



**IRG/ERG**

**Response to the Review of the EU Regulatory  
Framework for electronic communications network and  
services**

## ***Executive Summary***

Established under the Regulatory Framework, the ERG represents 25 independent regulatory authorities to act as an advisory group to the Commission under the broader umbrella of the Independent Regulators Group (IRG). IRG represents 33 independent regulators including the European Union member states, candidate accession countries and EFTA member states. The views expressed in this response represent the views of the IRG.

I/ERG welcome the opportunity to respond to the latest stage of Commission's review of the EU electronic communications regulatory framework. I/ERG would like to comment on all of the issues raised both in the Communication (2006/334), the Staff Working Document (2006/816) and the Impact Assessment (2006/817). I/ERG believes that any proposed changes to the Framework need to be evidence-based. The Commission expert reports are an important contribution in this regard and we make specific reference to these expert reports throughout this response. The response will follow the schema presented in the Commission Staff Working Document.

The 11th Implementation Report, the Commission consultation documents and the recent Eurobarometer e-communications household survey all point toward positive trends in competition and investment evident in EU communications markets. I/ERG notes that there is both;

(a) a narrowing of the differences between Member States on a number of wholesale indicators regulated by I/ERG members, including prices for key access products, and

(b) a decrease in prices generally.

These movements, particularly in local loop access pricing, interconnection pricing and mobile termination pricing underpin a great deal of the competition in retail voice and broadband markets and introduce more price competition and innovation for end users and show that the regulatory measures have started to work as intended. The review of the Regulatory Framework needs to ensure the current positive trends are encouraged. The review needs to be sufficiently forward-looking in terms of technological trends, and the promotion of competition and investment in the sector.

I/ERG in particular wishes to endorse the Commission's view on investment and innovation. I/ERG argued in its response to the Call for Input that the Regulatory Framework was sufficiently flexible to allow NRAs to incentivise new investment. However, I/ERG believes the effectiveness of remedies to address market failures needs to be a key focus of the review. In this regard, I/ERG is calling for more focus on the issue of non-discrimination, and for the express confirmation of National Regulatory Authorities (NRA) ability to implement remedies across a number of related markets, both of which are critical to the development of competitive markets. In this respect

I/ERG would welcome the ability of NRAs to impose a remedy of ‘functional separation’ on SMP operators, where appropriate.

It is clear from the responses to the Commission’s call for input that a majority of respondents see the Framework as sound and the scope of the review as limited. I/ERG supports this approach and also supports the Commission’s objectives in relation to spectrum management, consumer protection and security issues. I/ERG takes the opportunity to respond to the specific proposals of the European Commission and in some cases to recommend changes to the Framework Directives where there is a demonstrable weakness in the Framework. In relation to market reviews, I/ERG’s views are based on its members’ experience of the implementation of the Framework to date. The Commission’s proposed streamlining of market reviews does not address the bureaucratic burden associated with the Article 7 process. As discussed in I/ERG’s response to the Call for Input, the Article 7 process needs to concentrate on those contentious markets where there may be issues related to the development of the internal market. I/ERG would also propose that the SMP Guidelines, which have proven to be a useful document for NRAs in preparing market reviews, need to be updated in light of the conclusions of market analyses undertaken; developments in economic theory and also in relation to the timing and prioritisation of market reviews.

The promotion of the internal market is a key objective for NRAs under the Regulatory Framework and much progress has been made since the introduction of the Regulatory Framework. I/ERG is concerned that the proposed extension of the Article 7 veto to remedies will not solve the internal market issues that the Commission is trying to address. The existing Framework rightly recognises that NRAs have the detailed local knowledge and expertise required for the design of appropriate regulatory remedies, and the Commission’s proposal would undermine this expertise. I/ERG believes that the work of ERG (whose members are tasked, among other things, with promoting the consistent implementation of the Framework) should be supported as the appropriate mechanism for promoting harmonisation, particularly given recently adopted commitments to a series of regulatory and operational disciplines, which will enhance the group’s effectiveness in this regard. It is important to note that the Commission’s proposal to extend its veto rights to remedies is not supported by its own expert advisors.

I/ERG believes there are demonstrable weaknesses in the Framework. Firstly, there is clear evidence of deregulation in a number of Member States, but that the transition to deregulation needs to be supported by a Framework which incentivises regulators to reduce (in particular) retail remedies, where appropriate and justified, and concentrate on ‘bottlenecks’ where they emerge or exist. The current Framework does not accommodate the gradual removal of regulation, and the risk of overregulation in such a rigid regime is a real concern. Secondly, the Commission has missed an opportunity by failing to act on the conclusions of its expert reports in relation to the problems of regulating certain market failures. I/ERG in its response to the Call for Input had highlighted the trend towards convergence and oligopolistic markets and asked the Commission to give NRAs the tools to intervene in markets where there was a clear absence of effective competition, but where this was not possible to demonstrate (particularly in relation to

joint dominance) dominance. I/ERG believes that the Framework itself should provide the means to address these issues, to avoid ad-hoc interventions in the form of issue-specific regulations that may create regulatory uncertainty and undermine the objectives and overall approach of the Framework. I/ERG makes specific proposals in relation to these issues through its proposals in relation to Article 5 of the Access Directive (see below).

I/ERG welcome the Commission proposals to update and repeal certain outdated measures. Repeal of the Local Loop Unbundling Regulation is a sensible updating measure by the Commission. However the Commission should use the opportunity of the revision of the Directives to reinforce the importance of equal access to the local loop to the development of competitive broadband markets in Europe, and not allow the repeal of the Local Loop Unbundling Regulation to undermine the continued importance of Local loop unbundling. For example, it could be included in a recital of the Access directive that LLU is a key instrument for competition within Europe, as it is written in recitals 6 and 7 of the LLU regulation.

I/ERG members look forward to the Commission proposals in relation to the Revision of the Framework and to future dialogue with the Commission on these proposals.

## ***Investment, Innovation & Competition***

I/ERG welcomes the Commission's comments in relation to investment. I/ERG had argued in its response to the Call for Input that the Framework was sufficiently robust to allow regulators to differentiate investment risk and incentivise investments through remedies imposed following a market review. I/ERG agrees that the effective implementation of the Framework using pro-competitive principles both attracts and stimulates investment.

