

European Regulators Group and Independent Regulators Group Response to

CALL FOR INPUT

On the forthcoming review of the

EU regulatory Framework for electronic communications and services

Including review of the

Recommendation on relevant markets

Executive Summary

This response to the European Commission's call for input on the review of the Regulatory Framework is submitted on behalf of 33 regulatory authorities¹. This response is endorsed by both the European Regulators Group and the Independent Regulators Group. Most of these authorities have had responsibility for and experience of applying the Framework since its inception in 2003.

The objectives of the Regulatory Framework (relating to promotion of competition in electronic communications services, contributing to the development of the internal market and promotion of the interests of EU citizens) remain valid. The Framework is generally well constructed for meeting those objectives and for facilitating achievement of the Lisbon goals. Since 2005 total relevant investment by all market players has been faster in Europe than in Asia or US.

As markets evolve and new technologies and infrastructure are introduced, regulatory priorities will need to change in line with the objectives of the Framework. These should bring opportunities for further deregulation but could also, in some cases, give rise to new bottlenecks. It is therefore timely to consider whether any adjustments need to be made to the Framework. We believe the major areas for attention are:

- there is a need to target limited regulatory resources on the highest priority issues. The process requirements which the Framework imposes, in particular those under Article 7 of the Framework Directive, are onerous and pose problems for National Regulators (NRAs), particularly for smaller NRAs. Procedures need to be streamlined and simplified.
- the Framework rightly requires regulators to identify and analyse the vertical markets where the most significant competition problems are expected to occur. However, some problems can only be addressed effectively by

¹ Authorities from each of the EU states (the full members of ERG) plus Iceland, Luxembourg, Norway, Switzerland, Bulgaria, Croatia, Romania and Turkey.

applying remedies across several vertical markets. The provisions of the current Framework need to be clarified in order to facilitate this.

- there is need to address concerns relating to consumer protection and privacy; these have intensified as a consequence of the wider range of services and much greater number of providers resulting from liberalisation of the market
- there will be extensive commercial and technological evolution in the coming years, at different rates across Europe. Market definitions will need to evolve in step. The revised Recommendation on Relevant Markets requires appropriate flexibility to assist NRAs to formulate robust and objective market definitions. Clear transitional provisions need to be articulated so that the revision does not detract from legal certainty.
- in some member states judicial appeals processes vary considerably, in particular in their length, in the thresholds applied for consideration of suspension of regulatory decisions and in the account taken of relevant Commission guidance and comments. These variations have the potential to detract from effective implementation of the Framework and of the aim of appropriate harmonisation of regulatory approaches. Further alignment is highly desirable, in both the shorter and longer term.
- there is a need for ever-closer co-operation amongst Regulators and between Regulators and the European Commission to promote formulation and rapid dissemination of best practice

Conversely, there are some issues, addressed throughout this response where others have argued for change but where we believe that no change is necessary. In particular:

- investors in major new infrastructure need the opportunity to earn a reasonable return on their investments which properly reflects investment

risks. The Framework already permits NRAs to formulate regulatory obligations which respect that need, while at the same time promoting competition and facilitating innovation. Therefore we are opposed to any measures which would seek to undermine the competition law principles of the Framework, for example, the incorporation of “regulatory holidays” or their equivalent into the Framework.

- the balance of institutional responsibilities, as between Regulators and the European Commission, remains appropriate to the future challenges. We suggest a number of small changes to the institutional arrangements and recognise that the role of ERG needs to evolve and develop to help to meet the above challenges. However, we are firmly opposed to a European Commission right of veto over National Regulatory Authorities choice of remedies. We believe national regulators are best placed to decide on such issues.

We believe that the above evolutionary approach will ensure that the Framework remains appropriate for dealing with future challenges. We look forward to working constructively with the European Commission and stakeholders as the Review progresses.

Introduction

The European Regulators Group (ERG) and the Independent Regulators Group (IRG) welcomes the European Commission's decision to review the Regulatory Framework² and the Recommendation on Relevant Markets³ and welcomes the opportunity to respond to the call for input. The ERG is an advisory group created following the adoption of the Regulatory Framework⁴ and represents the 25 national regulatory authorities of the member states. IRG represents a larger group of 33 independent regulators drawn from the European Union, European Free Trade Area (EFTA) and a number of candidate accession countries. As the key implementers of the Regulatory Framework, national regulators are uniquely placed to offer a detailed perspective on its effectiveness and to suggest areas for review.

Since the introduction of the existing Regulatory Framework in 2002, the performance of the European Electronic Communications Markets has been strong. It has been characterized by an increasingly positive outlook with competition intensifying in most markets. European Commission implementation reports demonstrate a continuing decline in prices, both for fixed voice telephony and for broadband products.

In terms of the focus of the review, it is important to consider Europe's position in relation to other key global regions. It is clear from a number of reports that investment in the electronic communications sector and innovation are most prevalent in competitive markets⁵. In that context, it should be noted that in the European Union investment has exceeded that of both the United States and the

² Directives 2002/21/EC, 2002/20/EC, 2002/19/EC, 2002/22/EC & 2002/58/EC.

³ Commission Recommendation and Explanatory Memorandum on Relevant Product or Service Markets within the Electronic Communications sector susceptible to ex ante regulation in accordance with directive 2002/21/EC of the European Parliament and of the Council on a Common Regulatory framework for electronic communication network and services.

⁴ Directive 2002/21/EC, Recital 36.

⁵ OECD: ICT and Economic Growth 2003 <http://213.253.134.29/oecd/pdfs/browseit/9203031E.PDF>

Asia-Pacific region and continues to increase with alternative carriers investing at a faster pace than incumbents⁶.

The full implementation of the Regulatory Framework is essential to the continued development of the sector and the review of the Framework needs to focus on maintaining or further improving Europe's relative performance. The Framework creates the opportunity for regulation to evolve with the market and, while some adjustments to the regulatory regime may be necessary, the Framework is principally sound and provides the tools to allow for future efficient investment and ensure the incentivization of innovation.

