

ECTA RESPONSE TO ERG 2010 BIZ SERVICES CONSULTATION

1. ECTA welcomes the ERG consultation. It fully endorses the ERG's description of the issues that exist in the "high end" of the business market and the ERG's plans for future work. ECTA would nevertheless like to take this opportunity to underline the importance of the ERG's future task, clarify a number of points so that this task is underpinned by a clear conceptual framework, and request a more tangible agenda and a tangible set of deliverables. The first iterations of the EU Framework and the Relevant Markets Recommendation were formulated in a context where provision of circuit-switched voice communications was the telecoms industry's principal activity, and where companies requiring reliable data communications between different sites had to buy or lease lines to assemble their own private networks. Since then, however, the very rapid and widespread growth of broadband and in the business arena the development of Ethernet and the move towards virtual private networks (VPNs), has changed the requirements of both end users and their wholesale suppliers. Users are now more likely to demand advanced integrated services linking dispersed sites and combining secure communications with IT. This means that:
 - a. Business demand is typically not isolated to individual sites but may be multi-site, nationwide, or cross-border
 - b. To meet the needs of their customers, business suppliers have become more global, specialised and focused on the 'value added' element of business provision. Such providers, especially if they are serving multi-site clients are unlikely to have significant network scale in any region comparable to the scale that a mass market consumer provider might have.
 - c. Business supply no longer relies solely on wholesale leased lines, but on a combination of wholesale products including those supporting broadband and voice. The associated need for 'quality-assurance' by businesses therefore also applies across this wider product range.
2. If, as the ERG paper suggests and ECTA believes, there are valid concerns about the ability of business-focused operators to compete at the higher ends of the business market using the current mix of access products, then the position is likely to worsen in a next generation environment if the access products move closer to the individual customer location. Providing service to 100 customers on one cabinet in a residential area, and providing service to 100 sites for one customer across 100 different cabinets are completely different economic propositions. Those entrants whose customer base is geographically dispersed will clearly not be able to afford the investment per customer that the use of duct or sub loop unbundling would entail even if a consumer-focused

operator would find these passive products economical and practical (which, based on experience to date, is doubtful¹).

3. It is therefore becoming increasingly important that the ERG sets a framework that recognises the differences in demand and supply for business and residential products and that requires NRAs to take specific account of these factors in their assessment of markets, in deciding whether or not an operator has SMP, and in the setting of and enforcement of remedies. Moreover, these factors must be considered at the market assessment stage, not just at the remedy stage, because if there is no finding of SMP there is no requirement for remedies.
4. Successful completion of work in this area is critical to fulfilment of the NRAs' new duty to promote "efficient investment and innovation in new and enhanced infrastructures" (Article 8(5)d of the revised Framework Directive). The current lack of regulatory certainty regarding availability of business-grade access inputs is impeding investment in the virtual infrastructure layer: ie, in the platforms which operate "above" the basic connectivity layer, and which provide reliable and secure end-to-end data transmission between specific network termination points. NRAs need to ensure that they do not overlook these key investments and focus only on investment in physical assets such as duct and fibre. Virtual Private Networks are increasingly required by high-end users as platforms for provision of B2B knowledge-based services, and the type of business process innovation which promises to boost productivity and growth across the EU economy. Continuing failure to enforce obligations for non-discriminatory access or relaxation of these obligations with a view to promoting fibre investment will therefore reduce investment in higher-level platforms to the detriment of competition in provision of services to high end users. In other words, over-emphasis on one aspect of the ecosystem will upset its overall balance, and the potential benefits of interconnected IP networks for the broader European economy will not be realised
5. Successful completion of work on this issue is also a critical test of the ERG/BEREC's raison d'être. In its 2006 paper on "Effective Harmonisation" the ERG tried to identify pan-EU services as candidates for priority treatment, and concluded that mass-market VOIP services are the only relevant example. The business-grade data transmission services facilitated by virtual infrastructure were ignored, despite their critical role in supporting the Single Market in other industry sectors. Without fully non-discriminatory supply of wholesale access in one Member State, competitive provision of services in all other Member States can be blocked². Delivery of harmonised outcomes in this area must therefore be one of ERG/BEREC's most urgent priorities, and requires a commitment of co-operation between NRAs, not just a statement (page 16) that "it is for each NRA to consider if such problems exist within its jurisdiction and how to deal with them, in accordance with its national circumstances and the Framework". As a first test of BEREC's competence in addressing issues with cross-border implications, it is important to set a clear agenda or work plan, and the definition of clear deliverables within a predefined timeframe.

¹ Duct sharing has been mandated in several Member States for a number of years and has had little or no take-up. Sub-loop unbundling has been mandated in many Member States but has remained unused.

² This will be the outcome in a scenario where an invitation to tender requires connection of sites in all EU countries, but there is a concentration of sites in one Member State. If fit-for-purpose access inputs are not available in this Member State it may not be feasible to bid for the contract against the country's incumbent operator.

6. Turning to the preliminary conclusions from the questionnaire, ECTA notes that while responses to the first question (is there a non-discrimination obligation in place?) look encouraging, the answers to the subsequent question reveal how flawed this position is in reality. Even if almost all countries have required non-discrimination, few of them have a service level agreement to set out how that should work for something as simple as repair times, and almost none have an obligation to offer the kind of “premium” repair times business customers require. The extent to which that non-discrimination requirement is backed up by published KPIs is very limited - only 9 of the NRAs require this for WLR, and only 8 for wholesale leased lines.
7. The answers to questions 15, 18 and 19 tell a very worrying story for the competitive provision of services to businesses across Europe. Less than half the countries who responded have any obligation to provide wholesale Ethernet services, despite the requirements of the regime for technological neutrality, and despite the fact that this is the growth area for businesses, especially high end business users. If an entrant does acquire a customer using leased lines for some of its connectivity requirements, those retail lines cannot be translated to wholesale services on a speedy or cost effective basis in most countries. The ERG/BEREC should lead in defining best-practices for migration from retail leased lines to all relevant wholesale inputs, i.e. go beyond ‘contract novation’ and enable effective migration to wholesale terminating segments (of the same or other technology), bitstream and unbundling. Also, at page 12, 15 and 16, the ERG indicates, when referring to requests for ‘new’ wholesale inputs, that there is “fairly fundamental question which deserves further discussion”, but no tangible proposal/agenda/timeframe is made to actually engage that discussion. ECTA requests that this be taken as a tangible action point for 2010.
8. ERG suggests that there have been few formal complaints to NRAs about business services. This could be due in part to the cross-border and dispersed nature of business services which mean that regulatory resources are not necessarily extensive in any particular country but are focussed at the pan-European level. ECTA – and business users - have been making representations about business services for many years. NRAs also need to be aware that operators will be concerned that a complaint or appeal regarding the behaviour of a monopoly supplier could have counterproductive effects for the complainant (whether ultimately successful or not). If the ERG’s assessment of concern levels included general representations to NRAs and other relevant bodies regarding the environment for business services, the figures would surely be much higher.
9. In conclusion, ECTA welcomes this consultation and the further work planned; it can only stress the importance of this work, and of ensuring that NRAs understand why the current regulatory position in many countries fails to provide an environment that supports competition in the provision of electronic communication services to businesses, especially high end business users. We would particularly encourage ERG – and now BEREC – to set clear guidelines and measurable targets by which its regulator members should be expected to assess how they have taken account of the guidance given.