I/ERG believes the effectiveness of remedies detailed in the Regulatory Framework needs to be a key consideration in any review of the Framework. I/ERG supports their view that accounting separation combined with wholesale remedies on the different markets, imposed to ensure compliance with non-discrimination obligations may be not enough to prevent the distortions of competition that exist. I/ERG calls for the strengthening of non-discrimination obligations by amending article 10 of the Access Directive to include a provision which additionally allows NRAs to oblige functional separation where necessary. It has to be noted that it would fall short of the more problematic remedy of structural separation. The concept of 'equivalence of input' needs to be included explicitly in the definition of non-discrimination currently detailed in article 10 of the Access Directive. Equally article 10 needs to recognise that non-discrimination obligations should extend across a number of markets to address dominance across a wide range of horizontal markets but also recognising the vertical integration of some dominant operations into related retail markets. Therefore, I/ERG proposes amending article 10 of the Access Directive to include a provision which allows NRAs to oblige 'functional separation' where such a remedy is justifiable and proportionate. This could include, inter alia, the ability to:

- impose obligations on a vertically-integrated SMP operator to prevent price and non-price discrimination by means of a separation of specific inputs used for electronic communications access products and other downstream services.
- require the SMP operator to provide equivalence of the access products and the associated processes to its wholesale customers as it provides to its own downstream arm, including the same prices, service levels, terms and conditions using the same systems and processes.
- ensure that the equivalence of access products and services and associated processes is provided, including the transfer of information between the designated access provider and its customers, to ensure that affiliated organisations or lines of business do not gain advantage from insider knowledge.

NRAs should also be empowered to accept undertakings or commitments proposed by SMP designated operators, which serve to specify in greater detail the provisions outlined above and any additional relevant conditions.

Also, in relation to the effectiveness of Remedies, I/ERG requested in its response to the Call for Input that the Commission confirm that NRAs have specific powers under the existing Framework to impose cross-market remedies. The Commission has included some discussion of these issues in its Consultation on the Recommendation on Relevant Markets. It states that NRAs are entitled to gather information on non-relevant markets and on markets with no SMP, and to impose obligations, such as accounting separation, even on non-relevant markets and on markets with no SMP, where appropriate and justified

I/ERG would propose that any text to this effect be included in the relevant Directive, rather than the Recommendation, as it relates to applicable remedies and clarify the applicability for cross-market remedies under the existing framework. Cross-market remedies are likely to become increasingly relevant, especially when services are provided by integrated operators, whether vertically (i.e. wholesale/retail) or horizontally (i.e. fixed/mobile).

I/ERG welcomes the attempt by the Commission to clarify its views on emerging markets. I/ERG discusses its view of the concept of emerging markets in its common position on remedies<sup>1</sup>. In sum, it will always be necessary for NRAs to retain their flexibility in identifying economic markets which are appropriate to the national state of evolution, irrespective of the state of the fastest- or slowest-evolving market within the EU or with regard to some advance expectation of a European norm. For instance, there may be legitimate reasons why a regulator may impose remedies in new and emerging markets to, for example, avoid perverse incentives for a dominant provider to migrate customers from existing regulated services to new unregulated services.

With regard to access to ducts and investments in fibre in the local loop, it is generally accepted that the vast majority of costs associated with the rollout of local access networks relate to the opening of trenches and the laying of ducting, as well as the premises associated with the provision of access services: this will not change with the introduction of next generation fixed-access networks. I/ERG welcomes the Commission's comments in its Impact Assessment relating to duct-sharing. However, Of course, the practical issues of mandating the remedies of duct-sharing or fibre unbundling are immensely complex and will require further analysis and discussion, including over the question of the appropriate relevant market. I/ERG would welcome early engagement with the Commission to discuss these proposals in greater detail.

## **Impact Assessment**

In relation to the impact assessment and options presented by the Commission on investment and growth, I/ERG agrees with the Commission that the removal of all *ex-ante* regulation *en bloc* where evidentially SMP operators retain dominant positions would be detrimental to competition and would cause consumer harm. The Framework is

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<sup>1</sup> Please refer to ERG common position on remedies – p 19/20

built on sound principles, and NRAs should continue to be empowered to intervene where there is less than effective competition in defined relevant markets. As stated above I/ERG also supports the Commission's view that structural separation is not appropriate.

## ***Spectrum Management – flexibility and coordination***

I/ERG generally welcomes the Commission's proposals in relation to spectrum management and supports the objectives to enhance flexibility of use and lower access hurdles, to Radio Spectrum, and to facilitate the development of pan-European Services. I/ERG believes that a more technological and service-neutral spectrum management environment would profoundly affect the access barriers and the competitive environments in many, if not all, electronic communications network and services markets and so I/ERG believe it is important to offer its views on the proposals presented.

I/ERG supports the Wireless Access Policy for Electronic Communications (WAPECS) principles agreed at the Radio Spectrum Policy Group (RSPG) and the move to more market-based approaches to spectrum management. When considering such changes to the management of radio spectrum, transitional measures need to be developed to take into account existing rights of use, to allow the market to adjust to new conditions and to allow Member States to ensure that legacy issues can be addressed.

I/ERG supports the promotion of technological and service neutrality. However, where services offered in such bands are not electronic communications services (e.g. government use, and thus outside this regulatory framework) the impact of such dual use will have to be considered. A prior specification of the broad service classes to be used in specified spectrum bands may be advantageous and may ensure a more fair and equitable development of the markets. Such proposals also need to take into account the need to ensure the efficient use of frequency bands and avoid harmful interference between spectrum users.

As regards pan-European services, it will be crucial to identify the kind of service which can be regarded as a pan-European service. Once defined a number of key issues need to be resolved, including in relation to allocation, selection procedures, conditions of use and fees. These issues will need to be addressed by the Member States before any pan-European services can be authorised and a pan-European regulatory approach defined. I/ERG would stress that any harmonised approach should not undermine the rights of Member States to define the specific conditions attached to the rights of use, in particular the possibility of NRAs regaining full control of the spectrum when such authorisation period expires (taking into account specific national circumstances). The processes created to address these issues need to respect the existing institutions for spectrum allocation and assignment, and should be realised through the strengthening of the roles of committees and groups such as the Radio Spectrum Policy Group, CEPT and the Radio Spectrum Committee.