In some member states, implementation of the Framework has been slow. However, the market analysis process is now well established with over 315⁷ notifications presented by National Regulatory Authorities (NRAs) under the Article 7 procedure⁸. The market reviews provide a source of evidence-based regulatory decisions which ensure predictability and clarity to market players. Regulation is more focused and, where competition is established and effective, one can begin to see a clear trend towards further deregulation. This is particularly evident in some end user markets, specifically international services and, in some cases, in wholesale markets. It should be noted that where markets have been found effectively competitive, regulation imposed under the old framework has been withdrawn⁹.

The review should be evolutionary not revolutionary and retain the key principles of offering technological neutrality, legal certainty and the integration of competition based principles into ex-ante regulation.

This response to the call for input will elaborate on these issues in the responses to the individual topics raised in the call for input on the Framework and the Review of the Recommendation on Relevant Markets and takes the opportunity to identify

⁶ Infornetics, December 2005 Biannual Service Provider Capex Analysis: Europe (H1 2005)

⁷ CoCom05-47

⁸ Annex A includes a breakdown of notifications by country

⁹ A number of market notifications have withdrawn obligations on international and retail calls markets, wholesale transit markets and higher end retail leased lines markets. A full list of notifications is included in Annex A and Annex B

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other areas the European Commission should consider as part of the upcoming reviews.

General Topics

As a general introduction to the review process, there are a number of areas that I/ERG would wish to highlight as worthy of further consideration and debate:

Authorization Process

One of the strengths of the current Framework can be seen through the application of the authorization process. The new regime has increased both the number of operators in the market as well as giving consumers more choice. However, because the authorization process has had the effect of lowering the barriers to entry to communications markets, a number of issues have emerged, related to consumer protection and privacy, which will be addressed in more detail further in the response.

Harmonization

As markets are evolving across the union at different paces, there are a number of key challenges in adapting the Framework. The appropriate scope and level of harmonization across the European Union and the optimal way to achieve these aims is a key issue to be considered in the review, in particular, in respect of services delivered on a pan-European basis. While recognizing the role of the Article 7 process in promoting appropriate harmonization of regulatory practice, I/ERG considers that process improvements are necessary to enhance focus; to facilitate rapid dissemination of best practice and to reduce administrative burdens, especially for smaller NRAs. This response sets out a number of recommendations for possible changes and improvements to the Article 7 process later in the document.

Market Analysis

A key consideration for the review should be maintaining the stability of the regulatory environment which provides certainty to the industry and to investors. Considering the time and resources devoted to market analysis decisions and the

need for implementation of key regulatory decisions, the review of the Framework needs to ensure NRAs have sufficient tools and scope to address promptly, competitive and end users issues as the Framework evolves.

The ongoing consultation on article 82 of the Treaty, launched by the European Commission in December 2005, is of relevance to the Regulatory Framework, as market analysis performed by NRA's are based on article 82 of the Treaty. It is important therefore to consider the relationship between the review of article 82 and the review of the Regulatory Framework and integrate, where possible, the outcomes of the different work-streams.

Institutional Coordination

A key feature of the new Regulatory Framework is the increasing co-ordination between regulatory authorities, under the auspices of the European Regulators Group, and the growing ability of national regulators to address problems which transcend national markets. ERG is committed to continuing to evolve and develop its role, to ensure continuing benefits for European consumers and to promote the effective functioning of the internal market.

Application of Remedies

Members of I/ERG are fully committed to fulfilling their obligation to co-operate so as to ensure consistent application of the Framework. Their ongoing work to keep up to date a Common Position on Remedies¹⁰ is an important and tangible part of this commitment. While the toolkit provided by the Framework for application of remedies is soundly designed, there are some material incremental improvements to be made as a consequence of this review.

Regulatory authorities need to be able to frame remedies in a holistic manner which allows remedies to address effectively national cross market issues such as bundling, convergence, integrated operators and margin squeeze. Although the

¹⁰ Discussed in Common Position on remedies consultation, ERG website: http://www.erg.eu.int/documents/cons/index_en.htm (public consultations, ongoing).

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I/ERG has been able to address these issues in its work on the Common Position on Remedies, it considers that there is a need to review whether the relevant existing provisions in the Access Directive are sufficiently broad and clearly drawn. I/ERG would consider it important for such ambiguities to be clarified and addressed in the forthcoming review.

Similarly, I/ERG considers that there may be merit in making more explicit the nature of possible non-discrimination remedies so that NRAs are empowered to act to facilitate real equality of access to SMP networks, as between the operators of those networks and third parties.

Specific Topics

The European communications market is evolving rapidly in terms of infrastructure, product developments and services, with increasing evidence of convergence and renewed investment. Regulators need to have the flexibility and the regulatory tools to respond to changing technological and market trends. The market review process, which acts as a precursor to intervention, allows regulators in defining markets to address changes in technologies and markets. The ability of regulators to define remedies according to a set of common principles, but in a manner appropriate to national circumstances is, and should continue to be, a critical feature of the regulatory regime.

To our knowledge there is no evidence that the current ability of regulators to design remedies in a way that suits national market conditions has been damaging to European consumers or to Europe's economic development.

I/ERG is strongly of the view that any consideration of adjustments to the Framework should be evidence based and grounded on experience gained to date and would therefore stress that in the terms of the scope of the review the European Commission should consider the following issues:

1. Continuing to ensure the Framework respects technology neutrality and is equally service provider neutral
2. Ensuring legal certainty and predictability for all stakeholders
3. Ensuring the efficiency of the article 7 process

The existing Framework objectives are: development of the internal market, promotion of competition, and the protection of consumers. I/ERG would maintain that these objectives are appropriate and should not be changed or prioritised. The objectives can be realised within the current Framework but, to that end, the full

implementation of the Framework needs to be allowed to take place so as to ensure a predictable and stable regulatory environment for all stakeholders.

