

ECTA COMMENTS ON ERG WORK PROGRAMME 2008
November 2007

Summary and suggested actions

ECTA thanks the ERG for the opportunity to respond to its draft work programme. We broadly support the three main headings identified, but would suggest the following specific additional actions and focuses:

Framework Review

- In addition to the ERG's valuable policy input on the package, in view of changes to the Recommendation, specific focus should be given on providing guidance as regards trunk leased lines, transit and mobile competitiveness, and the horizontal issues of handling margin squeeze and anti-competitive bundling under the Framework. These work items could be included within the headings of harmonisation and 'emerging challenges'.

Harmonisation

ECTA particularly appreciates the work that has been done by the ERG to provide templates for best practice regulation in circumstances where dominance persists, but makes the following additional suggestions:

- Delivery of harmonisation: It is incumbent on the ERG to demonstrate that it can not only identify best practice, but that its members will apply it. We suggest that the VoIP proposals provide a good opportunity for the ERG to prove how a common position can be translated to changes in national regimes within a given timeframe.
- Next generation access best practice: ECTA strongly advises that the ERG translates its guidance into a best practice template that can be applied in practice during the period whilst NGA developments are taking place. This would provide a good indication that the ERG can anticipate market needs rather than following them – often too late.
- Leased line best practice: Once finalised, ERG should ensure that members commit to addressing issues such as availability of wholesale Ethernet services – within a given timeframe. Further focus on trunk segments would also be helpful in view of the removal of this market from the relevant market recommendation.
- Termination best practice: ECTA recommends that examination is made not just of the costs of termination but of retail-issues that may arise where SMP-operators can distort competition through discrimination in setting termination rates (on-net off-net issues and the circumstances in which this presents a competitive problem

- Transit: Guidance would be helpful on the circumstances in which it may be necessary to apply regulation in this market, given that the majority of countries have found dominance in this area.
- Margin squeeze, anti-competitive bundling and non-price discrimination: Explicit and detailed horizontal best practice on handling these issues including mechanisms to guard against these practices (such as use of internal and external KPIs, replicability tests etc) would be helpful

Emerging challenges

Convergence between fixed and mobile services is a key issue for ECTA's members. It is particularly important to ensure that there is a fair and level playing field in the provision of such services that gives all operators (and not just integrated incumbents and large mobile players) an opportunity to innovate in this field. There are four explicit issues that should be examined:

- Provision of competitive transnational mobile services – both for voice and data. Might further entry and access to allow more choice and price competition in the provision of cross-border services, rather than retail regulation deliver a better result with less intrusion? Examine in the context of the review of the Roaming Regulation and possibly through a jointly conducted transnational market analysis as envisaged under the Framework
- How to ensure no restriction of innovation through competitive problems that may exist in some mobile markets at a national level. What is a real MVNO and in what circumstances are markets sufficiently dynamic to deliver fully competitive outcomes?
- Non-discriminatory spectrum allocation: how can the playing field amongst mobile operators be levelled through ensuring spectrum with equivalent quality and cost implications.
- Access to services via mobile network: how can consumers be assured the possibility to access competitive value added services such as directory enquiries – at a fair price.

The Association's further comments and explanations are set out below under headings which correspond to those in the ERG document.

General remarks

The document as a whole raises an important generic issue which has a significant bearing on the weight given to different work areas, and the focus of work under subsequent work programme headings. Section 1 of the background section contains seven references to “consumers” but none to “business users”. ECTA believes this is symptomatic of a widely-held mindset which is in urgent need of change. This is not to say that markets for consumers (and small business users) no longer require the attention of NRAs. However, markets for the provision of services to large business users should be given at least equal treatment. Such a rebalancing of priorities is necessary and desirable for three main reasons:

- There are significant differences between the structure of consumer and business markets – in particular for business markets demand may be more geographically dispersed and value tends to lie more on seamless high quality service provision than in differentiation through widespread infrastructure ownership.
- EU productivity, growth and employment can be significantly boosted by competitive supply of the high-grade, “seamless” telecoms connections that are needed to ensure effective interworking of IT applications in different geographic sites.
- Business markets offer wider scope for development of pan-European services than consumer markets, and therefore offer larger opportunities to realise the efficiency gains associated with international trade that form a central part of the rationale for all EU Single Market legislation.