In relation to spectrum trading I/ERG is not in favour of a coordinated approach for identified bands, considering that national demand for trading will vary and Member States will need to keep the right to open frequency bands for trading as they consider appropriate. Such mechanisms, when defined, also need to ensure the continued efficient use of spectrum and ensure that competitive markets are maintained which prevent distortions of competition.

I/ERG welcomes the Commission's willingness to define new bands for systems under general authorisation, subject to market demand. However, I/ERG has concerns with imposing a general authorisation as a rule, for two key reasons. Firstly, the best way to impose good quality of services and network coverage is to through individual authorisations. Secondly, it should be noted that once such a principle is implemented it will become irreversible; therefore it is essential to be cautious and to check the concrete impact of such a process on the use of spectrum on a case-by-case basis.

Finally, I/ERG does not see any justification for the modification of the Authorisation Directive, as it has already proved to be effective. Systems can be introduced under a general authorisation regime on specific justified bands defined only after an impact assessment, and subject to market demand.

### **Impact Assessment**

I/ERG welcomes the Commission's view that a European Spectrum Agency is not necessary. All of the objectives stated in terms of access, allocation and spectrum management can be achieved by improving, as and when needed, the existing institutional arrangements with continued Member State participation.

## **STREAMLINING MARKET REVIEWS**

Before addressing the proposals in relation to streamlining markets reviews I/ERG would like to comment on the process as it currently is being implemented across the European Union and the EFTA states. Many responses to the call for input discussed both the delays in completing market reviews and the perceived bureaucratic burden. I/ERG in its response to the Call for Input argued that significant time and resources have been devoted to market analysis. NRAs have since the adoption of the Framework conducted not only evidenced-based market reviews but also a root and branch review of all regulation imposed under the old regulatory framework. For the accession states there has been the additional burden of completing market analyses whilst simultaneously establishing regulatory frameworks in their Member States.

The process of market analysis involves significant resources in data collection, consultation and review of consultation responses. In many cases NRAs are asked to extend consultation periods or are required to conduct subsequent data collection exercises which add to the time involved in completing market reviews.

I/ERG would restate its commitment to the principle of market-based competition analysis and argue, considering the resources devoted to the process, that any changes in the Framework should address the key bureaucratic bottlenecks in the process and enable NRAs to deploy their resources effectively, to address to key national regulatory issues and thereby meet the objectives laid out in the Framework (to promote the interests of end users, promote competition and contribute to the development of the internal market). Therefore, any efforts to streamline the notification process need to take account of the workstreams that take place at a national level prior to the consultation and notification with the EU Commission.

### **Relaxing Notification Requirements**

The Commission has proposed a number of measures intended to streamline the notification process, without removing the obligation on NRAs to notify. I/ERG welcomes the intention to streamline the notification process, but believes that the proposals outlined in the Commission consultation paper would have only a marginal impact on the time and resources devoted to both notifications and market reviews. I/ERG strongly refute the Commission's contention that the proposed system would represent a 'considerable decrease' in the administrative work of NRAs. NRAs will still be required to conduct (at times lengthy) national consultations and, irrespective of the information requirements of the Commission, NRAs still need to collect evidence. The only effect of the proposed standard notification form for NRAs seems to be that they will no longer need to upload the entire market analysis decision to the Commission. Furthermore, it is unclear what administrative burden operators face within the existing

notification procedure and how, therefore, the relaxation of the formal aspects of the notification procedure would benefit them.

A more structured pre-notification procedure is necessary, enabling NRAs to consult the Commission on specific issues concerning market definition and analysis of dominance, and get a prima facie Commission position. I/ERG's desire is to concentrate the Article 7 process on those decisions that are most contentious. It should be noted that a large number of notifications on non-contentious markets (in terms of SMP) or markets of similar structure and process (like fixed termination markets) tie up resources. Reducing the number of notifications would allow the Commission more time to gain a better appreciation of national circumstances and evaluate market data in those more contentious notifications.

One clear case for simplification would be a confirmation from the Commission that markets found effectively competitive, despite being listed in the Recommendation of Relevant markets, would not be subject to notification. The Recommendation is an indicative list which, under the provisions of the Framework Directive, NRAs are obliged to take utmost account of, however, I/ERG would welcome a Commission confirmation that markets found competitive do not need to be reanalysed and notified if NRAs believe there are no competitive issues. It appears the Commission still require such markets to be notified if they are part of the Recommendation lists.

The Commission's current proposals would still require notifications of all markets, irrespective of size or relevance to the internal market. I/ERG strongly proposes that the Commission and I/ERG should jointly agree clear categories of markets where, following initial notification, subsequent market reviews would not need to be notified to the Commission on the basis of a de minimis test.

In this regard I/ERG supports the proposal of Hogan & Hartson and Analysys, discussed in their expert report, for a 'white list' of criteria to be agreed between NRAs and the Commission which would identify markets which would not require notification. Such criteria could include, inter alia: market share stability; de-minimis impact on the internal market; limited technological change. I/ERG supports the conclusions of the expert report where it states that,

*'Such a large number of notifications are inconsistent with a system that aims for a light regulatory touch.'*<sup>2</sup>

The criteria agreed could be included in a future Recommendation or in the revision of the SMP Guidelines, to ensure that they are understood and transparent to all stakeholders.

Finally, it is unclear (given the tight timetables detailed in Article 7) how the Commission will be able to fit in a preliminary review based on the standard notification

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<sup>2</sup> Preparing the next steps in regulation of electronic communications, Hogan Hartson & Analysis, P153

form proposed, the detection of *substantial* changes in competitive conditions or *major* changes to the previously notified measures, and a full analysis of the decision notified in full, all within the one-month period.

### **Rationalisation**

I/ERG does not oppose the Commission's proposal to gather all the procedural rules related to market reviews into one text. However I/ERG is strongly opposed to the proposal to include such text in a single regulation. I/ERG would expect that provisions related to market analysis, like other proposals amending the Directives, would be given due consideration by all stakeholders in consultations and following review by Member States. A regulation would be difficult to amend in a timely fashion and the existing recommendations have proved to be an effective instrument for such procedural rules.