Convergence and technological development

Communications markets are undergoing significant technological transition towards next generation networks (NGNs)¹¹, converged and IP based services. In the near future IP services will be seamlessly provided through various networks. In addition, the bundling of services as well as the provision of cross-border services will increase. Technological developments will also dilute divisions between traditional platforms such as broadcasting and telecommunications where ‘triple’ and ‘quadruple’ play products are becoming increasingly prevalent. While these developments may undoubtedly give rise to new regulatory challenges, they may also fuel the expectation that lighter touch regulation will be possible in traditional areas of regulatory oversight.

In recognition of these developments the Framework review needs to guarantee appropriate flexibility to enable regulators to address the issue of convergence particularly as such changes will not take place in all European markets at the same time. As convergence becomes a reality, the Recommendation on Relevant Markets and the Framework in general need to be technology neutral

One of the increased challenges of converged markets is that there may be fewer instances of single company dominance. It is also likely that there could be a number of instances where markets are found to be oligopolistic in nature and where competitive forces are not sufficiently strong to fully protect end-user interests. Where such market circumstances exist and where the objectives of the

¹¹ As a working definition of Next Generation Networks I/ERG takes the definition from ITU-T i.e. NGN is a packet based architecture fostering the provisioning of existing and new/emerging services through a loosely coupled, open and converged communications infrastructure

Framework are not being achieved, the European Commission needs to ensure Regulators have the scope to intervene.

Single market aspects

Overall the Framework is sufficiently equipped to promote investment and support the growth of the sector. However, when considering any revisions to the Framework, we would repeat that the utmost consideration must be given to maintaining regulatory certainty. In a converging, fast moving, environment it is vital for companies, contemplating investments, that regulation is predictable.

The Regulatory Framework allows for the appropriate consolidation of the internal market and contributes to the overall development of the sector. The Framework has the objective of developing the internal market and provides the harmonized regulatory means and procedures to achieve this aim. A key strength of the current regulatory framework is the decentralised structure of regulatory authorities reacting to national circumstances within a coherent Framework.

In the recently published Communication on Market Reviews under the EU Regulatory Framework¹² the European Commission confirms that NRAs have generally applied similar sets of remedies to similar market failures. The Report goes on, however, to argue that the implementation of these remedies has differed across a number of member states and that such differences have significant implications for the internal market¹³. I/ERG recognizes the differences but considers that the implications of such differences, both good and bad, need to be better understood before any change to processes or responsibilities is instituted.

¹²Communication on Market Reviews under the EU Regulatory Framework - Consolidating the internal market for electronic communications" COM(2006) 28 final

¹³ An example of such an issue raised in the Communication relates to Mobile termination rates where most NRAs have selected the remedy of price control but in terms of implementation approaches differ from using cost methodologies to define termination rates, to benchmarking and glide paths

Full and universal implementation¹⁴ of the Framework will lead to a further degree of harmonization. I/ERG believe that remaining differences in detail of national remedies will prove to be appropriate measures ensuring the development of efficient national markets. The ability of NRAs to make an intelligent choice of remedies is an important component of making the Framework appropriately focused on the interests of end-users.

While it is the case that some services clearly lend themselves to a pan-European approach e.g. international roaming, it is significant that in most markets most services within the scope of the Framework are not traded across national borders. Moreover, remedies consistent with an efficient national market need to take account of the size of the relevant geographic market, the national/local economies of scale and density, the national/local network topology, the national rate of technological convergence, the size and degree of integration of the SMP player. These effects will all naturally and appropriately lead to differing degrees of harmonization of the implementation remedies amongst NRAs.

The degree of harmonization appropriate to achieve the objectives of the Framework is an area where further analysis is necessary. There is a need for regulators to give clear reasoning about their choice of remedies, both to meet the requirements of national courts and in the interests of the stakeholders and will continue under the auspices of ERG to develop common positions on remedies.

Article 7 procedures (Framework Directive)

The objective of the Article 7 process is to ensure key regulatory decisions, taken under the provisions of the Regulatory Directives, are applied in a consistent and transparent manner according to best regulatory practice.

¹⁴ Transposition issues in some member states may restrict the ability of NRAs to implement in full the harmonisation objectives of the framework

Regulators recognise the commitment of the European Commission and the Article 7 Task Force to the implementation of the Framework and the efforts made by the Task Force to ensure time-scales set out in the Directives are adhered to. However, the results of the process to date are unnecessarily burdensome particularly on smaller NRAs and notwithstanding their role in the establishment of the new process, they should be examined urgently. The market analysis process involves considerable time and resources from regulators and industry. While evidenced based decisions are key to the Framework, the Article 7 process consumes significant additional time and resources over and above that which regulators believe necessary to complete an effective national consultation. A key priority of any review should, therefore, be to consider the efficiency of the process and to assess whether the outcomes achieved appropriately reflect the inputs necessary to achieve them.

Following are a number of areas where I/ERG would maintain that further analysis and consideration is required, thereby, adding to and improving both the transparency and effectiveness of the process.

Simplification

Irrespective of the ability of the European Commission task force to meet the time-scales set out in Article 7, the process should be streamlined and simplified. The process is taxing for all NRAs and particularly for smaller NRAs. I/ERG consider that the Article 7 process needs to be focused. The administrative burdens, especially on smaller NRAs cannot always be justified by the benefits of the process. There is also currently insufficient differentiation according to whether or not the geographic and services markets under consideration are of real significance to the overall achievement of the objectives of the Framework. The Framework contains a number of provisions which protect stakeholders interests over and above those contained in Article 7.

Simplification should concentrate on firstly reducing the number of notifications by considering a threshold which could be based on a 'de minimis' rule or a

significance to the development of the internal market¹⁵. Secondly, notifications could be simplified by differentiating notifications using a threshold which would reflect a markets limited development or evidence of ‘super-dominance’ (i.e. persistent monopoly market structures) and where such notifications would not warrant the same level of scrutiny as more contentious notifications which may impact on the Framework objectives. The objective should be to concentrate on notifications which raise issues of consistency in terms of the internal market.

