

27th February 2007

Viviane Reding
Member of the European Commission
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Belgium

Subject: European Regulators Group advice in the context of the Review of the Regulatory Framework for Electronic Communications Networks and Services (pursuant to Articles 3 and 7 of Commission Decision 2002/627/EC, as amended by Commission Decision 2004/641/EC), in response to the letter by Commissioner Viviane Reding of 30 November 2006.

Dear Commissioner Reding,

The ERG¹ has received your letter of 30 November 2006 and welcomes your initiative to consider the operation of the current institutional framework for the regulation of European electronic communications markets, in the context of the ongoing review of the Regulatory Framework. The ERG also welcomes the opportunity to engage in this discussion with the Commission, in fulfilment of its aims to contribute to the development of the internal market and the consistent application of the regulatory framework across Europe.

This response begins with a summary of our understanding of the Commission's initiative, as described in the Commission's letters to the ERG dated 30 November 2006 and 30 January 2007, as well as in discussions with your Staff and the Commission Services over the last two months (Part I). A summary of the ERG's position follows in Part II. In Part III we analyse the problems of regulatory consistency identified by the Commission, considering consistency in remedies and regulatory coordination separately, and set out the ERG's views on the appropriate response to each of those challenges. Part IV contains the ERG's conclusions. Annex I contains a detailed

¹ For the sake of simplicity, we will use the term "ERG" in this response. However, there will be issues that will need to be resolved in relation to those members of the wider Independent Regulators' Group (IRG) who are observers (rather than members) of the ERG (i.e. the four EFTA states and the EU accession/candidate states). Should these discussions develop in a positive direction, then we will need to consider carefully how to accommodate the consequences of the discussions for this larger group in an acceptable way.

description of the steps taken by the ERG since 2006 to promote regulatory consistency, and Annex 2 contains the ERG's initial thoughts on various scenarios of ERG enhancement (in relation to each of the Commission's concerns).

I. Summary of Commission initiative

The Commission has identified as the most important issue of the review of the regulatory framework the need to "ensure consistency of regulation on electronic communications in Europe's internal market." In particular, you have pointed to:

- a perceived lack of consistency in the application of the regulatory framework, and in particular the fact that similar remedies are not always applied in similar circumstances across Member States.
- the difficulties of achieving a common approach to regulating cross-border services².

Your letter, as well as our subsequent correspondence with DG INFSO Director General, Mr. Fabio Colasanti, raise fundamental questions about the nature and respective roles of the institutions currently involved in the regulation of the sector, highlighting the challenges of delivering the appropriate level of regulatory harmonisation, while at the same time respecting the principle of subsidiarity and ensuring appropriate levels of institutional accountability and transparency.

It has been made clear to us that you currently intend to propose to give the Commission the power to require NRAs to withdraw remedies notifications, and the power to require NRAs to carry out market reviews and/or impose remedies, under the Article 7 procedure. We understand that you are open to considering some alternative approaches, including simplifying the current Article 7 procedure and possibly involving the ERG in that procedure, and we welcome your willingness to consider seriously the value that ERG can add to achieving effective and consistent (where warranted) regulatory remedies. You have described two possible scenarios of ERG "enhancement" (both involving some degree of power being ceded to the ERG from the Commission and possibly from member NRAs themselves, to different degrees and perhaps at different speeds):

- **Scenario 1** – strengthening the ERG's existing advisory powers in specific areas, and ensuring that the Commission acts (to a lesser or greater extent) on the basis of the ERG's advice. When applied to the choice of remedies under Article 7, we understand that in essence this scenario would involve giving the Commission the power to require NRAs to withdraw remedies, and the power to impose remedies, but subjecting the exercise of this power (and the Commission's existing power in relation to market definition and SMP assessment notifications) to some form of prior consultation with the ERG.
- **Scenario 2** – giving the ERG the power to take decisions itself which are binding on NRAs (and/or market players). When applied to the choice of remedies under Article 7, the ERG would be responsible for the activities that currently fall within the Commission's remit

² A cross-border service is one where the service's characteristics mean that it is obviously sensible (commercially or for other reasons) to offer it uniformly across borders or where (in the case of Pan-European services) the service has naturally international characteristics and in respect of which centralised decision-making could be warranted. These include VoIP and mobile satellite services (MSS).

under the Article 7 procedure. We understand that under this scenario, the ERG would also have the power to require NRAs to withdraw remedies, and the power to impose remedies, and that the ERG's decisions would be challengeable in European courts.