I/ERG is equally opposed to the proposal to impose time limits on the completion of market reviews following the publication of a revised Recommendation on relevant markets. This proposal is driven by the time it has taken many NRAs to complete the first set of market reviews following the issuing of the current Recommendation. However, subsequent market reviews are likely to be less onerous to complete. There is a real concern that many NRAs, already criticised by market players for not giving sufficient time for national consultations, will be further hurried to complete reviews. This could impact on the ability of NRAs to consider issues raised as part of national consultations, and also have a negative impact on the quality of the review. NRAs are also concerned that time and resources will be devoted to completing market reviews for the sake of meeting an inflexible schedule, where this does not represent the optimal prioritisation of NRA resources. NRAs need the discretion to allocate resources to those market-facing activities which best achieve their regulatory objectives.

As noted above, I/ERG would support amendments to the SMP Guidelines which give NRAs and industry more clarity on the criteria which would trigger a market review. I/ERG believes this would have more relevance to the concerns raised by stakeholders over the perceived delays in the implementation of the first round of market reviews, and would give certainty to the industry on the timing of future reviews.

### **Minimum Standard for notifications**

I/ERG supports the initiative to improve the minimum standard for notifications, in the context of our comments on the streamlining proposals above. I/ERG will seek to work closely with the Commission in relation to agreeing the minimum standard and would support further clarification from the Commission in relation to the minimum evidence required in a notification. However, I/ERG would be concerned to ensure that the proposed new standard template for notification does not itself become an additional bureaucratic burden. I/ERG would also wish to ensure that the notification requirements

do not constrain NRAs' independence in evaluating the functioning of the national markets and do not prevent NRAs from taking into account national circumstances.

### **Renotification of vetoed decisions**

I/ERG opposes the obligation to renotify vetoed decisions within a set time frame. A veto may highlight particular complexities in a market, and could have far-reaching implications which could take time to resolve. A veto could also lead to legal challenges or the need for a further consultation or consideration of market conditions, and it could require a renotification in a different form. I/ERG therefore opposes inflexible and arbitrary time limits, but would propose a public update on NRAs' progress within six months following a veto, to give industry and the Commission an understanding of the issues being addressed by the NRA.

### **Other Streamlining**

I/ERG would restate that the timing of market reviews should remain at the discretion of NRAs. NRAs welcome timely detailed evidence from undertakings on changes in market circumstances and will consider that evidence in deciding on the appropriateness of commencing a review of any market. Therefore, I/ERG would request that the Commission confirm the approach, explicitly detailed in the SMP Guidelines, that the timing of market reviews is at the sole discretion of NRAs.

### **Additional proposals for streamlining market reviews**

I/ERG would also stress that it is essential that all stakeholders respect the provisions of Article 6 of the Framework Directive, which obliges NRAs to conduct national consultations and consider the views of all stakeholders to proposals detailed in market reviews. The Commission should encourage stakeholders to participate in national consultations.

Secondly, I/ERG is disappointed that the Commission has not proposed a revision of the SMP Guidelines or at the very least indicated a future consultation on the Guidelines. It is evident from the expert reports and the text of the draft Recommendation on relevant markets that important issues related to countervailing buyer power and self supply are being discussed. I/ERG believes it is appropriate to consider these topics in the review of the SMP Guidelines and would call on the Commission to ensure that a commitment to review the Guidelines is announced as part of the review of the Regulatory Framework.

I/ERG would also welcome the deletion of Annex II of the Framework Directive, as it has proven to be of no use and even confusing, taking into account several criteria plus the ECJ case law on joint dominance.

## **Impact Assessment**

I/ERG believes the existing veto on SMP decisions should remain but the focus of the review should be to make the process more effective and less bureaucratic. This leads to our proposals described above to simplify the notification requirements and the introduction of a 'white list'. I/ERG, as noted in the third option of the Commission's impact assessment, will continue to be the coordinating body advising on the consistent application of the Framework, and I/ERG believes this strategy will build on the good aspects of the Framework and address those areas where NRAs feel processes need to be streamlined.

## ***Consolidating the Internal Market***

### **Commission veto under the Article 7 procedure**

I/ERG welcomes a debate on the consistent application of, and harmonisation under, the Regulatory Framework. This is an area on which the I/ERG has focused its activities and it will continue to develop its role in this regard in line with its mandate.

I/ERG members have agreed at its latest plenary a series of activities to continue harmonisation initiatives and have restated the importance of consistent application of the Framework.<sup>3</sup>

The development of the internal market and the consistent application of the Regulatory Framework are essential concerns for I/ERG. Even though the I/ERG was created as an advisory group to the Commission with the aim of seeking to ‘achieve consistent application, in all Member States, of the provisions set out in this Directive and the Specific Directives’<sup>4</sup>, the Commission has not raised the issue of inconsistent applications of the Regulatory Framework directly with the I/ERG or sought our advice on this issue. Despite this I/ERG has continued its work promoting harmonised approaches to the Regulatory Framework and will continue to do so.

The Commission argues that the extension of the veto provisions of Article 7 to remedies is necessary to promote the development of the internal market. However, I/ERG does not believe that extending the veto to remedies will achieve these aims. I/ERG is concerned that such extension of the existing Commission oversight will undermine one of the key features of the Regulatory Framework which promotes the decentralisation of regulatory decisions to expert local regulators who use local knowledge to apply the most appropriate and least burdensome remedy<sup>5</sup>, and tailor remedies to the competition problems found in the national market analysis. In accordance with Article 5 of the EC Treaty, action by the Community shall be taken following the principles of proportionality and subsidiarity. The latter principle implies that, in areas which do not fall within the exclusive competence of the Community, such as electronic communications, the Community shall take action only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. I/ERG believes that NRAs are best placed to define and implement remedies appropriate to national markets, and that the Commission has neither the experience, expertise nor resources to assess the optimal design of remedies. I/ERG thus

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<sup>3</sup> ERG Madeira Statement

<sup>4</sup> Framework Directive, recital 36

<sup>5</sup> See Presentation to ECTA Regulatory Conference, December 2005, Reinald Kruger, DG Competition

argues strongly that the Commission proposal to extend the veto to remedies is wrong in principle.