I/ERG would welcome early discussion with the European Commission on these proposals with the aim of improving the process and efficiency of the Article 7 procedure.

Value of Article 7

The European Commission needs to consider the practical added value of the Article 7 process. It is certainly the case that a good deal of consistency is evident in market definitions and market analysis. However, it is far from clear that this derives from the Article 7 process itself, as most of the definitions would have been the same in the absence of the process.

One of the stated aims of the Article 7 process is to ensure consistency particularly in the case of Significant Market Power (SMP) findings. It should be noted, however, that recent judicial decisions appear not to have taken into account the objectives of Article 7, and specifically raise doubts as to compatibility with European Community law, in deciding on national cases. The European Commission should address the potential for inconsistency in regulatory decisions by ensuring that the review of the Framework considers how the Article 7 process can provide certainty to regulators in terms of national and European Commission reviews.

The ability to notify interim measures, as detailed in Article 7.6 of the Framework Directive is a key provision for NRAs ensuring the ability of NRAs to respond promptly to market circumstances. This provision should be retained in any review.

¹⁵ This issue is specifically evident in Finland where the number of small local monopolies requires the regulator to notify over 400 market notifications.

Transparency

While I/ERG recognize that the comments made by the Commission in responding to Article 7 notifications provide useful guidance, there has been insufficient attention given so far to the distillation of general lessons from these experiences. I/ERG propose to discuss with the European Commission how best to achieve this.

Scope

The proposals detailed above are intended to improve the existing provisions of Article 7 and to ensure the consistency sought by the objectives of this article are achieved as efficiently as possible. The article, as currently drafted, is sufficient in scope to achieve these objectives and should be continued. Consistent with the arguments above concerning harmonization, I/ERG considers proposals to extend the power of veto to Remedies decisions as inappropriate. There are a wide range of implementation decisions which need to remain the discretion of the expert national regulatory authority with the best understanding of national circumstances. Consistent application by all regulators of the provisions of the Framework concerning remedies is best achieved through the continuing work of ERG on its common position on remedies¹⁶ and through the development of ERG's ability more generally to offer guidance on when (and when not) very close alignment of remedies is appropriate.

Spectrum management

There is an increasing demand for the use of radio spectrum and a corresponding recognition of its importance and economic value. These changes are driven not least by rapid technological developments and convergence of telecommunications. It is important, therefore, that within this dynamic environment proper assessment is given to the current management model and assessment made as to the future requirements of the sector. Any change to the current structure, with particular

¹⁶ Discussed in Common Position on remedies consultation, ERG website: http://www.erg.eu.int/documents/cons/index_en.htm (public consultations, ongoing).

regard to trading and liberalization of use, should, however, be developed in conjunction with European spectrum management authorities and with due consideration of the social effects of any changes.

In respect to the question on possible changes to the current management of the radio spectrum, it should be stressed that I/ERG supports a common approach to an efficient management of radio spectrum in the European Union. In this regard, I/ERG welcome further study of market based and other approaches to frequency administration. Implementation of Community policies may need to ensure that national regulation of the use of spectrum does not exclude the use of technologies or offering services that have pan-European dimensions. Obligations to provide core information about assigned and unassigned spectrum and to make vacant spectrum available for interested parties on the basis of non-discriminatory, objective and open procedures, should be reinforced

Spectrum trading mechanisms should ensure the efficient and flexible use of frequencies. Competition law principles should be applied to prevent concentration of ownership leading to less competition in the markets for electronic communication services. With respect to trading mechanisms the concept of ‘use it or lose it’ should be considered and the means should exist to prevent the accumulation of spectrum without the objective of commercial use.

In all relevant cases there should be the mechanism to introduce technical regulations, which are necessary to avoid interference between radio networks and also to increase the efficient use of certain frequency bands.

Competition and access regulation

This is a key part of the Framework. I/ERG has a number of suggestions for development of the Framework to:

- promote incentives to efficient investment;

- allow regulators to deal efficiently and effectively with any competition problems which arise in oligopolistic markets
- clarify the ability of NRAs to apply effective remedies to deal with issues which transcend a number of services markets
- improve the transparency and predictability of the Market Analysis process

Efficient investment

I/ERG recognizes the importance of fostering efficient investment and innovation by both incumbents and new entrants. It also recognizes the important role next generation networks (NGNs), convergence and innovation can play in for the future development of the single market and the achievement of the Lisbon goals. It can be inferred from broadband penetration rates that competitive markets, with facilities and service based competition, are successful in encouraging investment and innovation consistent with the Lisbon goals. If one considers the G7 nations, the growth in broadband penetration for both the UK and France exceeded that of the US in the past four years¹⁷ The ITU have argued that, in terms of broadband deployment,

‘competition in as many areas of the value chain as possible provides the strongest basis for ensuring maximum innovation in products and prices and for driving efficiency’¹⁸.

¹⁷ OECD Broadband stats ,June 2005, see Table 1

¹⁸ The Role Of Regulators in Promoting Broadband in Developing Countries, Global Symposium for Regulators, page 4

Table 1: OECD Broadband Statistics, June 2005¹⁹

	<u>2001</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>	<u>2005</u>
<u>France</u>	<u>1.0</u>	<u>2.8</u>	<u>5.5</u>	<u>10.6</u>	<u>12.8</u>
<u>UK</u>	<u>0.6</u>	<u>2.3</u>	<u>5.4</u>	<u>10.5</u>	<u>13.5</u>
<u>US</u>	<u>4.5</u>	<u>6.9</u>	<u>9.7</u>	<u>13.0</u>	<u>14.5</u>

In recent months much attention has been given to suggestions that established network operators need guaranteed “holidays” from regulation, in order to give them the necessary incentives to undertake major new infrastructure investment. This is likely to lead to a period of partial or complete monopolization of those services which can best be delivered by such new infrastructure.

I/ERG does not accept that investment incentives are undermined in the absence of a guaranteed right to monopoly access to new infrastructure. Such investment will also be driven by the efficiencies and cost savings such networks will offer firms. It is clear this investment will reduce costs in the long run in terms of network elements, maintenance and outsourcing²⁰.

