

ANNEX 2 – ERG ENHANCEMENT SCENARIOS

This Annex contains a discussion of various scenarios of ERG “enhancement”, both in relation to the Article 7 process (Part A), and in relation to regulatory coordination for cross-border/pan-European issues (Part B). As already indicated in the cover letter, the ERG is only able to comment at a high level on the Commission’s initiative, bearing in mind its institutional role as the Commission’s expert advisor and noting the constitutional role of the European Parliament and the Council in the assessment and approval of the Commission’s eventual legislative proposals.

The degree to which the ERG’s powers are eventually enhanced, if at all, will in part determine the legal instruments necessary to give effect to the agreed changes. The implications of this legal process on the Commission’s timescale will in turn need to be carefully considered. For the purposes of this response, the ERG does not consider in any detail the legal implications or prerequisites of possible approaches to ERG “enhancement”. Indeed, noting the Commission’s assurances that there are no legal impediments to its proposals, it urges the Commission to carry out a thorough analysis of the legal implications of its initiative as a basis for productive and focussed discussions going forward.

Finally, it should also be emphasised that the efficient and effective operation of the ERG depends on its constituent NRAs, and continued accountability to the NRAs themselves will remain key to ensuring that we do not undermine how well we work collectively now.

PART A – THE ARTICLE 7 PROCESS

The ERG agrees that a greater role for the Group in the Article 7 process is desirable and would be beneficial. The ERG’s recent experience with the Article 7 Expert Group, described in Annex 1, demonstrates the value of the ERG’s input into this process. We have argued in the cover letter for a continuing evolution of the ERG’s current involvement in the process, including an increased reliance by the Commission on the ERG’s input under the terms of the existing Decision. This approach should therefore be pursued regardless of what might be decided at the political level for the period beyond 2010, and we expect it to have a significant impact before then.

The Commission has expressly asked the ERG to consider proposals for the period beyond 2010. It has described two possible scenarios (as an alternative to the Commission having the veto “plus”), both of which involve a “veto” on remedies (whether in the hands of the Commission or the ERG). While we briefly consider these Commission proposals below, the ERG does not support the need for the veto as a formal oversight mechanism. Instead the ERG prefers to consider a third option, an evolution of the current situation, which does not presume a veto on remedies, which we will call Scenario 3.

All scenarios described below contemplate the continued existence and operation of the Madeira commitments.

1. Scenario 1

This Scenario proposed by the Commission contemplates that the Commission would have the power to require an NRA to withdraw a remedy (plus the power to impose remedies, as per the Commission letter). The existing Article 7 process would continue to exist, with notifications being made to the Commission. However, if the Commission were to propose to issue a serious doubts letter/if a case were to enter Phase II, this would automatically trigger the establishment of an ERG expert group to consider the NRA’s

notification. The expert group would provide the basis for an ERG recommendation to the Commission in relation to that notification (agreed to by the ERG Plenary). The Commission would be obliged to take utmost account of the ERG's recommendation in deciding whether or not to use its veto. In this way, the ERG would constitute a comitology committee, and operate much as CoCom currently does in relation to the Commission's existing veto powers under Article 7. An ERG committee would operate transparently, as its recommendation would be based on a report by an ERG expert group substantiating its recommendation to the Plenary.

The subjection of the Commission's exercise of such a veto power to an ERG (non-binding) recommendation would not address the ERG's continued concern that the Commission is ultimately not best placed to take decisions on the design of regulatory remedies for individual national markets. Furthermore, the ERG does not believe that by 2010 the formal oversight mechanism of the veto will be warranted. By 2010 NRAs will be completing their third round of market reviews (resulting both in greater regulatory experience/expertise and, in the spirit of the regulatory Framework, progressive deregulation). Such a power would therefore constitute an unjustifiably heavy-handed regulatory response to what is expected to be, by then, at most a residual problem.

2. Scenario 2

Under this Scenario proposed by the Commission, an NRA would submit its notification (of market definition, SMP assessment *and* proposed remedies) to the ERG. The ERG would have the same powers currently enjoyed by the Commission (namely to require the withdrawal of notifications on market definition and SMP assessment). The ERG would also have the power to require an NRA to withdraw or impose a regulatory remedy. Notably, were the ERG come to have primary responsibility for the Article 7 process, it would be reasonable for it also to play a central role in (if not have primary responsibility for) the revision of the Recommendation on Relevant Markets and the SMP Guidelines.

