

ERG draft workplan 2010: ECTA comments

Summary

ECTA thanks the ERG for the opportunity to comment on its draft work programme for 2010. In what promises to be a busy year institutionally as well as for policy and implementation, it is important for the ERG to focus on delivering a few concrete results for core issues that will affect the sector and support the Commission in identifying key actions at a time when they will be setting their priorities for the future.

In this context, it would be useful for the ERG to make its voice heard and highlight the importance of open and competitive telecoms markets in discussions on the 'European Digital Agenda' post i2010.

Concerning the work programme, we believe two important subjects have been omitted and should be addressed. Despite 10 years of liberalisation significant differences remain in most countries in the market positions and financial situation of incumbents compared with entrants and progress towards competition in broadband has halted with incumbents maintaining an average of nearly 50% share of the market. The ERG should take this opportunity alongside the approval of the EU Framework to produce detailed guidelines on.

- Enforcement of the key concept of **non-discrimination** including circumstances where the new power of functional separation may be appropriate.
- Consistent **fixed access costing methodologies** which eliminate any excessive returns made on legacy copper networks and thereby provide appropriate forward-looking incentives for dominant firms to upgrade networks. Prevention of margin squeeze including in bundled environments should also be addressed.

As regards the topics which have been included, we would suggest setting clearer priorities and timelines amongst the many topics listed. Three issues are particularly relevant for the coming year because they will impact the industry significantly as well as influencing initiatives high on the agenda of the European Commission:

- **Next generation access:** the ERG should provide continued input to ensure the publication of an effective Commission Recommendation and should rapidly prepare guidelines on NGA-based wholesale products for the consumer and business segments.
- **Business services:** The ERG should issue specific guidelines to ensure the availability of consistent fit-for-purpose business products across the EU given the economic importance of this segment of the market.
- **Spectrum/Digital Dividend:** The ERG should prioritise efforts with the RSPG to ensure that spectrum allocation supports the development of competition in mobile and wireless services.

Lastly, we would appreciate if the ERG could explain how it plans to follow-up:

- The ERG's proposals for **long-term interconnection** (Bill and Keep)
- **Conformity with ERG common positions** in circumstances where surveys show that best practice recommendations have not been adopted

More detailed comments are provided below on each subject.

Engagement in setting priorities for the incoming Commission

The ERG has an important role to play in sharing its practical experience with the EU institutions and helping to ensure the right objectives and priorities are pursued. The incoming European Commission will be setting priorities for the coming 5-10 years under the auspices of the 'post i2010' **European Digital Agenda** announced by President Barroso in his manifesto to the European Parliament. Amongst the questions raised is the relevance of competition and access measures in the telecoms sector.

It would be helpful for the ERG to provide input to this process at an early stage particularly as regards its experience of the benefits of open market and competition for consumers and the relationship between competition and investment.

Proposed new topics for ERG's workplan

We are concerned that, with all the recent EU focus on institutional changes and review of core objectives, important aspects of implementation may have received less attention at both European and national level. Now, with the expected approval of the EU Framework and with the confirmation that competition remains a core objective for European regulators, it is time to re-energise efforts to achieve this goal. This will require additional efforts and vigilance. A worrying trend is that the average market share of incumbents in broadband has now remained static at just below 50% for more than two years and is increasing in some countries. Meanwhile there remains a very substantial gap in the financial performance of incumbents compared with entrants despite extensive consolidation in many markets. These issues are likely to be further exacerbated with the move to next generation access networks which pose significant risks for competitive reversals in the sector. We propose that the ERG should in conjunction with the Commission prepare guidelines on two very important overarching issues which may be affecting the development of competition in the sector.

Non-discrimination: Discrimination in the supply of services (foreclosure) and in associated terms and conditions as well as lack of accounting transparency remains a core problem in many markets, which may become even more pronounced as incumbents merge fixed and mobile operations and bundle products. Yet despite the widespread application by NRAs of 'non-discrimination' obligations, enforcement remains uneven. Given the over-arching importance of this subject, the further emphasis placed on non-discrimination as an objective for national regulators in the revised Telecoms Framework and the introduction of a new power of functional separation, it would be helpful for the ERG to issue specific guidelines on how this concept should be elaborated and effectively enforced, in which circumstances functional separation may be appropriate and if so, what may be effective means to apply it. The concept is explored by the ERG to some extent within individual 'best practice' guidelines, but a more thorough treatment is warranted.

Fixed access costing methodologies: Under current approaches, cost-orientation of remedies such as unbundling has made a substantial contribution to competition, but still failed to achieve fully competitive markets in many markets or to enable competitors to make a fair return on broadband that is comparable with that achieved by incumbents. Now, with clarity that copper networks will not be renewed, except with fibre, it is particularly important to ensure that pricing has been correctly and consistently set, with asset lifetimes that genuinely reflect the longevity of the networks, which can average 40 years. Measures to prevent excessive returns on copper are also vital to ensure that the correct investment incentives (ie relative returns between copper and fibre) are provided for deployment of fibre by dominant firms and to ensure that competitors are able to achieve sufficient cashflows in broadband provision to enable them to make further investments in an NGA environment. This exercise could also usefully encompass costing

across the value chain with a particular focus on prevention of margin squeeze, including in situations where the retail product may be bundled. Whilst costing is mentioned in the context of 'regulatory accounting', the scope appears relatively narrow, insufficient priority and attention has been given and no concrete recommendations are envisaged during the course of 2010. We encourage the ERG to adopt detailed guidelines to improve the accuracy and coherence of costing methodologies across Europe for copper and copper relative to fibre.