The evidence on investment discussed above is at odds with the concept of regulatory holidays. Firstly, regulatory holidays will rarely be in the best interests of end users or the most efficient outcome. Moreover, if a period of monopoly use were to be permitted, there could be a severe regulatory problem in dealing with entrenched market power after the expiry of the holiday. Secondly, NRAs have a policy objective to ensure there is no distortion or restriction to competition.²¹ For these reasons, I/ERG is firmly opposed to the concept of regulatory holidays being introduced into the Framework.

¹⁹ OECD Broadband Statistics, June 2005, percentage based on 100 inhabitants with broadband connection

²⁰ European Telecommunications Platform, ‘On the Technology, business models and regulatory aspects of NGN

²¹ Directive 2002/21/EC, Article 8.2(b)

I/ERG recognizes that investors need a reasonable opportunity to gain an appropriate return on their investment. I/ERG considers that this can be assisted significantly by provision of a reasonable degree of regulatory certainty, in particular concerning policy on:

- the nature of interconnection and access arrangements
- the basis of price regulation (based on a reasonable rate of return e.g. Weighted Average Cost of Capital)
- the approach to the ladder of investment

I/ERG will continue to develop appropriate ways of promoting regulatory certainty²² and to continue developing principles on access remedies which will reflect the impact of investment risks in regulated markets.

The Regulatory Framework should be sufficiently flexible to enable national authorities to intervene both quickly and effectively in substantial competition problems regardless of the technology used. Specifically, in relation to NGN's, new forms of access may lead possibly to new interconnection disputes which NRA's need to address quickly and effectively. It is also important to recognize that one of the barriers to deployment of new fixed infrastructure investment is the lack of access to the ducts of SMP players and the access directive should be clarified to facilitate imposition of such remedies where appropriate.

Oligopolistic markets

I/ERG recognizes that dominance is the appropriate test in markets with a single large player. In I/ERG's response on Convergence and Technological

²² Ofcom has recently faced an issue in the regulation of broadcasting transmission, where major capital investments will need to be recouped over 20 years or more, where investment costs are at present highly uncertain and where both transmission providers and broadcasters need a degree of certainty over future transmission charges. Its approach was to complement formal regulation by guidance by way of non-binding statements of policy. In this case, both efficiency of provision and a reasonable rate of return can be achieved while providing a reasonable degree of certainty to the broadcasters over future charges. Ofcom proposes to achieve this via a requirement to offer a cost-oriented charge (on which it has issued detailed guidance) plus the use of a "gain/pain sharing mechanism". Under this mechanism, any cost-overruns will be shared between the provider and broadcaster, as well any savings.

Developments it was recognized that market structures may evolve to more oligopolistic structures. However, the test of joint dominance applicable in such markets can be an unworkable threshold for intervention. Although oligopoly market structures show, in many cases, evidence of effective competition, I/ERG proposes that the European Commission in its review of the Framework considers NRAs scope to intervene in the evolving oligopolistic market structures where there is ineffective competition. Specifically, the European Commission should consider redefining the scope of the concept of joint dominance or widen its interpretation in an ex-ante context. The European Commission should also consider strengthening the provisions of Article 5 of the Access Directive to allow regulatory authorities to intervene in non-competitive markets to ensure the objectives of the Framework are being met. To complement these longer term developments, I/ERG considers that a pragmatic approach could be the introduction of bespoke legislation to deal with exceptional and specific competition problems in oligopolistic markets.

I/ERG note a suggestion that competition problems in oligopolistic markets could typically be solved by release of additional spectrum, so as to facilitate additional entry. While not dismissing this possibility, I/ERG consider that it is neither a quick, easy or universal solution to the problem. It could be a medium to long term solution in certain cases but does not negate the need for the effective tools to deal with exercise of market power in such markets.

Issues which transcend a number of services markets

The present Framework is unclear about the extent to which remedies can deal with issues which transcend a number of markets. This is particularly relevant when one considers whether the application of appropriate remedies to services within the Significant Market Power (SMP) market is insufficient to deal fully with the competition issues which arise from that position of SMP. It is also important when considering cross-market concepts such as the ‘ladder of investment’ that regulators are empowered to deploy the full range of remedies in other markets as a consequence of a position of SMP in one market. For example, the Framework is unclear about NRAs ability to impose remedies which are necessary in order to deal effectively with an identified position of SMP but which apply, partly or

wholly, to services outside the market in which SMP has been identified. Accounting separation is one such remedy.

Transparency and predictability of Market Analysis

Considering the number of reviews completed to date, it is also important that the SMP Guidelines²³ be updated to take account of recent case law and to address a number of economic issues raised during the market review process. Specifically, the guidelines need to address Countervailing Bargaining Power, the application of the SSNIP test, joint dominance and self-supply. I/ERG would maintain that these issues are not adequately addressed in the current guidelines.

Finally, and particularly in view of convergence trends, there is value in maintaining the provisions as outlined in Article 8 of the Competition Directive.

Authorizations, rights of use and Consumer protection, citizens' interests and users' rights

The Authorization Process

The authorization process has been a clear success of the Framework as witnessed in an increase in the number of EU operators and the resulting increase in competition. Consumer protection measures are, however, a key issue in the review of the Framework. The lowering of barriers to entry under the authorizations provisions, while welcome, has raised a number of end user issues in some markets which, for the avoidance of doubt, should be addressed in any future review. In this regard, I/ERG would welcome clarification of provisions within the Directives providing a basis for the implementation of measures to promote market transparency. These could include the discretion for NRAs to require publication

²³ Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic networks and services, OJ 2002 C 165/3, ("the SMP Guidelines").

and provision to end users of information on tariffs as well as on quality of service parameters that could be shown to be problematic in terms of consumer protection or to be a barrier to efficient markets.

I/ERG is concerned at the growing and widening incidences of commercial practices which are designed to exploit the vulnerability of certain target groups of consumers or in some cases to defraud them. While prosecution of fraud is beyond the responsibilities of regulators, ERG considers that there is a growing expectation that regulators will take reasonable steps to protect vulnerable consumers.