A key feature in the current structure is the accountability of NRAs at a national level. NRAs are obliged to consult nationally on proposed measures and are accountable to all stakeholders for their final decisions, and ultimately accountable to national courts. NRAs are obliged to ensure that remedies are proportionate and justified to the competition problem identified, and rely on their experience in designing remedies which are practical, taking into account the expected behaviour of regulated players, and of their expert local knowledge in judging the most appropriate and effective range of remedies to achieve their regulatory aims. The Commission does not possess this experience or local knowledge. I/ERG is seriously concerned that a veto on remedies would lead to more rigidity by NRAs in framing remedies; would lead to less regulatory innovation and most likely less deregulation. This concern is shared by the Hogan & Hartson and Analysys expert report. The expert report identified correctly that regulators' decisions on remedies are more discretionary than their decisions on SMP. The policy objectives set for NRAs are numerous, flexible and open to interpretation. Hogan & Hartson and Analysys argue that

*'NRAs, being closer to their national market and more directly accountable should be generally at least as well placed as the Commission to exercise such a discretionary decision. A discretionary Commission veto against discretionary Member State measures, drawing its justification from vague policy objectives would be unprecedented, and perhaps even legally questionable EU measure'*<sup>6</sup>

I/ERG notes that the Commission frequently makes use of its power to comment on remedies and that NRAs are obliged to take utmost account of such comments. Furthermore, NRAs are obliged under the provisions of Article 8.1 of the Access Directive to only impose remedies detailed in articles 9 to 13 of said Directive. If an NRA intends to impose other obligations it must obtain prior Commission approval. The Commission therefore already has a large degree of oversight.

In any event, I/ERG believes that any Commission veto, including those on market definition and SMP assessment, should be subjected to more checks and balances. The Commission should initially rely on the NRA's analysis and should provide detailed economic evidence to support its intended deviation from an NRA's decision. Furthermore, the Commission should be required to seek expert advice prior to the publication of a serious doubts letter. The Commission veto is a serious decision with national repercussions for the Member State concerned, and I/ERG therefore believes it should be subject to more expert review. Finally, clear procedural rules should be established with regard to access to information and use of such information by the Commission

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<sup>6</sup> Preparing the next steps in regulation of electronic communications, Hogan Hartson & Analysis, P158

## National Appeals

I/ERG supports the aim of the Commission proposal relating to the suspension procedure. However, I/ERG notes that courts across Member States currently employ a range of criteria in deciding whether or not to suspend NRA decisions. For example, in France, under administrative law (applied to appeals of market analysis decisions), a decision from ARCEP can only be suspended by the judge if the appellant successfully demonstrates the fulfillment of two cumulative criteria (article L. 511-1 administrative justice code):

- *urgency:*

The appellant must demonstrate that the decision appealed causes a serious and immediate prejudice to a public interest, the appellant situation or to the interests he is fighting for.

- *+ serious doubt concerning the legality of the decision.*

In Germany, the merits of any application for suspension of a decision are assessed by the court on the basis of the following two criteria:

- Prospect of success on the main issue: this is assessed by the court in a preliminary summary examination. Only if the court finds that the measure taken by BNetzA is neither evidently lawful nor evidently unlawful, the second criterion (*weighing* of interests) is applied.
- Weighing of interests: the adverse effects likely to be suffered by the appellant if the application for a suspension is refused is weighed against the public interest in immediate implementation of the measure.

In Lithuania the court will suspend a regulatory decision if there are extraordinary circumstances (according to the Code of Civil Procedure), and according to the court precedents any possible negative effect on the financial status of the appellant cannot be treated as an extraordinary circumstance for these purposes.

The Commission should consider these and other national precedents in its proposals. Criteria for the suspension of a regulatory decision should be broader than ‘irreparable harm’, the single criterion which the Commission mentions in its proposals.

Indeed, at the European level, the ECJ also applies more than one criterion. Article 243 of the Treaty combined with article 83.2 of the rules of procedure of the ECJ, as interpreted by the ECJ, define three criteria. First, the suspension must be necessary. Second, the appellant must give the pleas of fact and law establishing a *prima facie* case for the interim measures applied for, also called “*fumus boni juris*”. And finally, the appellant must demonstrate the urgency to act, interpreted as the necessity to show a serious and irreparable harm.

Therefore, the Commission proposals should either impose cumulative criteria, in line with existing European legal practice, or if it confirms its current proposal, indicate that “irreparable harm” is a non-exhaustive criterion that can be complemented by others according to Member States’ law.

I/ERG supports the Commission’s proposal to require NRAs to report on the progress of appeals across the EU, and recognises the difficulties for the Commission in relation to ensuring the prompt conclusion of outstanding appeals in some jurisdictions. I/ERG notes that in a number of jurisdictions market reviews have been challenged and remain to be implemented long after the initial analysis has been completed.

### **Pan-European authorisations**

I/ERG agrees with the need for more coordination for authorisations in certain fields and it is correct to consider the development of pan-European services and the possible barriers to adoption. However, the Commission’s proposals are not completely clear and many questions remain: will the pan-European authorisation process, including the approach of mutual recognition suggested by the Commission, be applied to general authorisations as defined by Article 3 of the current Authorisation Directive (not dealing with scarce resources), as well as to rights of use of spectrum and numbers?

I/ERG believes that the principle of mutual recognition should be studied further as far as the general authorisation procedure is concerned, but that it is not appropriate in relation to spectrum/numbers rights of use.

I/ERG believes that there are pan-European services which may be suitable candidates for pan-European authorisations (for example, mobile satellite services). However, in relation to other pan-European services, for example those which have a national market dimension, coordination at European level may not be appropriate.