Background: Section 1

We note particularly on paragraph 2 that it is not true to say that Europe is falling behind on telecoms investment (although it may be on ICT investment as a whole). In particular some countries in Europe have amongst the highest consistent levels of investment per capita in telecoms in the world according to recent figures from the OECD (Communications Outlook 2007). The issue of further raising investment in Europe is therefore not universal but rather should focus on sharing best practice to bring all countries up to the same high standard. In addition, it should be recognised that it is efficient investment rather than investment for its own sake that is the objective for regulators in the Framework. By this we assume that the objective is to encourage as much (but not more) infrastructure-based competition as is economically rational whilst ensuring that service competition is ensured even where there are economic limitations on duplicating infrastructure.

As regards convergence, we believe the issue is not necessarily to develop a new approach to regulation, but rather for the ERG and national regulators to prevent distortion of competition in the development of converged services through ensuring that there are no bottlenecks in any of the essential components that are needed to drive convergence.

ECTA agrees that there is a need to provide better and clearer guidance for consumers concerning quality of service in an environment where products are increasingly being differentiated by quality, and has provided comments to the ERG specifically in relation to VoIP on this subject.

Framework Review: Section 1.4

Response to the revision of soft law

ECTA welcomes the ERG's intention to produce guidance on the harmonised application of the three criteria test, and a common view on the planned new SMP Guidelines. However, since the draft Work Plan was formulated, the Commission's publication of its revised "Relevant Markets" Recommendation has raised a number of other important transition issues that the ERG needs to address.

A first group of issues relates to the removal of several wholesale markets from the old list (viz, markets 10, 14, and 15). ECTA's concerns regarding the deletion of these markets have already been set out in detail in our submissions to the European Commission and shared with the ERG. In summary, the Association believes that, in most cases, these markets remain characterised by competition problems that justify continued regular analysis by NRAs.

ECTA would also draw attention to Section 5 of the Explanatory Note which accompanies the new Commission Recommendation and which underlines that markets currently subject to regulation should not be deregulated before the NRA in question has completed a new analysis of the market.

Against this background, the Association believes that further work to ensure harmonised treatment of these markets would be more than justified. More specifically, the ERG should consider extending the list of Common Positions envisaged for delivery in Section 2.1 of the Work Programme to more fully cover treatment of trunk leased lines (currently under consultation) and transit – and that work should be explicitly envisaged under 'emerging' challenges to propose concrete solutions to the problems raised in mobile markets.

A second group of transition issues is raised by the removal of most retail markets from the old list. Formulation of general ERG guidance on mechanisms to address margin squeeze (already covered to some degree under specific 'best practice' guidance for broadband and leased lines) and anti-competitive bundling issues has been made more urgent by this move.

Universal Service Review

ECTA would like to continue to encourage the ERG to include the consideration of directory enquiry services (DQ) within its work on universal service.

It is the view of our members that competitive providers are capable of delivering on the goals of universal service regulation (high quality, universality and affordability) and, hence, that it should be removed from the scope of USO; provided appropriate wholesale intervention is in place to address wholesale bottlenecks. In this regard, current regulation already includes an obligation on telephony operators to supply subscriber data to competitive providers (art. 25.2, USD), although there is still work that needs to be done on ensuring comprehensive, cost-oriented and cross-border access.

In addition, there is an issue of increasing relevance which the Commission has now identified in the Explanatory Memorandum to the new Markets Recommendation: access to DQ services from mobile telephones (page 41). The goals of transparent and reasonable prices (affordability) are impeded in some cases by MNOs applying excessive origination prices and, furthermore, preventing DQ providers control over their retail prices.

Therefore, in considering the removal of DQ from the scope of universal service, in line with basic regulatory principles of proportionality, we encourage the ERG to address solving the problem of mobile origination.

Further harmonisation of the internal market

ECTA welcomes the ERG's commitment to defining best practice on leased line regulation. As mentioned above – particular guidance should be given on the circumstances in which remedies should be applied to trunk leased lines.

In view of the removal of market 10 from the list, best practice guidance could perhaps also be envisaged in relation to transit.

ERG's work on fixed and mobile termination rates is particularly critical. In addition to examining issues of what constitutes efficient cost for termination, we urge the ERG to examine the perhaps more competitively fundamental issue of discrimination in setting termination rates – which has an anti-competitive effect particularly when practiced by operators with a comparatively large customer base. This has been a problem in the mobile environment for some time, affecting the ability of smaller mobile operators to gain market share and for business service providers to compete effectively in offering telephony packages, but is now becoming increasingly critical with the move towards fixed mobile convergence for consumer as well as business services. It may also increasingly be an issue in the fixed environment following the relaxation of retail price controls for calls.