ERG notes that there is a need to review the implications for regulators of two recent pieces of general consumer legislation:

- Unfair Commercial Practices Directive
- Co-operation of Consumer Bodies Regulations

Beyond that, ERG considers that clearer powers may be needed to allow a competent national body to promote Codes of Practice dealing with conduct of business. I/ERG will consider what collective best practice can be developed and will update its work programme accordingly.

Disabled Users

I/ERG consider that there is more need for multi-lateral debate involving disabled users on questions of their needs.

It recognizes that the communications industry has and continues to respond to the needs of those with disabilities. Specific measures are provided for as part of the Universal Service Obligation. I/ERG considers that necessary measures will usually, more appropriately, be taken as part of general Community initiatives in respect of services (not just electronic communications) for disabled users although it does not rule out further measures in the Universal Service Directive, where they would be the best route for dealing with an identified market failure.

Radio Spectrum resources

In terms of radio spectrum resources and the national authorization regime, I/ERG would argue that spectrum rights of use and frequency assignment procedures are generally best dealt with at a national level. Further harmonization could be pursued in terms of frequency allocations in order to develop pan-European services, where this is appropriate, and safeguards to protect against cross-national issues such as interference. For such pan-European services, a high degree of co-ordination and co-operations is required.

Numbering

In respect to numbering, it should be recognized that some countries have geographic numbering plans and other countries have non-geographic numbering plans. The European Commission should be mindful of this difference in approach if further harmonization with regard to numbering is considered.

Additional Issues

The review should also address the issue of jurisdiction concerning cross border services. This is particularly relevant in respect to services provided over IP networks, but is also an issue in Satellite Broadcasting. The user and the service provider may be situated in different countries. Jurisdiction based on the general authorization is not applicable in all of these situations and therefore, rules on jurisdiction in the Framework would create more legal certainty for the IP-service providers and regulators.

Privacy and security

The issue of consumer protection and ensuring the protection of privacy and security of citizens is key to the adoption of new technologies and the development of the electronic communications sector. It should be noted, however, that complexity and diversity of common security threats make it impractical for many citizens to protect themselves from various common security threats directed against information systems and networks. Nor do they have skills to stop the growth of unsolicited electronic communications they increasingly receive. To protect citizens' privacy and security and to promote consumer trust and confidence, I/ERG would make the following recommendations:

- network and communication service providers' rights and obligations must be clarified specifically in relation to the detection and prevention of malicious content and to ensure users' information security and electronic communications are protected.
- in order to effectively ensure information security and to manage information security disruptions, the provisions must provide the ability to not only safeguard network services and communication services but also to safeguard the communication ability and information security of users. This is especially important when trying to guarantee business continuity and to protect critical infrastructure.
- future provisions must, therefore, clarify operators' rights to manage information security violations and events when their ability to offer electronic communication services is threatened and also when users' electronic information infrastructure or communication ability is threatened by information security risks from a network.

Standards and interoperability

I/ERG considers Article 17 is necessary to harmonize standards within EU Member States. Bearing in mind that such regulation offers some market security

for operators to invest, standardization has a crucial role in anticipating the market rules because it creates transparency in the development and use of technologies. In this context, the standards list should be dynamic in order to follow the developments in networks, services and equipment. The relevant articles on standards should be maintained (i.e., Articles 17 and 18). In particular the policies related to intellectual property rights (IPR) should be duly considered when selecting the standards to be published. In addition, the definition of "interoperability" should be improved by clarifying the criteria applicable to standards that should be included in the List.

Leased Lines

The specific issues related to the review of the recommendation on relevant markets are addressed below. Generally, changes to the recommendation need to be based on evidence from notifications and the application of the three criteria. Currently, however, the minimum set of leased lines is not defined on a technologically neutral basis and increasingly other technologies are acting as substitutes to traditional Leased Lines. The market, if found to pass the three criteria, could be defined to reflect similar point-to-point and point-multi-point products which currently act as substitutes for leased lines.

I/ERG would argue that in order to guarantee the proportionality of any necessary regulation of end-users markets, provisions in the Universal Service Directive which lay down mandatory remedies on findings of SMP in retail markets should be removed in favour of the flexible approach reflected elsewhere in the Framework²⁴.

²⁴ The specific articles are contained in Directive 2002/22/EC, Article 16 Review of Obligations, Article 17 Regulatory Controls on retail services & Article 18 Regulatory Controls on the minimum set of leased lines

Institutional aspects

ERG has met 16 times since its first meeting in 2002. It has developed substantial annual work programmes and has published a number of Common Positions, after public consultation of stakeholders, and reports. It has been instrumental in deepening working relationships and co-operation both amongst regulators and between regulators and the European Commission. Under any revision of the Framework, ERG believes that its role as a body promoting harmonization, transparency concerning regulatory approaches and a forum for the exchange of views and best practice needs to continue. More generally, best practise could be disseminated more effectively if mechanisms could be developed to include ERG in discussions prior to veto decisions under Article 7.

ERG is committed to developing its role and aspects of this have been discussed earlier in this response. ERG recognises the desirability of deeper engagement with stakeholders and greater transparency. It has taken a number of initiatives in this direction and will develop these further over the coming months.

Other Areas for Review of the Framework

I/ERG would also like the European Commission to consider the following issues as important areas for review of the Regulatory Framework:

Definitions

There is a need for review of a range of definitions currently contained in the Regulatory Framework to address imperfections in definitions and to ensure that articles in the Framework are sufficient to ensure and support future developments in electronic communications markets²⁵.

The current definitions for Electronic Communications Service (ECS)²⁶, Electronic Communications Network (ECN)²⁷ and Publicly Available Telephone Service (PATS)²⁸ included in the Framework need to be reviewed to ensure they are future proofed for converged sectors and are technologically neutral. As mentioned earlier, it is unclear, for example, if the Framework envisages the consumer protection provisions of the Universal Service Directive to apply to consumers of broadcasting services. There is also an issue in terms of Voice over IP (VoIP) operators and the definition of PATS in relation to emergency services.

