

CONSULTATION ON REVISED ERG COMMON POSITION ON REMEDIES

Explanatory Memorandum

In April 2004, following public consultation, ERG published a document setting out its common position on appropriate remedies in the new regulatory framework (ERG (03) 30 rev1) to be applied with players found to have a position of Significant Market Power (SMP). Although this was a substantial document, it was recognised nevertheless that it would need to evolve in line with the experience of applying the new framework and with the development of the market.

Therefore, ERG decided at its Plenary in February 2005 to set up a project team to review the document with a view to consulting on revisions at the end of the year. This draft document “The approach to appropriate SMP remedies in the ECNS regulatory framework – revised ERG Common Position (ERG (05) 70 rev 1)” is now published for consultation.

Because the original document is fairly recent, it was recognised that a root and branch review of the whole document would be inappropriate. Instead, ERG decided at its Plenary in May 2005 that a limited review concentrating on a small number of topics was the appropriate approach. The topics selected for review, based on the experiences of NRAs so far and some suggestions by the services of the European Commission were:

- Emerging markets
- Ladder of investment
- Coherent price regulation
- Non-price discrimination
- Variations of remedies within a market or between termination markets
- Linkages between markets
- Removal of remedies

The amendments made in these areas are summarised below. Outside these areas, amendments have been made only to align the text with recent publications (including selected comments of the Commission’s Art.7 Task Force on notifications by NRAs) or to correct minor errors in the original document. The

Emerging markets and new infrastructure

Changes made to the original text in Text Box 1 (Chapter 1) are modest and are simply for clarification. According to Recital 27 of the Framework Directive, emerging markets are not to be subject to inappropriate regulation and the Text Box was created so as to illuminate this doctrine.

ERG has noted that there is some confusion over what is an emerging market. However, the criteria for suitability of markets for ex-ante regulation (the “3 criteria”) have been defined by the Commission (“Recommendation on Relevant Markets” – C(2003)497). It can be assumed that emerging markets would not normally satisfy those criteria. In an exceptional case where the criteria were satisfied by an “emerging” market and a position of SMP was identified, appropriate SMP remedies should be applied.

ERG has also noted that public discussion of this area sometimes confuses the separate (although related) issues of regulation of emerging markets and regulation

of new infrastructure. Where wholesale services provided over new infrastructure substitute for services provided over existing infrastructure (or amount to an evolution of such services), the new services would normally fall within a market already defined (in the Commission's Recommendation on Relevant Markets susceptible for ex-ante regulation). In such cases, the question of regulation of an emerging market is not relevant. See Text Box 5 in section 5.6.1 for discussion of this area.

Where new downstream services are provided over existing infrastructure, the text clarifies that it may be justified to regulate access to the relevant wholesale access services in order to prevent foreclosure of the emerging downstream service.

Where new infrastructure is used for the provision of wholly new retail services, the corresponding wholesale access services might properly be regarded as forming a new market which might (or might not) satisfy the 3 criteria. In the former case, ex ante regulation is considered to be justified if a position of SMP is established. In the latter case, it is not. Where ex-ante regulation is appropriate, the NRA retains a range of regulatory options so as to strike the right balance between incentivisation of investment and innovation (of all market players) and protection of consumer interests. In this context, some have argued for "regulatory holidays" from a formal access obligation. Others believe that holidays will lead to foreclosed downstream markets which will not be to consumers' benefit and are moreover unnecessary, since well-targeted access regulation will allow the SMP player to reap acceptable rewards for their investment. Text box 5 examines the arguments briefly but the appropriate regulatory treatment of such markets is a matter of current debate and ERG has not yet taken a definitive view.

Comments on the latter subject are therefore particularly invited.

Ladder of investment

A number of changes have been made in sections 4.2.3 and 5.2.2.3 dealing with the so-called "ladder of investment". These changes incorporate thinking already published by ERG in its Broadband Report (see reference) and underline the importance of coherence in regulatory policy across the value chain. They also clarify the circumstances in which regulated access at more than one point of the value chain may be necessary for some time.

Coherent price regulation

As noted above, this is an important issue in the context of the ladder of investment. More generally, there is a need for a degree of coherence across the entire range of regulatory responsibilities. This helps to give all market players confidence in the consistency of regulatory approach which, in turn, reduces the risk in their investment decisions and, accordingly, promotes efficient investment.

The revised text deepens the previous discussion about choice of approach for controlling prices. It examines more fully than previously the advantages and disadvantages of the various commonly-employed approaches and discusses the theoretical and practical criteria which need to be considered in making the choice in a particular case.

One possible type of pricing remedy which is so far lightly treated in the Common Position is an obligation to "offer reasonable prices". ERG would particularly welcome comments on what guidance might be offered so as to make the concept a meaningful one.

The main discussion of access pricing is to be found in section 5.2.2 but some changes have also been made, for clarification, to the sections on termination prices in sections 5.5.2 and 5.5.3.

Non-price discrimination

The additional text falling in sections 5.2.3 – 5.2.5 can be characterised under 3 headings. First, the text points out that it is often unclear in practice what types of behaviour would be regarded by the courts as “discrimination”; that such uncertainty detracts from efficient investment and innovation; and that therefore the regulator should make efforts to reduce that uncertainty as far as possible.

The text goes on to illustrate that point by discussing a number of practical ways in which non-price discrimination often takes place in practice and identifies suitable regulatory solutions to those specific problems which the NRA can put in place where justified and proportionate.

Finally, there is a discussion in section 5.2.5.7 of the important issue of network migration, not dealt with substantively in the previous Common Position. Efficient and effective migration processes are often a pre-requisite to effective competition between an SMP player’s downstream business and third party service providers and are likely to underpin a functioning ladder of investment.

Variations in remedies

A new section 5.6.1 deals with the circumstances in which it may be appropriate to consider varying the remedies imposed on SMP players within the same market (or across a set of similarly defined markets). These may arise from lack of homogeneity across the market in competitive conditions as this will not always imply that a further segmentation of the market is justified.

Text box 5 examines the question of the circumstances in which the advent of new or upgraded infrastructure might lead to a variation in remedies.

Other issues

Two short new sections (5.6.2 and 5.6.3) deal with issues not covered in the existing common position. The first examines the responsibility of the NRA to consider disruption to market players when proposing to remove or substitute an existing SMP remedy. The second consolidates guidance which has already been published elsewhere about the circumstances in which remedies which apply to services outside an SMP market may be imposed on linked markets in order to complete and make fully effective a package of SMP remedies.

Consultation

ERG would welcome comments from any stakeholder on the issues covered above and on the other changes to the text. All changes from the April 2004 Common Position have been highlighted.

ERG does not expect on this occasion to consider changes to unedited parts of the Common Position unless the issues arising are of vital importance.

ERG proposes to arrange a public hearing on the revised draft Common Position on 12 January 2006 in Brussels at 09h30 sharp to provide an opportunity to clarify for stakeholders its proposals and to help it understand stakeholder reactions.

If you wish to register, please send an e-mail to erg-secretariat@cec.eu.int stating that you wish to attend. Upon receipt of the registration request, you will be sent a formal invitation with the exact date. Please bring this invitation with you. You will need to show it at the entrance of the building. Please send registration requests before Friday 23 December close of business.

Written responses to the consultation document should be sent to the ERG Secretariat via e-mail (erg-secretariat@cec.eu.int) no later than 13 January 2006.

Comments will be published on the ERG web-site unless confidentiality is requested.