### **Proposed changes to Article 5 of the Access Directive**

I/ERG is opposed to the Commission proposal to submit to Commission approval the use by NRAs of their powers to impose remedies under Article 5 of the Access Directive. There are a number of circumstances where NRAs have considered or are considering using this provision. Specifically, in relation to access and interconnection issues related to interoperability, billing on non-geographic calls and premium rate numbers. The article is also important to allow legacy issues from the old framework to be updated. These are essentially national issues and there is no pan-European dimension for the Commission to

oversee. The proposed change imposes an undesirable barrier for an NRA to be able to solve interoperability problems quickly. This might hamper regulatory efficiency and sustainable competition, and is certainly not in the best interests of end users. While the Commission asserts that its rationale for this proposal is to prevent the fragmentation of the internal market, it has not explained why this would be the case. Prima facie, the use of this article touches upon national issues which do not have an impact on the internal market.

However, I/ERG would like at this juncture to propose two initiatives which address weaknesses of the Framework and may require a revision of article 5.

It is clear from the debate on international roaming that the Commission recognizes that the Regulatory Framework as currently drafted is not able to effectively address all of the competition issues that arise in communications markets. The Commission has proposed with the Roaming Regulation to intervene in markets, without a market review, but with clear objectives. I/ERG would argue that a similar provision should be available at national level to address well-defined and measurable competition problems with clear objectives and limited remedies where no operator is susceptible to have SMP.

The 'black and white' nature of the Framework on issues related to a finding of SMP ignores, firstly, the transition of markets from less than effective to effective competition and the need for regulators to continue to monitor markets, and, secondly, the very high evidential test for finding joint dominance. Currently the Framework allows markets, with clear indications of market failure, not to be addressed through ex ante remedies. Where NRAs cannot take any regulatory action in relation to clear problems of competition, this can ultimately lead to consumer harm.

In relation to transitional measures, I/ERG believes there is clear justification for such a limited intervention and cites the expert report by Hogan & Hartson and Analysys, who recognise the difficulties faced by NRAs when moving from markets with SMP to markets where there is no finding of single or joint dominance. The SMP framework ignores the gradual progression of markets to effective competition. It does not cater for situations where a market is still less than effectively competitive, ultimately with negative effects on end users, but where a finding of SMP may have become difficult to demonstrate because of the high thresholds set by case law.

In relation to joint dominance the high evidential test is cited by the expert report as creating difficulties for regulators in finding SMP in some oligopolistic markets. I/ERG would argue that markets can exhibit evidence of market failure, including excessive pricing and denial of access, even where the case law does not support an SMP finding, and yet there is no mechanism available to NRAs to address this. For example, the 11<sup>th</sup> Implementation report highlights the positive competitive impacts MVNOs have on mobile markets however a large number of member states do not have MVNO access. In these member states the lack of MVNO access maybe the result of market failure and in those member states consumers are loosing out on the benefits of such competition.

I/ERG is proposing that such scenarios be addressed through the application of precisely defined remedies introduced following a market review, where a clear competition problem was identified but an SMP finding could not be supported by case law. Such a procedure would allow prompt and flexible responses to competition problems, particularly those arising in the transitional period when a market is en route to effective competition but where upstream remedies cannot in the short term provide sufficient assurance that consumers will be adequately protected from the exercise of residual market power.

I/ERG would propose therefore that Article 5 be amended to allow NRAs to intervene on their own initiative to introduce precisely defined remedies, following the conclusion of a market review notified to the Commission under Article 7, and a temporary finding of an 'absence of effective competition'. Given that, in the circumstances in which this would be used, it would not be possible to establish a position of SMP, the evidence for the finding of "absence of effective competition" would need to be compelling. Such temporary measures would of course need to be proportionate and justified and have a clear date for removal.

### **Other issues related to the Internal Market**

In relation to the Commission's proposals to introduce new procedures for the agreement of common requirements related to network and services, I/ERG would welcome a fuller explanation of the concerns which the Commission is attempting to address. In particular, I/ERG would like confirmation that such issues relate only to interoperability.

Furthermore, I/ERG would like to ensure that existing structures are used as far as possible, and that no new mechanisms are created that duplicate existing structures which operate effectively. Any new mechanism should be broadly consistent with the New Approach, which has proved its worth in the equipment area.

It is equally unclear what the Commission is trying to achieve with the proposal to broaden the scope of technical implementing measures in relation to numbering, and by extension why it needs additional powers. The Commission already has wide powers under the provisions of Article 10(4) of the Framework Directive and has not shown why these existing powers are insufficient.

While the Commission asserts that there is scope for increased coordination, at European level and among Member States, of numbering and associated tariff schemes, it has not identified the internal market dimension to its proposals for increased powers. In fact, European coordination of tariff schemes may conflict with the concept of proportionality applied by NRAs when imposing tariff regulation in their respective market analysis decisions. Furthermore, as a quintessentially national resource, the existence of national

numbering plans is justified, and these may differ from one State to another without any adverse impact on internal market.

In relation to the Commission's proposal to withdraw ETNS, I/ERG believes that even if (as the Commission asserts) it is true that ETNS has not been successful, it might nonetheless be worth considering whether going forward, in an NGN world, Europe might need a specific resource such as ETNS. Therefore, before withdrawing this possibility, I/ERG urges the Commission to carry out a forward-looking impact assessment to assess its possible future utility.

I/ERG would also argue that, in relation to all numbering issues, the Commission must be aware of the impact that any changes to EU numbering regimes may have on national numbering plans. Full consultation therefore needs to be carried out prior to the generation of any proposals for change.

### **Non-Geographic Numbers**

I/ERG supports the initiative of the Commission to make non-geographic numbers more accessible. I/ERG would suspect that increasingly we should see fewer differences between geographic numbers and non-geographic numbers as NGN developments will allow number types to converge. Indeed, at some point in the future there may be no need to make separate rules for geographic numbers and non-geographic numbers. Nevertheless, for some services there is a strong case for consumer protection regulation, which may preserve some of these differences in regulatory approach.

As discussed above the Commission needs to be conscious when proposing changes, of the impact of such changes on national numbering plans and on consumer protection (e.g. in relation to price limits, advertisements, price information, etc.). Therefore the Commission should ensure that it consults fully on any proposed change in this respect.

### **Consistency with the R&TTE directive**

The proposal to relax the obligation imposed by the R&TTE Directive on network operators to publish their interface specifications could (subject to what is intended by the Commission) be tantamount to a paradigm change, one which could lead to "walled gardens". In any case, depending on the extent of the relaxation, existing competition in the terminal equipment market could be impaired without the certainty of innovation being promoted in return.

