it is demonstrated that the benefits of deregulation clearly outweigh the costs. This approach is in stark contradiction to the principles of the NRF to only intervene in markets where this necessary and proportionate to remedy a specific market failure.

ETNO has repeatedly and without success called for the incorporation of a cost-benefit analysis in the process of identifying appropriate remedies. That this instrument is now proposed to justify continued public intervention against a private undertaking instead of applying it to justify any intervention in the first place, shows how far detached ERG thinking is from the concept of proportionality of public/regulatory intervention and, indeed, the very fundamentals of the European legal and regulatory framework.

7. Remedies in related markets, pt. 5.6.3 and Accounting separation, pt. 3.2.3

ETNO agrees on the importance of maintaining consistency between remedies, so that the introduction of further remedies does not unintentionally undermine the effectiveness of others.

ETNO is at the same time concerned that the ERG has developed general conditions under which remedies are supposed to apply to non-SMP-markets. The Framework is purposely and strictly limiting regulatory intervention to operators active on a market where they have been identified as having SMP, Art. 15, 16 Framework Directive and Art. 8 Access and Interconnection Directive.

The ERG draft provides no justification for this major step towards an extension of regulation to areas normally outside of the scope of ex-ante regulation. The conditions proposed for such intervention are very general and the whole concept appears to be not thought through. An incomplete reference made to a "Greek case" in Fn 177 does not help to clarify the subject either.

In this context ETNO reiterates its concern with the extensive interpretation of the Accounting Separation obligation by ERG and European Commission who argue that an obligation for accounting separation may apply to markets where the operator does not have SMP. [xxvi] Such an approach is, in line with the above reasoning, not in accordance with the NRF. According to the systematics of the Directives, the accounting separation obligation itself can only apply to the SMP market.

If a regulator needed information on a non-SMP market without which an accounting separation obligation could not be implemented, the requirement could not go beyond information on the non-SMP market provided in a summary fashion. Any such request should be justified and proportionate. This does not amount to an imposition of the obligation on the non-SMP-market itself.

Endnotes

[i] Revised draft ERG Common Position on appropriate remedies in the ECNS regulatory framework, ERG (05) 70rev1, pt. 4.2.3

[ii] Commissioner Nellie Kroes speech at the Fordham Corporate Law Institute, New York, 23 Sept. 2005

[iii] Precisely this form of micro-management is prescribed in detail in the chapter of the paper dealing with the ladder of investment, however (s. below, II. 2.)

[iv] Baake, Kamecke, Wey; "Efficient Regulation of Dynamic Telecommunications Markets and the New Regulatory Framework in Europe", Berlin 2005; note prepared by Ovum (Levin) and Indepen (Williamson) "Regulating emerging markets?", 2005

[v] S. Fn 4,

[vi] As a consequence, the problem of risks involved in the built-out of new infrastructure is being dealt with by ERG in yet another context on p. 117-118.

[vii] For example Spain, France, Germany (in the reasoning to the law)

[viii] E.g., in Germany. Equally, Ofcom and ComReg have applied the three criteria to markets in the Recommendation, e.g. with regard to market 18

[ix] An evident example being voice over IP service offers, irrespective of whether they can be classified as "existing services" or not.

[x] Cf. Indepen / Ovum, fn. 4

[xi] Commission Recommendation on relevant product and services markets, COM (2003) 497

[xii] ERG id. p. 118

[xiii] ETNO Reflection Document RD227 on re-assessing the "ladder of investment" in the context of broadband access regulation, September 2005

[xiv] ERG Broadband market competition report (ERG (05) 23), May 2005

[xv] S. above Fn 15

[xvi] ERG id., p. 71

[xvii] Something the ERG cautions against itself in the context of the ladder, ERG id., p. 60

[xviii] M. Cave, "Encouraging infrastructure competition via the ladder of investment", 2005; Oldale, Padilla, "From state monopoly to the "investment ladder": competition policy and the NRF", 2004

[xix] An adequate regional differentiation of remedies may be achieved already at the level of geographic definition of the relevant market. The ERG finds that "*it is often the case that geographical markets are national in character due to a common pricing constraint. The origin of such a common downstream pricing constraint may in fact be regulatory or the result of normal economic forces.*"[xix] However, the imposition of uniform national tariffs under the Universal Service Directive does not justify them being used as 'evidence' for national markets for the purpose of SMP-regulation. In a future multi-service environment and in the absence of retail regulation, prices will increasingly reflect underlying costs linked to geography. The – in some countries widely differing - conditions of demand and supply in different areas often as a result of the reach of alternative networks, in ETNO's view require a reasonably differentiated approach to geographic market definition.

[xx] ERG id., pt. 5

[xxi] Costs can include, e.g., regulatory product development (IT, systems and gateways development), Service level agreements (SLAs); KPI measurement; etc. but also resources at the regulated company and the NRA.

[xxii] ERG id., pt. 5.2.2.2.1

[xxiii] ERG id., pt. 5.2.4.8

[xxiv] A similar inaccurate approach is also made within the recently released ECTA-commissioned Jones Day/SPC Network *Regulatory Scorecard*, which incorrectly assumes in its "Broadband services" criteria that "migrations from a resale ADSL offer to a bitstream offer to fully unbundled or shared loops" is an appropriate remedy and legal obligation under the NRF.

[xxv] CASE „remedies Under EU regulation of the Communications Sector", June 2003, pp. 27 – 30; ETNO Reflection Document on Consultation Document: Draft joint ERG/EC approach to appropriate remedies in the New Regulatory Framework, January 2004

[xxvi] ERG id., pt. 3.2.3; EC Recommendation COM (2005) 3480