The Commission has expressly asked us to consider these proposals in relation to the period beyond 2010, by when you currently anticipate the revised directives to come into force. While we note that this legislative time-frame is not fixed, and may well be (further) delayed, we have nonetheless adopted it for ease of reference for the purposes of this response.

II. Summary of ERG position

The two issues identified by the Commission (consistency in remedies, and regulatory coordination) can and should be looked at separately as they raise different challenges for NRAs and for the ERG (and stakeholders), over different time-frames.

- **Over the next three to four years (before the anticipated implementation of the revised Directives)**, there will continue to be the need for concerted action to address any remaining unjustified inconsistency in SMP remedies. The ERG recognised this one year ago, and has put in place a series of mechanisms intended to achieve this, as detailed in Annex 1. In addition, we believe that there is certainly scope for the ERG immediately to begin to play a larger role than it currently does in the current Article 7 process, and we urge the Commission to use us to the full potential of the role and powers already attributed to us pursuant to the Decision establishing the Group. The ERG welcomes the Commission's early engagement in the scoping and formulation of the present proposals, which began with the Commissioner's letter of 30 November 2006, as it represents a significant development in the cooperative and collaborative relationship of the two institutions in this direction.
- **By 2010**, we believe that a commitment by the Commission immediately to involve us in getting the most out of the current Article 7 process, together with the mechanisms we have already put in place, will mean that everything that can be done to improve consistency in SMP remedies should have been done, and that on this basis, consistency in SMP remedies and the Article 7 process should not be the central focus of our collective consideration of the period from 2010 onwards. In any event, the ERG maintains its opposition to the Commission's original proposal of a "veto on remedies" (and the option that the Commission is currently proposing to pursue (the "veto on remedies" plus the power to impose remedies on NRAs) on the grounds of subsidiarity.

However, over the next five to ten years the ERG does see an increase in services with a pan-European potential and with a significant cross-border dimension, both of whose full potential cannot be realised without a common regulatory approach across Europe. Indeed, if Europe is to play a leading role in the global economy, its 27 NRAs will need to work closely together to ensure that European businesses can take full advantage of the scale of the European market. The ERG believes that this is where there is merit in considering the enhancement of the role and duties of the Group for the medium-to-long term.

At this early stage, and respecting our institutional role, the ERG can only comment at a relatively high level on the Commission's proposals, as any serious consideration of the practicality of these proposals will depend on their details, which are expected to be the subject of discussions between the Commission, the Parliament, national governments and the ERG over the coming

year. However, while we note your descriptions of Scenarios 1 and 2 relate primarily to the Article 7 process and your concern with inconsistent remedies, scenarios of ERG enhancement could be developed which would equally and fruitfully address your concern about the need for regulatory coordination in relation to cross-border/pan-European services in the medium-to-long term. In this respect, and only to the extent that it is feasible, legally and practically, to transfer powers to the ERG, this is something the ERG would welcome in principle. Specifically, while the Commission has indicated that the ERG should not be concerned with the legal aspects of the Commission's proposals (which it believes are not an impediment to those proposals), we would invite the Commission to begin to investigate the legal implications of its proposals in greater depth at the earliest opportunity (in particular their conformity with the Treaty), in order to ensure that the discussions which have been initiated by this exchange of letters are as focussed and productive as possible.

Finally, we recognise that any ceding of Commission functions/powers to an entity such as an enhanced ERG will inevitably raise concerns for the European Parliament, which has already expressed resistance to Commission devolution of powers to other centralised bodies in other contexts. Furthermore any proposal for NRAs to pool sovereignty in an enhanced ERG would require the agreement and backing of Member State governments.

III. Regulatory consistency as the “most important issue” of the Framework Review

1. A perceived lack of consistency in remedies (Article 7)

A concern with the perceived lack of consistency in remedies has been highlighted over the last year, as the Framework Review has subjected the experience of the last three years to very intense scrutiny. While we recognise these concerns raised by some commentators, the work conducted by the ERG (including through extensive consultation with stakeholders) highlights that some variation in regulatory remedies is in fact desirable, given the very different national market circumstances that exist throughout the EU today. A balance must be struck between the promotion of national efficiency (which may require specific remedies to be imposed) and trade reciprocity (which may demand that these specific remedies be consistent with a level playing field between countries), as both are needed to ensure efficient competition on a European scale. Complete homogenisation of remedies is economically undesirable, and this will remain the case for the foreseeable future – i.e. beyond 2010.