On no account should the current obligation in the R&TTE Directive to publish interface specifications be deleted, even if for some areas only, without anything being put in its place.

This all the more important as experience in the broadcasting sector (where equipment for the reception of sound and TV programmes is not covered by the R&TTE Directive and where there is hence no obligation to publish interfaces), shows that the absence of transparency can lead to problems of interoperability for the end customer, and competition problems in the terminal equipment market. (Indeed, this is why the Universal Service Directive contains provisions specifically intended to secure interoperability for receiving equipment). To our mind, it would appear altogether more appropriate to bring broadcasting equipment within the scope of the R&TTE Directive, with a view to achieving a consistent regulatory approach in the relevant Directives (Universal Service and R&TTE).

The proposal to relax the obligation on network operators to publish their interface specifications appears to be closely linked with the Commission's further proposal to review the definition of the network termination point in the Universal Service Directive. Essentially, the scope of each of the R&TTE Directive (on the one hand) and the Framework Directives (on the other) is largely determined by the definition of network termination point.

If changing the definition of network termination point in the Universal Service Directive shifts the demarcation between network and terminal equipment to such an extent that relatively large parts of the communications process are assigned to the network and not to the terminal equipment, correspondingly less terminal equipment would be covered by the R&TTE Directive. In that case, the obligation in the R&TTE Directive to publish interface specifications would not need to be relaxed at all – indirectly, the changed definition in the Universal Service Directive would have the same effect, and therefore could not be supported for the same reasons. In any case, I/ERG believes that the discretion that NRAs currently have to define the location of a network termination point (pursuant to Recital 6 of the Universal Service Directive) should be retained.

## **Enforcement**

I/ERG welcomes the proposals of the Commission in relation to enforcement and would go further by proposing that the proposals relate not only to the enforcement of authorisation conditions, but extend to other provisions of the Framework.

## **Must Carry rules**

The Commission proposes to introduce a deadline for review of must carry obligations by Member States and to require a justification for must carry rules in national law. This topic is likely to be part of the review of the TV Without Frontiers Directive (TVWF). The Commission should ensure these issues are dealt with also in the TVWF (i.e. in its successor, the Audiovisual Media Services Directive). Must carry obligations should not, in terms of transmission networks, allow any distortion of competition. This principle is already clearly set out in the Framework and should be retained. I/ERG feels that the

provisions in the Framework are adequate and that the Commission has sufficient means at its disposal to intervene where these are not being adhered to without resorting to the mechanisms being proposed in the review.

### **Impact Assessment**

I/ERG considers that the options detailed in the impact assessment in relation to “Regulatory Models and the Internal Market,” extend beyond the scope of this limited review of the Regulatory Framework. There is no evidence from the ‘Call for Input’ to justify the inclusion of some of the options presented and the Commission offers no evidence to support their inclusion or its conclusions.

I/ERG believes that option 1 (A single European Regulatory Body) and Option 2 (extending the scope of Commission oversight to remedies) are, although legally distinct, the same option from the point of view of implementation. Both would effectively result in a European Regulator. For the reasons detailed above the I/ERG believes there is no justification to extend the veto or to change the institutional arrangement underpinning the Framework, and that what is required is a limited review to address real areas of concern.

## ***Strengthening Consumer Protection & User Rights***

### **Improving Transparency and publication of information for end-users.**

I/ERG welcomes the Commission's proposals in relation to improving tariff transparency. In relation to International Roaming a number of NRAs already support tariff transparency initiatives on the basis of the existing Framework. However, I/ERG believes that NRAs do not always have enough power under the current Framework to introduce adequate tariff transparency measures.

The literal text of Article 21 of the Universal Service Directive (*Transparency and publication of information*), paragraph 1, and Annex II (*Information to be published in accordance with Article 21*) refers only to information on the applicable tariffs and conditions of *public* telephone services, whereas it should make more sense if it was applicable to *all* services and operators (consumers do not make or do not know such a distinction). The problem is in the wording of Article 21 of the Universal Service Directive itself as well as the definition of a "publicly available telephone service" (e.g. terms like 'originating calls' and 'receiving calls' are not applicable to all services). Instead of information on the applicable tariffs and conditions relating to access to and the use of public telephone services, Article 21 should apply to all information on the applicable tariffs and conditions of *all* services provided by providers of public telephone services.

### **Improving caller location obligations -**

While I/ERG welcomes this proposal, NRAs have concerns about how this proposal is intended to be implemented. In particular, it may not be possible to meaningfully consider how this provision would operate, given that technical measures to obtain and convey such call location information may not yet be available. I/ERG would, however, promote the view that this information should be provided to the emergency services in a 'push' mode as opposed to a pull mode.

It is also not clear on what grounds the cost of the transmission of caller location information should be borne by network operators, and I/ERG believes this will need very careful justification.

### **USD provisions**

Universal Service issues are a matter for Member States. However I/ERG welcomes the plans of the Commission to update the Universal Service Directive and to publish a Green Paper on Universal Service in 2007. I/ERG believes it would be more effective to address all issues related to USO in the proposed Green Paper.

In relation to the proposals in the present consultation, I/ERG would agree that universal directory enquiry services are characterised today by a large number of operators, and that this could justify the withdrawal of these services from the scope of universal service. However, the situation varies across Member States, and in some Member States users face very high prices for this service.

I/ERG welcomes the proposal to update definitions currently in the USO, such as the definition of PATS, which is currently not unambiguous. I/ERG welcomes the amendment of the USD to make separate obligations for access infrastructure providers and service providers.

### **Other changes**

The Commission proposes to extend portability to services other than numbers (it gives the example of personal directories) and to identifiers other than traditional numbers. While it is true that obstacles to switching provider might arise in the future which existing number portability obligations are unable to address, this is an area which will develop at different rates and in different ways across the EU Member States, and therefore one where NRAs should retain the flexibility to respond to their particular national market demands. The Commission has not demonstrated why this would be an area for Commission involvement and EU-level coordination. In any event, I/ERG would welcome more clarity on these proposals and the extent of the changes to portability, the services included and the cost of these proposals. For example, it is important to define accurately what the Commission means when it says that “internet naming and addressing will remain outside the scope of the responsibilities of the NRAs”. Furthermore, it is not clear whether the address sip://name@provider.com is categorised by the Commission as “internet naming” (for which the Commission does not foresee a role for an NRA and no obligation for portability), or as an “identifier other than a traditional telephone number” (for which the Commission does foresee a role for an NRA and an obligation for portability). NRAs should have flexibility to adapt portability obligations given technological developments in their particular markets.