Assuming this Scenario were legally and practically feasible (a Commission claim which the ERG expects to be investigated in due course), the ERG's concerns in relation to the principle of subsidiarity would remain. On the one hand, the implications of such centralisation of power could be somewhat mitigated to the extent that ERG decisions were to continue to be rooted in its constituent NRAs and to draw from the collective knowledge and understanding of local conditions. However, as noted in relation to Scenario 1, the ERG does not believe that by 2010 the formal oversight mechanism of the veto will be warranted.

3. Scenario 3

As described in the cover letter, the ERG firmly believes that "consistency" will become less and less of an issue, with its Madeira commitments (together with its full use by the Commission) expected to make a significant impact on any remaining consistency problems through the next rounds of market analysis. As regulators become more experienced, it could therefore be argued that the need for a formal quality control/supervision mechanism will fall away.

Given this, the alternatives for the period beyond 2010 need not be seen as limited to those of the Commission. Instead, the present formal scrutiny process of Article 7 could be replaced by a more streamlined and targeted approach, rather than being extended to include formal scrutiny of remedies.

Under this scenario, in the period beyond 2010 NRAs would continue to submit their market reviews, but would do so to the ERG and only for the maintenance (by the ERG) of a full data base. The ERG would take on a scrutiny role over NRA market reviews, but this would be triggered by an NRA or the Commission asking the ERG to examine particular markets or market reviews (or the ERG taking the initiative itself). Notifications would thus be assessed by the ERG “by exception”, based on whether they raise a material single market concern. It would therefore continue to be possible to challenge (e.g.) defective reasoning on analysis of the relevant market, but there would no longer be any automatic examination of such matters as in Article 7 today. The deployment of expert resources would be targeted at those cases which warranted intervention (rather than be dispersed across a range of notifications with varying levels of impact on the single market).

This process could be seen as the natural evolution of the ERG Article 7 expert group mechanism which currently exists, and as such would not involve any institutional transfer of powers.

PART B – COORDINATION OF REGULATORY APPROACHES TO PAN-EUROPEAN/CROSS-BORDER ISSUES

Given the nature of the challenges anticipated in the period beyond 2010, it would make sense for the logic of any enhancement to the ERG to be based on a regulatory “coordination” function, rather than on Article 7. However, as already noted above, the ERG would urge the Commission to carry out full feasibility studies (including studies on conformity with the Treaty) on any proposal which involves a potential change in the institutional balance of powers between the various entities involved in the regulation of the electronic communications sector in Europe. Furthermore, the ERG notes that any proposed devolution of Commission functions/powers to the ERG can be expected to raise concerns for both the European Parliament and the Council.

The scenarios described below would enable a greater (or central) role for the ERG in achieving regulatory coordination in relation to pan-European/cross-border issues. This could be in relation to either (1) decisions requiring coordination, but which are taken nationally (e.g. common approach to numbering resources, or common authorisation requirements), or (2) decisions taken centrally (e.g. a single spectrum award process for services such as MSS).

In relation to the decisions described under (1) above, if coordinated regulatory action in relation to cross-border/ pan-European services is to be effective, then these decisions will have to be binding on NRAs. At the moment the ERG is not involved in the existing legislative processes for the production of Commission Decisions (which must be complied with by Member States) ,as these are currently generated using the committee procedures, with specific mandates issued to appropriate technical bodies. In relation to the generation of Regulations, the ERG is able to participate in the consultation alongside all stakeholders, but does not enjoy a privileged position at the policy/proposal development stage.

Furthermore, the ERG is unable to issue decisions which are binding on its members. However, in many (perhaps most) cases, the ERG would not be capable of achieving coordinated regulation *on its own* even if its decisions were binding on NRAs, as national divergences in regulatory approaches are often rooted in differences in national law, or in national policy (the preserve of Member State governments, not NRAs), particularly in relation to the use and allocation of scarce resources like numbering and spectrum.

Thus, in order to play a greater role in regulatory coordination, either the ERG could increase its involvement in existing legislative processes (formalising its advisory role to the Commission in the production of legislative proposals, whether of direct or indirect effect), or (at the other extreme) some of the Commission's powers of initiative could be transferred to the ERG, and the ERG could be empowered to define and implement (through the generation of binding legal instruments) a European policy on those pan-European issues requiring coordination (which could include the allocation or use of numbering or spectrum resources).