Article 4 of the Framework Directive

Although not an issue in all member states, I/ERG would welcome a review of article 4 of the Framework Directive so as to avoid the risk of excessive length of

²⁵ I/ERG would draw the European Commission's attention to inconsistencies in Articles 4 and 5 of the Access Directive where 'operators' are referred to, and the diversification in the definition of undertaking in Articles 12.1 and 12.2 of the Framework Directive.

²⁶ Directive 2002/21/EC Article 2 Definitions

²⁷ Directive 2002/21/EC Article 2 Definitions

²⁸ Directive 2002/22/EC Article 2 Definitions

appeals processes and broad scope for regulatory decisions pending appeal. In particular, alignment of the threshold for the granting of suspensions with that which applies under EU Competition Law may be appropriate in some member states, having the merits of being tried and tested while further aligning the Framework with competition law. The introduction of time frames for judicial reviews could be considered. It is also unclear whether national judicial procedures are giving due regard to the process and outcome of decisions subject to the Article 7 provisions.

Universal Service Directive

Currently the Universal Service Directive specifies for a number of retail markets the obligations which would follow from a designation of SMP such as carrier selection or pre-selection and retail tariff control. The inclusion of remedies in the Universal Service Directive in relation to a finding of SMP in certain retail markets needs to be reviewed. I/ERG considers it more appropriate to align these provisions with approaches taken in the Access Directive.

The review of the Regulatory Framework should remove constraints and clarify interpretations to allow a technologically neutral approach to the implementation of the Universal Service Obligation. The review of the Universal Service Directive should recognise the various stages of market development and the expansion of the EU in ensuring that the Regulatory Framework is responsive to these conditions. In relation to Universal Service the Framework should, in light of national conditions, explicitly provide Member States with the appropriate level of flexibility to define what connections are considered to be at a fixed location. This should ensure that publicly available telephony services are made available to all end users. There may be a need, considering technological developments, to ensure that the provisions of the Universal Service directive are reviewed in a timely manner.

There is also a need to consider the development of services such as Voice over IP (VoIP). In some Member States operators have already taken considerable steps towards replacing the PSTN services with VoIP services and there is also some

evidence from some member states of fixed mobile substitution. As these services evolve along with mobile communications, it is necessary to review definitions used in the directive. This should ensure that the use of new technology is not hindered or user rights neglected. Presently, it is unclear if and to which extent the current provisions of the USD cover VoIP services. In the interests of technological neutrality this issue should be clarified in the Review, in particular with regard to definitions.

Enforcement

I/ERG is concerned at the anomaly contained in Article 10 of the Authorization Directive, specifically Art 10.7, where breaches of authorization provisions identified by regulatory authorities, specifically in relation to emergency services, are subject to the provisions of Art.4 of the Framework Directive (appeals mechanism).

I/ERG also notes that the provisions in Article 10.2, where transposed literally by Member States, amount to an incentive to regulated players to avoid compliance for as long as possible. This is not a characteristic of an effective regulatory regime which should be designed, as far as possible, to promote compliance.

CALL FOR INPUT ON THE RECOMMENDATION ON RELEVANT MARKETS

Introduction

I/ERG welcomes the opportunity to respond to the European Commission call for input on the review of the Recommendation on relevant markets.

Questions 1-2: Are there markets listed in the Recommendation which should be withdrawn or modified? Are there markets which should be added to the list in the Recommendation?

The market analysis conducted by regulatory authorities in the first round of notifications should be considered as the starting point for subsequent market reviews at a national level and as a valuable source of market data for the review of Recommendation on relevant markets.

Market failures that justify ex-ante regulation such as, but not limited to, bottlenecks (often combined with vertical integration), still persist in a number of markets. Any review or proposed change should be based on evidence from market analysis conducted to date. According to the Recommendation, the European Commission should base the removal or inclusion of markets from the existing recommendation on the clear application of the three criteria as detailed in the explanatory memorandum of the existing Recommendation²⁹.

Since the adoption of the existing Recommendation in 2003 (almost three years ago) the communications sector has begun to undergo a significant technological transition towards next generation networks and IP based services. Notifications to date reflect

²⁹ Commission Recommendation and Explanatory Memorandum on Relevant Product or Service Markets within the Electronic Communications sector susceptible to ex ante regulation in accordance with directive 2002/21/EC of the European Parliament and of the Council on a Common Regulatory framework for electronic communication network and services

trends that may give rise to an opportunity to review and update the Recommendation in a number of areas. The review of the Recommendation gives an opportunity to modify the current market definitions, withdraw markets and define new markets as a result of commercial and technological convergence and other developments. The review also offers the possibility of future-proofing market definitions to take account of developments of this kind.

It can be expected that technical and commercial developments will lead to evolution of the boundaries of the markets, in principle at different rates in different Member States. For example, fixed mobile convergence *may* give rise to the conclusion that corresponding fixed and mobile markets should be combined. The current definitions of the retail markets have resulted in many decisions on significant market power in the end user markets and NRAs should retain the ability to regulate, where appropriate, retail fixed networks. However, where competition is established there is an opportunity to reduce regulation of end user markets and address convergence issues at wholesale levels by including, for example, a wholesale fixed access market. There is also an opportunity to consider merging retail markets.

Regulatory authorities need flexibility to redefine existing boundaries in line with national developments without that being considered a deviation from the Recommendation. Market definitions included in the Recommendation should represent an attempt to define national economic markets and these will vary from Member State to Member State but should be defined more broadly using the three criteria. Such an approach would represent clear guidance to regulatory authorities on their priorities for market analysis but would avoid the mistake of creating a strait-jacket on the incorrect presumption that one size will fit all.

