



## ERG REPORT

### THE ERG RESPONSE TO THE COMMISSION'S PROPOSAL FOR A REVIEW OF THE RECOMMENDATION ON NOTIFICATIONS, TIME LIMITS AND CONSULTATIONS PROVIDED FOR IN ARTICLE 7 OF DIRECTIVE 2002/21/EC

#### Preliminary remarks

Following the general outline of the Commission's proposals to streamline the notification procedure under Article 7 of the Framework Directive during the workshop with NRAs on March 5<sup>th</sup>, and the requests raised by many NRAs that the ERG should be consulted on a text of the new draft Recommendation, the ERG welcomes the opportunity given by the Commission to comment on the text in the light of the major impact that the Recommendation's provisions will have on the daily NRAs' activities in related to national markets analyses.

To this end, the ERG is concerned that a very short timeframe of 5 working days was allowed to provide formal comments on such an important issue and asks the Commission to take due consideration of the following comments and proposals for amendments, particularly in light of the proposed Recital 15 which states that the ERG, "*has recognised the need for these arrangements*". The Commission will appreciate that such an abbreviated timeframe does not allow for an exhaustive review of the text by all NRAs and that further comments may be expressed by the ERG during the adoption phase.

This point also relates to Paragraph 20 of the current Recommendation 2003/561/EC which provides for joint evaluation by the Commission and NRAs on the necessity to review the procedural rules. While there had been some engagement on this issue in 2006 and 2007, the ERG considers that the process employed by the Commission in drafting and presenting its proposals falls short of the inclusive procedure implied by that provision. The ERG also notes that the proposed text has omitted procedures for a future joint review and considers that such a provision should be reinstated.

The ERG has on many occasions publicly expressed its support for any initiatives to simplify the notification process based on the practical experience gained from the first rounds of market analyses. However, modifications should be tailored in order to take into account the role and duties of all actors involved in the notification process (the Commission, the NRAs and relevant market players) and it should aim to improve the procedures for all of them.

While the ERG welcomes the Commission's initiative to simplify the procedural rules for notifications, it points out that the proposed changes will have a relatively low impact on NRAs' daily workload. Additionally, the ERG is concerned that some of the proposed changes, if not properly clarified and/or amended as suggested below, will in fact give rise to an increase in NRAs' workload. The ERG also believes also that a streamlining of both the Commission's and NRAs' workloads could be usefully pursued by means of a simplified standard of market analyses and would be glad to discuss this further with the Commission's services.

### **Specific comments on the draft text of the new Recommendation**

The ERG is pleased to note that some of the issues of common concern raised by NRAs in the workshop of March 5<sup>th</sup> have been taken into account by the Commission and appropriate clarifications have been provided for in the proposed Recommendation. Nonetheless, the ERG considers that the following matters still remain to be addressed.

#### **“No comment” letters**

The ERG acknowledges that the Commission has considered as well-grounded NRAs' concerns (in terms of both legal certainty and NRAs' position in national appeals) that relate to its stated intention not to issue “no comments letters” upon completion of the notification process. While the proposed text does not explicitly state that such letters will not be issued, it remains unclear whether the Commission intends to issue no comment letters in the case of short notifications given the text of Paragraph (17) of the draft Recommendation.

The ERG confirms its view that a formal “no comment” letter would also be appropriate at the end of the short notification process.

#### **Transparency and harmonisation of practice**

The ERG expresses a general concern, with regards to transparency, on the proposed simplified forms, for which the type of information as well as the level of detail given is considerably reduced.

As stated above, the simplification of the procedural rules for market analysis and notifications should aim at reducing daily NRAs' workload (simplifying market analysis themselves and not market analysis notification only), while avoiding any negative impact on transparency and harmonisation. The reduction of information given in the simplified forms barely reduces NRA's workload, since they would still have to give this information in the market analysis document notified.

Moreover, if the Commission considers abolishing the procedure for publication of “no comment letters” for these simplified notifications, it will reduce transparency, which would increase NRA's workload in keeping other NRAs informed on analysis. When they cannot read the complete analysis document due to language differences, these letters are sometimes the only means at the disposal of NRAs to collect information on each others respective market analysis that is a little more precise than that indicated in the notification forms. The proposed new procedure will be potentially harmful to the harmonisation of NRAs practices, since they will be less able to learn from each other or to gain experience from Commission views.

As a consequence, the ERG considers that the simplified form would need to be specified and detailed in order to maintain an adequate level of information on NRA market analysis, essential to the objective of European harmonisation.