The Commission proposes that some provisions, e.g. (but not exclusively) CS and CPS, are likely to need to be technically updated or removed going forward, and it proposes to introduce a mechanism to do this under a committee procedure. I/ERG does not believe that such issues should be decided by an unspecified committee procedure. In any event, it should be noted that an anomaly exists in relation to carrier selection obligations under the Framework. Unlike the SMP remedies which NRAs have the discretion to impose under Articles 9 through 13 of the Access Directive, and Article 17 of the Universal Service Directive, under Article 19 of the Universal Services Directive NRAs *must* impose carrier selection obligations on operators that have SMP in relation to the provision of connection to and use of the public telephone network at a fixed location, i.e. those operators with SMP in markets 1 to 6 of the recommendation. In its response to the Call for Input, I/ERG had already made the point that carrier selection and retail regulation should be aligned with the approach taken in the Access Directive, which

means such an obligation would be imposed if it was proportionate, justified and based on the nature of the problem identified. The current provisions are overly rigid and produce unsatisfactory outcomes. For example, if an operator has SMP on retail markets that include traditional voice as well as VOB, an NRA may wish to impose carrier selection on traditional voice but not on VOB. However, Article 19 does not allow any flexibility.

### **Net neutrality**

I/ERG has concerns in relation to the extension of NRAs' existing powers related to minimum quality levels. I/ERG would seek clarification on what issue is being addressed here and would argue that there is some uncertainty about whether existing provisions of the Access Directive are sufficient to deal with the blocking of information society services, especially in cases when these information society services could not be classified as electronic communications services.

### **Strengthening e-accessibility**

Whilst I/ERG supports moves to improving e-accessibility to consumers and end-users, the I/ERG would welcome more details about the precise measures that the Commission contemplates within the context of the Framework Review.

## **SECURITY**

While I/ERG welcomes the debate on security and privacy related issues, it notes that the Commission proposes extending the scope of regulatory interventions to include obligation on operators and enforcement obligation on NRAs in this area. I/ERG stresses that there are different aspects of security some of which only some are suitable for consideration under the EU electronic communications framework, whilst others are intrinsically linked to national security concerns and therefore are the responsibility of national ministries and agencies. I/ERG therefore considers there is limited scope to extend the remit of NRAs in this area. I/ERG recommends that the Commission also makes it clear that when referring to the relevant competent regulatory authority that this may in actual fact be the national ministry or other rational agency, such as a data protection agency or commission, as appropriate.

I/ERG considers that these issues are important, however the extension of such provisions are a matter of policy in Member States and the existing policy initiatives in place at national level to deal with these issues particularly in the area of the integrity of critical infrastructure, which cannot be divorced from national security concerns.

With respect to security concerns affecting end users, this is of equal concern to operators and service providers, many of whom provide security services to end users and as well has having measures in place to deal with, for example, in cases of fraud. I/ERG would therefore welcome further evidence from the Commission of the market failure that requires increased compliance and regulatory burden on industry and regulators in this respect. I/ERG would welcome further discussion of enforcement of consumer protection rights.

In relation to privacy issues, the provision as laid down in Article 5 (*Confidentiality of the communications*) paragraph 3, Privacy Directive is so vague with regard to the way end-users can be informed, that enforcement is almost impossible. This is in particular of concern in case of spyware. I/ERG suggests to aggravate the material standard for permission and refusal (e.g. extended with “on the basis of complete information” and “refusal in a simple way”).

With regard to Article 6 Privacy Directive (*Storage of traffic data*) I/ERG stresses that the provisions should be tuned with laid down in the recent Directive on the retention of communications traffic data<sup>7</sup>. For example, the latter refers to an obligation to store traffic data for a specified period while the Privacy Directive refers to an obligation to erase traffic data. Article 13 Directive on privacy and electronic communications (*Unsolicited communications*) deals with spam and telemarketing.

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<sup>7</sup> Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

I/ERG believes that the following issues should be addressed in relation to spam:

- the concept of “subscriber” as recipient is an undesirable restriction and would be linked to the concept of “aggrieved party”.
- the prohibition of spam should be expanded to chain letters and virus-e-mail.
- prohibition of spam should be applicable to new forms of spam, such as spam over VoIP and mobile broadcasting.
- knowingly cooperating in sending or distributing spam/spyware/malware should be prohibited.
- The exclusion of liability of ISPs, based on their categorisation as ‘mere conduits’, as laid down in the E-Commerce Directive, should be taken into account, as it can severely limit the enforcement of anti-spam obligations.

*In relation to Direct marketing by phone (telemarketing or person-to-person voice telephony calls) the Privacy Directive gives Member States the choice to implement an opt-in or an opt-out regime in case of direct marketing. I/ERG supports further debate of the appropriate level of harmonisation of the applicable regime: whether opt-in or opt-out. In respect of opt-out this has worked well in some member states and a move to an all opt-in regime could be deleterious and disruptive to consumers in those countries which have grown accustomed to particular schemes that have proven to be effective. Therefore I/ERG would welcome further consideration on the dissemination of best practice.*

## ***Conclusions***

I/ERG welcome the review of the Regulatory Framework and many of the proposals made by the Commission. I/ERG is responding separately to the consultation on the Recommendation on Relevant Markets. In this response I/ERG have restated their view that the Framework is fundamentally sound and the key priorities in this review should be ensuring the continued effective implementation of the Framework, reducing the bureaucratic burden and addressing those weaknesses of the Framework which are at present preventing NRAs from optimally achieving the objectives set for them in the Framework Directive.

I/ERG look forward to the specific proposals from the Commission following the consultation and look forward to continued dialogue with the Commission and all stakeholders on the review of the Regulatory Framework.