In relation to the decisions described under (2) above, the ERG could serve as a central implementing agency for regulatory decisions taken in other fora. For instance, the Commission has already begun to consult, in the context of the Framework Review, on the desirability of pan-European authorisations (e.g. in the context of MSS). If a case is made, following the Framework Review, for pan-European authorisations, then an enhanced ERG could represent an appropriate licensor. Alternatively, an enhanced ERG could be empowered to both initiate and implement policy initiatives. That said, it should be noted that to date the only potential candidate for centralised decision-making in this way is the authorisation of MSS services. By their nature, electronic communications markets are national (though with occasional transnational aspects, such as in international roaming) and the need for coordination, rather than centralisation, is likely to be the key driver for years to come.

The scenarios described below contemplate various degrees of involvement of the ERG in the generation and implementation of coordinated regulation, beginning with a marginal increase in ERG involvement (possibly achievable immediately with little or no new legal instruments), and extending as far as the creation of a new legal entity with devolved powers. The ERG has not carried out any formal legal assessment of these scenarios, and as noted above the Group invites the Commission to undertake an in-depth analysis of the legal implications of devolving powers to a new legal entity, as contemplated in the letters from the Commission.

1. Scenario 1

Under Scenario 1, the ERG's advisory role to the Commission in the production of legislative proposals could be formalised. The Commission could commit to involving the ERG at a very early stage (e.g. pre-publication of proposals) to inform/scope proposed legislative instruments relating to common/coordinated policy/regulatory approaches. In relation to Commission Decisions, this could resemble the Commission's relationship with CEN/CENELEC or ETSI (where the Commission issues a mandate, the body develops an appropriate standard, and that standard is subsequently adopted into European law following consideration by CoCom). This could take many forms, for instance,

- the ERG could provide advice, before the Commission makes a proposal to CoCom, or
- the Commission could mandate the ERG to prepare a proposal which the Commission would consider before putting its own proposal to CoCom, or
- the Commission could mandate the ERG to prepare a proposal which would automatically be considered by CoCom

The resulting legal instruments would be binding on Member States (whether directly or indirectly), and their implementation would be managed by NRAs as appropriate.

This would involve the Commission increasing its use of the ERG within the terms of the existing Decision (much as it is doing currently in relation to these proposals), though it might require some amendment to it.

Regardless of whether any additional role for the ERG is ultimately decided upon following the political discussions in this regard, the ERG would urge the Commission to increase the Group's involvement in relevant policy initiatives along these lines under the terms of the existing Decision.

2. Scenario 2

The ERG could have a formal role in the legislative process (potentially in addition to its role under Scenario 1). In relation to Commission Decisions, a comitology committee formed by the ERG could be involved in relation to those issues where the NRAs were the relevant national implementing bodies.

In relation to Directives or Regulations, the ERG could be given one or two readings of draft legislation prior to readings by the European Parliament. While such readings would be open and public (and therefore increase the transparency of the legislative process), we also acknowledge the impact of an additional layer in the legislative timetable, and the unknown legal implications of such an approach.

3. Scenario 3

Under this Scenario, which we understand the Commission is contemplating, the responsibility for formulating decisions would be transferred from the Commission to the ERG, with appropriate oversight procedures. The ERG would have the power to define and implement a European strategy in those areas where coordinated action was warranted. NRAs would remain central constituent parts of the "federal" system. The ERG would issue legal instruments which are binding on NRAs and Member States to give effect to the European policy. The ERG could have enforcement powers in relation to NRAs who failed to comply with/implement an ERG decision.

All three scenarios, and Scenario 3 in particular, would need to comply with the subsidiarity principle and, in this respect, would require the development of clear subsidiarity-based criteria to define more precisely the class of areas where coordinated and/or centralised action was warranted. Of the three scenarios, Scenario 3 would be the only workable model under which the ERG (as opposed to the Commission) would be able to take and implement decisions centrally (though, at present, the ERG has identified one candidate – MSS – for this centralised treatment). In any event, it would have to be flexible (enabling responsibilities to be attributed to the entity gradually over time, as new issues requiring a coordinated approach were identified) and non-bureaucratic (consistent with the deregulatory approach of the Framework).

As noted above, full feasibility studies (including studies on conformity with the Treaty) would be required on any proposal involving a transfer of powers from the Commission, and concerns with such a transfer can be anticipated from both the European Parliament and the Council.