### **New concept of “complete notification”**

Unresolved problems remain with respect to the newly introduced provisions for “complete” notifications, in so far as they raise questions regarding conformity with the current regulatory framework.

In confirmation of what was outlined at the workshop on March 5<sup>th</sup>, the Commission has introduced in the draft Recommendation a new provision related to “complete notification”; in particular, Paragraph (3), when interpreted by Recital (10), confirms the Commission's intention that a standard notification should be considered “complete” only if it simultaneously includes market analyses/SMP and remedies (or, where relevant, remedies withdrawal). Indeed, Paragraph (3), setting provisions as to the date of registration of a draft measure by the Commission, refers to a “complete notification”, whose meaning is expanded in Recital (10).

The ERG is of the opinion that, according to Article 7 of the Framework Directive, with reference to Commission's competence in assessing NRAs' measures, evaluation of measures on market definition and SMP will in some cases have to be kept separate from the evaluation of NRAs' regulatory measures and, therefore, that providing for bundled notifications containing both elements is held to be an unjustified restriction of the system's flexibility and potentially amounts to a substantial change to the provisions of Art. 7 regulation.

### **Cooperation commitments**

The ERG welcomes and urges closer cooperation between NRAs and the Commission with the aim of streamlining notification procedures. In this respect, as stated above in the preliminary remarks, the ERG considers that the current Paragraph (20) (providing for an early consultation phase between the Commission and NRAs for the review of procedural rules) should be confirmed and should also involve the ERG.

Moreover, the ERG considers that the Commission's monitoring duties on the functioning of the short notification system (including possible adjustments to the list of measures to be submitted to via the short process) proposed in Paragraph (7) should be dealt with in close coordination with the ERG itself and, therefore, the ERG asks for a formal involvement in such a review process. It goes without saying that any change to the Recommendation or adjustment to the list in Paragraph (6) should also be submitted to the comitology procedure.

It is also highlighted that the draft text proposes some wording changes to Recital (1), asking NRAs to cooperate with each other and with the Commission in order to, “*ensure consistent regulatory practice*”; current Recital (1) states that such cooperation should, “*ensure the development of consistent regulatory practice*”. The ERG contends that the original text is faithful to Article 8.3 (d) of the Framework Directive whereas the revised text is not. Consequently the ERG holds that the proposed new wording is inappropriate and the current wording should be retained.

### Categories of measures eligible for the simplified notification process

As far as the identification of cases in which the simplified notification process can be adopted (Paragraph (6) of the draft text), the ERG considers as follows.

- On measures falling under (6)a: the Recommendation could include in this category the case of markets which were never in the recommendation on relevant market and that have been specifically identified by NRAs and approved by the Commission in the early rounds, once the NRA has found them as competitive in the subsequent round. The ERG also deems appropriate that Paragraph (6)a be amended as follows: “....*either where the market is found to be competitive by the national regulatory authority, or where the NRAs considers that the three cumulative criteria...*”, as this would avoid any possible confusions regarding NRAs’ duties on substantial market assessment.
- On measures falling under (6)c, the ERG welcomes the Commission’s additional clarifications provided by means of examples of measures containing “technical details” in Recital (13). Measures to be notified according to the short format are also differently listed in Paragraph (6). In the ERG’s view, some further clarification is still needed in order to avoid any doubts and delays in this process.
- In general terms, it has to be noted that the simplified procedure, in compliance with Paragraph (6), does not seem to be an option, but, rather, an obligation on NRAs. This is quite different from the proposal by the Commission during the workshop on March 5<sup>th</sup> where it was clarified that NRAs are free to continue using the standard procedure in order to save time and avoid the Commission’s request for a standard notification (pursuant to Paragraph (14)).

The ERG believes that additional clarification on the definition of cases falling under 6 (c) and a clear statement that the simplified process is an option (not an obligation) for NRAs would be of great benefit to the functioning of the new process (for example, the term “should” could be replaced by “may” in the first sentence of paragraph 6).

### NCA and remedies

A final remark relates to the forms provided at Annex II (cases 2, 3 and 4) where a tick box reference is made to NCAs’ opinions on the proposed measure.

The ERG points out that an opinion by the NCA on remedies is not requested under the current framework and that the proposed Annex I (standard notification form) correctly mentions NCAs’ opinion only under sections 1 and 2 (market definition and designation of SMP operators), not under section 3 (regulatory obligations).

Furthermore, such a reference seems inconsistent with many of the cases of simplified notification (i.e. in case of technical changes of remedies) where it is quite clear that NCAs’ do not have any role.

The ERG believes that the short notification forms can be easily amended in line with these considerations for the avoidance of any confusion.