In conjunction with ensuring consistent costing methodologies, a coherent approach by NRA's regarding regulatory accounting rules is needed, especially in key wholesale access markets. We would strongly recommend much greater attention on providing guidance, monitoring and enforcement on important accounting mechanisms including publication within a reasonable timeframe.

Further priorities

We broadly agree with the topics identified by the ERG for examination in 2010. However, given the number of subjects, it may be helpful to highlight which are the priorities and provide more specific timelines for the deliverables particularly where public reports or consultations are envisaged.

We would identify the following three issues (alongside the two identified above) as being particularly high priority in view of their impact on the sector and relevance to live initiatives from the Commission, Council and Parliament.

Next generation access: NGA remains an open issue for the new Commission with the Recommendation unpublished, whilst national developments show widespread divergences that cannot in all cases be justified by national circumstances. The approach to NGA will be absolutely critical not just to ensuring the vibrant development of high speed services, but also in ensuring that investments continue to be made by competitive operators and that any progress towards competition is not undermined. In an environment of uncertainty or risk that access will be denied through near term technical developments, the business case for investing in unbundling is severely diminished. For this reason we urge the ERG as a priority to:

- Inform incoming Commissioners about NGA issues and encourage the Commission to publish a Recommendation on NGA swiftly, after making improvements, particularly as regards compatibility with the market analysis process (annex III) and avoiding pricing regimes which may be discriminatory (ie discounts in certain circumstances).
- Identify best practice product specifications for unbundled fibre, bitstream (explicitly addressing the separate requirements for consumer provision including multi-cast and high quality business provision) and duct access. Regarding multi-fibre, we suggest the ERG examines the cost model and analysis conducted by WIK on this subject.
- Benchmark regulatory rules applied and products available through the 'best practice' monitoring exercise.
- Ensure through engagement in Cocom that effective broadband data is made available which allows an examination of NGA deployments, take-up of access products and the competitive implications.

Business services: ECTA represents a significant number of operators which specialise in the provision of services to multi-national businesses. These operators unanimously highlight that unavailability of or inadequate provision of access products suited to

businesses across Europe hampers their ability to cost-effectively meet the demands of their customers for secure networks connecting multiple sites nationally and across Europe. We therefore urge the ERG to go beyond reporting and:

- Include in the 2010 work programme specific deliverables including a consultation with guidance on how NRAs should approach business service issues when considering markets for broadband and calls in addition to ensuring the availability of Ethernet-based leased line terminating segments. Specifically ECTA's members request the specific (nationwide and pan-European) nature of business services to be taken into account in the market definition and the availability of business-grade services with appropriate service level guarantees and in the case of broadband, technical characteristics which allow low contention rates, greater symmetry and the provision of multiple VLANs. These requirements apply equally for NGA.

Spectrum and the digital dividend: We are very pleased to see that the ERG will be working alongside the RSPG on spectrum issues and proposed to consider competitive issues connected with the allocation of spectrum. We would recommend giving significant priority to this subject in view of the Commission's proposals for a technical Recommendation, and more importantly, a strategic programme – for the allocation of spectrum. We also understand that a summit on spectrum issues will be held in late January 2010. It is important that competitive issues are addressed within the context of these exercises. We therefore recommend that the ERG:

- Work with the RSPG to advise the Commission, Council and Parliament on best practice mechanisms to ensure that the allocation of spectrum under the digital dividend as well as refarming and associated rules support at least current levels of competition in the mobile sector and preferably help to boost competition more broadly in wireless services.

Comments on other issues

We broadly agree with the other topics proposed to be covered by the ERG in 2010, and would offer the following comments:

Convergence: convergence is indeed an important – and far from emerging – topic which should be examined by the ERG. In particular, we would urge the ERG to:

- Examine trends towards bundled products which may involve two (VoB and broadband), three (VoB, broadband and TV) or four (VoB, broadband, TV and mobile) services.
- Highlight the implications for such developments on:
 - The definition of wholesale broadband access including the need for multicast capability
 - Margin squeeze tests when conducted in a bundled environment (this could alternatively be addressed in the context of wider guidelines on costing methodologies as suggested above)
 - Potential knock-on competitive effects of exclusive television rights on neighbouring sectors

Conformity with ERG Common positions: we very much welcome the ERG's efforts to define best practice in relation to certain markets and to monitor the extent to which NRAs are conforming with such guidance. However it is unclear what measures are taken if widespread divergence or non-conformity is found. We would encourage the ERG to:

- Report publicly on the degree to which there has been conformity with common positions, consult stakeholders on whether they agree with this assessment, and explain what measures ERG proposes to take to reduce non-conformity including for example setting deadlines by which it expects NRAs to be in conformity or encouraging action by the Commission should conformity not be achieved.

Roaming: we are pleased that the ERG will be examining the issue of roaming and identifying potential alternatives to retail price regulation. ECTA's mobile challenger and fixed members would encourage the ERG explicitly to examine measures which could help existing and new operators to build a greater cross-border footprint enabling them to compete more effectively in the provision of roaming services.

Universal service: we would encourage the ERG to examine more radical solutions for universal service than expanding the existing regime which was designed with perception that a single operator would offer specific end-to-end 'minimum' services identified by the Government or regulator. An alternative approach would be to address infrastructure availability in uneconomic regions separately through measures such as state aid and rely on effective service competition to deliver and preferably beat 'minimum' service expectations.

Next generation networks/IP: the ERG has just released an extremely detailed and important consultation on the long term interconnection regime with a response deadline of 10 December. However, no mention is made of this project in the 2010 work programme. It would be useful for the ERG to give guidance on what it expects to be the next steps for this project.