At the same time, it is worth remembering the achievements of the last three years, particularly given the significant differences in institutional and market conditions that existed at a national level when the current Framework came into force. Despite the magnitude of the task, the evidence suggests that significant progress has been made over the last three years – the 11th Implementation Report, the Commission consultation documents and the recent Eurobarometer e-communications household survey all point towards positive trends in competition and investment in EU communications markets. There is both (a) a narrowing of the differences between Member States on a number of wholesale indicators regulated by ERG members, including prices for key access products, and (b) a general decrease in prices.

For this reason, and as noted in our response to the Communication on the Review of the Regulatory Framework, the ERG believes that the current Framework is fundamentally sound. Indeed, most respondents to the Commission's exercise feel the same way, despite any concerns some may still have over consistency in remedies. Indeed, as competitive conditions continue to improve nationally and on a European basis, a degree of deregulation should follow. Nonetheless,

the ERG believes it is necessary to continue to encourage actively the positive trends of the last three years, and to continue to develop our role under the Framework. For this reason, the promotion of targeted regulatory consistency has been one of the ERG's key priorities during 2006, in recognition of the fact that not all regulatory variation is detrimental. Conscious that it had not necessarily been fulfilling its potential as a mechanism for regulatory approximation and the promotion of the internal market, the ERG has invested a considerable amount of its resources during the past year to improve its own effectiveness as an organisation, and will continue these efforts during 2007 (including through the establishment of a permanent secretariat). Details of the mechanisms which the ERG has put in place in 2006 are provided in Annex 1.

We note the Commission's concern that despite the ERG's best intentions, the initiatives outlined in Annex 1 will by themselves be unable to *guarantee* the consistent application of remedies. In addition, the Commission has on other occasions (notably in its Implementation Reports), expressed specific concerns with the operation of the current regulatory environment in some Member States which may well account for a considerable portion of the perceived lack of consistency:

- the de facto lack of political independence of some NRAs
- the lack of resources of some NRAs (undoubtedly, this has been a problem in the initial years of the Framework but may be less of an issue in future. To the extent that individual NRAs remain severely resource-constrained, the ERG's Madeira commitments will help to alleviate the problem, in particular the provision of case studies of regulatory best practice and the identification and availability of NRAs with relevant experience and knowledge of key regulatory issues)
- the role of national courts in the implementation of the regulatory framework (in those Member States where appeal of NRA decisions "on the merits" is interpreted as allowing the court to substitute NRA decisions with its own, this will admittedly risk slowing down the harmonisation efforts of those NRAs)³

While it is true to say that the ongoing review of the Framework provides a unique window of opportunity to re-examine whether the current institutional blueprint is operating effectively (and indeed whether it is capable of delivering the desired regulatory consistency), it should be noted that, however well institutional structures may be designed, adoption of best regulatory practice will be influenced by political views. Furthermore, the fact that the Commission's views may be at odds with those of national courts (as could the ERG's views be, under the Commission's Scenario 2) creates additional challenges. Any assessment of current institutional arrangements, and any attempt to address the problems through institutional change, should take these issues into account. A thorough cost-benefit analysis should also be carried out to ensure the consistency of any proposals with the general deregulatory approach of the Framework, in order to ensure that any change does not result in an unjustified increase in bureaucracy.

2. An effective and timely response

In considering whether institutional changes could accelerate the trend towards greater consistency, we note that the Commission has expressly asked us to consider the possible

³ For instance, recently courts in the UK, Ireland and the Netherlands have questioned NRAs' SMP findings in the wholesale market for mobile call termination, where the Commission has argued (in comment letters) that SMP should be assumed in this market (100% market share) and that countervailing buyer power (CBP) should not undermine SMP. The courts have disagreed, leaving NRAs with the prospect of a Commission veto if they do not find SMP (as a result of taking account of CBP), and an appeal to the national courts if they assume SMP regardless of CBP.

structure of the ERG in the period beyond 2010, by when the Commission anticipates the new directives (including the implementation of any enhancement of the ERG) will come into force.