A further issue which we are surprised not to see included in this section is any follow-up on policy concerning next generation access, particularly in light of recent developments at a national level and the plans for the ERG to issue a Recommendation on this subject. As NGA developments are no longer an 'emerging' challenge, but a reality in many markets, ECTA believes it would be helpful to translate the broad ERG guidance into a 'best practice' template that can be monitored and can also be used to feed into Commission guidance on this subject.

Response to emerging challenges on the market

Cross-border mobile issues

In line with its generic comments on the importance of business users above and in view of the removal of the market for mobile access (market 15) from the relevant market recommendation, ECTA would highlight an additional emerging challenge which requires the ERG's attention.

In order to improve their productivity, European firms are increasingly seeking to facilitate the access of all employees to critical enterprise IT applications. Fixed pan-European platforms for this purpose can currently be constructed – albeit with some difficulty – using wholesale inputs from operators with a presence in the country concerned. However, since regulated wholesale mobile offers are available in only a few Member States and operators elsewhere are generally reluctant to cooperate, the construction of converged platforms which are able to accommodate the needs of a mobile workforce on an EU-wide basis is simply impossible. The consequent need for firms with a Europe-wide presence to deal with a patchwork of separate mobile networks imposes costs which are not faced by their competitors in the United States.

Similarly, there exist barriers to pan-European directory enquiry services impeding access by users who are travelling within the European Union to cross-border services and requiring them to access local services in the country they are visiting.

In addition, we note that the ERG has been tasked with monitoring roaming developments including the pricing of data roaming – which was not covered under the recently adopted Roaming Regulation. ECTA's view is that – rather than adopting intrusive retail price regulation, roaming for both calls and data could better be handled through allowing entry into the market for pan-European mobile service provision which would result in retail prices being set on a competitive basis.

Against this background, ECTA would propose that the ERG undertakes a joint analysis of the *transnational* market for wholesale mobile access. Such an analysis should assist in the elaboration of a Commission Decision on this matter as envisaged in Article 15(4) of the current Framework Directive, or if appropriate contribute to future amendments to the existing Roaming Regulation with the aim of achieving a more competitively driven outcome.

Mobile competitiveness and fixed mobile convergence

In addition to this pan-European aspect, ECTA has serious concerns that the competitive development of fixed mobile converged services could be undermined at a national level and any competitive problems from mobile transferred into the fixed environment unless attention is paid to certain issues in mobile markets which are preventing a level playing field amongst mobile operators and between fixed and mobile operators. These include the availability of frequencies which allow indoor coverage for smaller mobiles, discrimination in the rates set for mobile termination by large mobile operators (mentioned under 'harmonisation'), and the absence in many markets of real MVNO agreements that would allow competitive entry in fixed mobile service provision. In addition, the issue of competitive failure in access to value added (incl Directory services) has been raised in a number of countries and has been recognised in the Commission's explanatory memorandum to the Relevant Market Recommendation.

We encourage the ERG to set a deadline to publish guidelines which should include:

- a consistent definition of 'real' MVNO access and other forms of access to mobile networks with guidance to regulators on issues that should be considered and data that should be collected when reviewing mobile markets to assess their competitiveness
- recommendations concerning non-discriminatory provision of frequencies to intensify mobile competitiveness
- a proposed common approach to addressing high and discriminatory charges for access to value added services (in particular, directory enquiries) over mobile phones, as well as impediments to the setting of retail prices by service providers.

Finally we would like to flag concerns over the comment in this section that:

Based on the previous year's experiences, before the development of common positions in specific regulatory topics, the first step is to monitor the national market development in the early phase of innovation. After having studied the mainstreams of the future market trends, the ERG can start the work on the evaluation of the regulatory situation and makes recommendations as to how to

deal with new challenges. After the adoption of any common positions by the ERG, the group needs to regularly review and indicate some more topics to investigate in the future to achieve better harmonization.

If, even in the early phase of innovation, a dominant operator is leveraging a dominant position, including its control over bottleneck resources, its customer base, etc. then such behaviour should be immediately addressed. The key criterion for the ERG in its guidance on the ex ante application of the Framework must therefore be to anticipate problems and promote competition as opposed to allowing the reinforcement of a dominant position.