The analysis conducted by regulatory authorities' shows that further work is required on a number of markets. It is clear that notifications by a number of NRAs differ from the Recommendation candidate market to such an extent that the review should reconsider the approach to redefining those markets. An example of such a market is *Wholesale Broadcasting Transmission*, where the current definition has proved inapplicable in most Member States³⁰. Consideration of other markets has raised generic economic issues, for

³⁰ For more detailed summary of notifications see Annex B

example, the question of whether self-supplied services should be included within the defined market or not.

There is also an opportunity in the review to confirm that the inclusion of a market in the Recommendation offers NRAs the ability to review markets in the list but not an obligation to do so, if the NRA has previously concluded the market was effectively competitive. I/ERG believes that the European Commission should make this explicit in the review of the Recommendation.

Currently a number of market analysis decisions have yet to be finalised and these decisions may be subject to appeal procedures under national law. In addition, a number of Member States have yet to notify conclusions on market analysis based on the existing Recommendation. The European Commission should, therefore, state clear transition provisions and clarify the status of any revised Recommendation prior to the adoption of any revision to the Recommendation.

Question 3: Should the 3 criteria, which are used to determine which markets may warrant ex-ante regulation, be adjusted?

A key feature of the Framework is the flexibility for regulatory authorities to define markets based on national circumstance. The flexibility to define markets is critical to the maintenance of appropriate regulation at a national level. It should be noted that, in terms of future developments, markets and market definitions will evolve at different rates. Therefore, the Recommendation needs to respect this development and should be sufficiently future proofed to ensure that such flexibility is supported.

The three criteria identified in the Recommendation are important as they enable national markets to be defined flexibly, taking into account national characteristics on the basis of common principles. However, recent cases show that they are by no means straightforward to apply, that there is need for more clarity about interpretation in practice, and that they may not be relevant in all cases. In this respect I/ERG would welcome guidelines, drafted jointly by the European Commission and regulatory authorities under the auspices of ERG, on the practical application of the criteria. Some members of ERG are already developing an economic analysis which could inform the development of such guidelines.

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The grounds for regulatory intervention on a market should be based on economic reasoning supporting the principles and concepts on which the three criteria test are based. However, the Explanatory Memorandum to the Recommendation should more extensively reflect the underlying economic reasoning justifying the recommended markets in order to secure objectivity and predictability.

Furthermore, the use of the three criteria to define markets which deviate from the Recommendation needs further clarification, as regulators consider that in some cases they have been inconsistently applied in the comment letters issued to date and have created uncertainty around their purpose and use. Clarification on their use, through the developments of guidelines, is key to the review on the Recommendation on Relevant Markets.

I/ERG observes that the concept of emerging markets has not proved a useful one in practice either for the purposes of defining relevant markets or for the proportionate application of SMP remedies. In particular, it sees no need to formalize further its use in market definition.

Conclusions

The review of the Regulatory Framework and the revision of the Recommendation on relevant markets should be based on a vision which sets out a road-map for the achievement of the goals of the Lisbon Agenda. The proposed changes to the Framework should be well-balanced and clearly articulated to ensure the Regulatory Framework has the tools to achieve this vision.

The existing framework is fundamentally sound and is intended to make a transition from ex-ante to ex-post regulation. This can be achieved by means of less regulation where appropriate, leaving more issues to competition law. However, the European Commission should ensure, when proposing changes to the Framework, whether the intended transition to competition law actually contributes to the policy objectives of the Regulatory Framework and the Lisbon agenda.

This response to the call for input has given us the opportunity to re-assent that, despite slow implementation of the Regulatory Framework in some Member States, the full implementation of the Regulatory Framework is essential to the continued development of the sector. The Framework provides the tools for NRAs to incentivize investment and

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promote innovation and can address the challenges of new technologies and convergence. The Article 7 process, in its current scope, and the work of the ERG, provides a basis for harmonization of methods across the European Union. I/ERG looks forward to a constructive debate with all stakeholders to ensure the efficient completion of the review.

Annex A

Approximately half of the art 7 notifications have been finished across the EU.

Note: simplified for better illustration Country		Relevant markets according to EC recommendation																		Symbols	
		Retail Fixed Voice						Retail Leased Lines	Wholesale Fixed Voice			Wholesale ULL Broadband		Wholesale Leased Lines		Wholesale Mobile			Wholesale Broadcasting		
		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18		
Austria																					
Belgium																					
Cyprus																					
Czech Republic																					
Denmark																					
Estonia																					
Finland																					
France																					
Germany																					
Greece																					
Hungary																					
Ireland																					
Italy																					
Latvia																					
Lithuania																					
Luxembourg																					
Malta																					
Netherlands																					
Poland																					
Portugal																					
Slovakia																					
Slovenia																					
Spain																					
Sweden																					
United Kingdom																					

market definition and/or SMP-determination and/or remedies have been notified to European Commission

veto decision by European Commission (EC)

opening of phase 2 by EC

Data source:
European Commission (Circa Server)
Status: 2.2.2006

AnnexB

Progress and results differ in the 18 markets.

Note: simplified for better illustration Country		Relevant markets according to EC recommendation																	
		Retail Fixed Voice						Retail Leased Lines		Wholesale Fixed Voice		Wholesale ULL Broadband		Wholesale Leased Lines		Wholesale Mobile			Wholesale Broadcasting
		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
Austria																			S
Belgium																			
Cyprus																			
Czech Republic																			
Denmark																			
Estonia																			
Finland		A	A	S		S		S			S		S						
France																			
Germany																			
Greece																			
Hungary		5A	5A	5A	5A	5A	5A		5A			5A	5A						
Ireland																			
Italy																			
Latvia																			
Lithuania																			
Luxembourg																			
Malta																			
Netherlands								S		S	S		S						S
Poland																			
Portugal																			
Slovakia																			
Slovenia																			
Spain																			
Sweden																			S
United Kingdom							S												S

Symbols

one SMP operator

joint dominance

effective competition, no SMP operator

all operators have SMP in their individual market

other result

no notification until now

S sub-markets

A local areas

veto by EC

opening of phase 2 by EC

Data source:

European Commission (Circa Server)

Status: 2.2.2006