With this in mind, while the issue of any remaining (unwarranted) inconsistencies in remedies is of concern to the Commission and some stakeholders today, the ERG anticipates that the ERG's Madeira mechanisms, while perhaps not a "guarantee", are nonetheless expected to make a material impact over the coming years and to continue to make an impact for as long as they are in place. Indeed, it is preferable to step up current efforts to promote consistent regulation, rather than just wait for the implementation of an institutional solution in 2010. For this reason, whatever the outcome of the Framework Review and the political discussions over the next year on the future role of the ERG, the ERG urges the Commission to begin to use the Group to its full potential as its advisory body under the existing Article 7 procedure. The ERG has recently agreed to the automatic establishment of Article 7 expert groups to advise affected NRAs in relation to Phase II cases, and notes that the Commission has never sought the Group's input in relation to a Phase II/serious doubts letter (and indeed has expressly declined to discuss open cases with the ERG). We would urge the Commission to call upon our expertise, committing to seek our advice in relation to Phase II cases, or where the Commission contemplates issuing a serious doubts letter, as well as in the development of revisions to the Recommendation on Relevant Markets and the SMP Guidelines. This would give full effect to Article 7(2) of the Framework Directive whereby NRAs should "contribute to the development of the internal market by cooperating with each other and with the Commission in a transparent manner to ensure the consistent application, in all Member States, of the provisions of this Directive and the Specific Directives. To this end, they shall, in particular, seek to agree on the types of instruments and remedies best suited to address particular types of situations in the market place."

This can begin without the need for any legislative proposals, under the terms of the existing Decision establishing the ERG. If the Decision needs to be improved to formalise ERG involvement further, this can be done relatively easily. Alternatively, if the Commission issues a regulation on the Article 7 procedures, as it indicated was its intention in the Communication on the Framework Review, then any formalisation of the ERG's involvement in this way could be set out in such regulation. Together with the mechanisms the ERG itself has already put in place in Madeira, we anticipate that the issue of consistency in remedies will have moved on significantly by the time the revised directives are transposed and that this should not, therefore, be the primary focus of the present discussions over the longer-term enhancement of the ERG.

Indeed, in the medium-to-long term, the ERG anticipates that the Article 7 process itself can be replaced by a more streamlined and targeted procedure subjecting notifications to formal scrutiny on a "by exception basis" only, rather than extending existing veto powers to cover remedies. A central role for the ERG in such a procedure would be a natural evolution of its current role and the mechanisms it has put in place since Madeira. Of course, any proposals for the replacement of Article 7 would have to come from the Commission and be agreed to by the European Parliament and the Council.

In any event, in its response to the Framework Review consultation, the ERG has already clearly argued against the Commission's original proposal of a "veto on remedies" on the grounds of subsidiarity, and, in particular, in recognition of the fact that NRAs (and not the Commission) tend to have the relevant knowledge and understanding of their respective markets necessary for the design of appropriate regulatory remedies. The ERG continues to believe that this is the case, and considers that the option that the Commission is currently proposing to pursue (the "veto on remedies" plus the power to impose remedies on NRAs) is inappropriate for the same reasons.

3. The case for a common regulatory approach to cross-border services

Many of the traditional “single market” arguments for harmonisation have not traditionally applied to electronic communications, as (with some important exceptions), electronic communications services tend to be location-specific, unable to be traded across borders. It has not generally been possible, for instance, for services to be provided from a single Member State throughout the EU.

However, whereas the ERG expects the problem of consistency in remedies to decrease in the coming years, we anticipate an increase in services with a pan-European potential (which can in principle be provided remotely to the customer from any physical location, such as VoIP), whose full potential cannot be realised without a common regulatory approach across Europe. We also anticipate an increase in services with a significant cross-border dimension (such as international roaming), where a coordinated European approach is required to overcome differentiated incentives across Member States resulting from regulatory differences. Indeed, regulatory coordination will be critical to ensuring that the scale of the European market can be fully exploited by European businesses, enabling Europe to compete effectively in the global economy.

The ERG has already identified services with pan-European potential as an area requiring its specific attention, beginning with the work programme of the VoIP Project Team scheduled for 2007. We will continue to prioritise these areas going forward and we welcome the opportunity to discuss with the Commission how we might be able to improve our effectiveness in achieving coordinated regulatory approaches. We therefore believe that it is appropriate to begin considering today what new institutional powers/structures, if any, might be needed in the period beyond 2010 to enable effective regulatory coordination. In the meantime, we would urge the Commission to make full use of the valuable concentration of regulatory expertise and experience already at its disposal, and give the ERG a privileged status in the preparation of recommendations and legislative instruments across the electronic communications field, within the terms of the existing Decision establishing the ERG.

4. Coordination, institutional remits and the subsidiarity principle

There is a strong argument to be made that the ERG would be the natural forum for regulatory coordination in relation to those services and markets (e.g. cross-border and pan-European services and markets) which warrant a common European regulatory approach. Where coordination also requires some degree of centralisation of regulatory power and/or implementation, the ERG could also be an appropriate candidate. For instance, the notion of a pan-European authorisation (e.g. for mobile satellite services) is already being considered in the context of the Framework Review, and if it gains currency and a single European licensing entity is called for, then this could theoretically be a role for the ERG. However, it would have to be carefully considered whether and how an enhanced ERG could add value to the present system and any such increased role for the ERG would have to be agreed to by the European Parliament and the Council, on the basis of a Commission proposal.

The question of whether there is any scope for centralised decision-making also has to be carefully considered for each potential candidate for regulatory coordination, respecting the principle of subsidiarity (i.e. excluding those issues which will continue to be most appropriately dealt with on a national level). Indeed, whatever the ultimate political decision on the future enhancement of the ERG, the ERG intends to continue the work that it began in 2006 with its paper on the Theory of Harmonisation, to help identify those areas which warrant coordination at a European level.

Furthermore, it has to be recognised that currently the NRAs within the ERG have different regulatory remits. While the remit of many NRAs already includes spectrum management (and some NRAs sit as the Member State representatives in the RSC), in many Member States the government retains oversight in relation to many aspects of spectrum management. Therefore, political agreement to the inclusion of spectrum in the remit of an enhanced ERG, in recognition of the intrinsically cross-border and pan-European nature of radio spectrum, is difficult to be forthcoming at the outset (though it could become feasible in due course). Currently only a few of the 27 NRAs in the ERG have responsibility for content regulation, and in some member states this is a decentralised function (e.g. in Germany, with content regulation at Lander level). It is true that transmission of and access to content are intrinsically linked to the electronic communications framework, and the argument could be made that expanding ERG competence in this direction could, in the interests of consumers and industry, provide NRAs with sharper tools to address many of the regulatory issues related to convergence. However, any moves in this direction could require a considerable amount of institutional reconfiguration at the national level in the majority of Member States, and generate substantial debate at both national and European levels.

IV. Conclusion

We urge the Commission to make full use of the valuable concentration of regulatory expertise and experience already at its disposal, and give the ERG a privileged status in the preparation of recommendations and regulatory decisions, and proposals for other legislative instruments, across the electronic communications field. Again, we believe that this can largely be achieved with minimal delay within the terms of the existing Decision establishing the ERG. This, together with the ERG's own recent initiatives, should address any remaining concerns with inconsistent SMP remedies over the next three to four years.

In relation to the period beyond 2010, however, the ERG believes that the anticipated evolution of markets and technologies (including the consolidation of European industry and an increase in pan-European services), requires an effective mutual coordination system, and to this end we welcome the Commission's initiative to consider an institutional framework which has at its core a strengthened and independent network of national regulators and which provides an effective and non-bureaucratic coordination mechanism.

We would presume that any increase in the ERG's role and/or powers would imply its independence from other Community institutions, an increase in its transparency and accountability (including, as appropriate, to the European Parliament), as well as adjustments to its governance structure (both decision-making procedures and the constitution of decision-making bodies) and an increase in resources (both human and financial). However, any specific mechanisms that would need to be put in place could be carefully looked at once the Commission begins to elaborate its proposals further.

In addition, we strongly believe that the collaborative/collegiate approach of the ERG to date has been an important, if not the key, basis for NRA support for the ERG. The legitimacy of the ERG in the eyes of its members, and the effectiveness of the mechanisms it has put in place, derive from the fact that the NRAs are at the root of the ERG as an institution, both in practice (e.g. through the constitution of the Article 7 expert groups) and in principle (based on the NRAs' privileged position of knowledge and understanding with respect to their national markets). Care is needed to ensure that whatever changes are made do not undermine this foundation, and the progress which has already been achieved.



While ultimately the decision on the future role of the ERG will be one for the European Parliament and the Council, the ERG looks forward to continuing to participate in this process, and to contribute to the discussions with the legislating parties in its capacity as expert advisor to the Commission.

Sincerely yours,

Roberto Viola
ERG Chairman