

**Public consultation on the draft joint ERG and
Commission Services approach to remedies
under the new regulatory framework**

5th December 2003

1. INTRODUCTION

Articles 7(2) and 8(3)d of the Framework Directive require the NRAs and the Commission to cooperate in a transparent manner on the consistent application of the provisions of the new regulatory framework, and in particular to seek agreement on the instruments and remedies best suited to address particular types of market failure.

In line with this obligation to promote a consistent regulatory approach, the ERG and the Commission Services¹ have prepared a draft document on a joint approach on appropriate remedies in the new regulatory framework. The ERG is publishing this draft document for comment in advance of the document being finalised. The final version of the document will take account of the submissions received where appropriate.

In order to ensure the maximum transparency of the process involved, interested parties are hereby invited to submit their views in writing to the ERG secretariat (at the e-mail address below) before close of business on the 19st of January 2004.

ERG Secretariat :
erg-secretariat@cec.eu.int

Comments will be made available to the ERG members, the representatives of the accession countries, and the Commission and unless marked as confidential, will be published on the ERG website (erg.eu.int).

Comments should be sent in English or any other official language of the EU.

Once the written responses have been received and analysed, a **public hearing** will be held in Brussels on 26th of January 2004 to provide interested parties the opportunity to present and discuss their views.

2. Structure of the draft document

The draft document is comprised of four chapters.

The first chapter provides a generalisation of the competition problems encountered in communications networks and services markets. These problems are associated with the vertical leveraging of market power, the horizontal leveraging of market power, single market dominance and two-way access.

¹ Commission Services from DG Information Society and DG Competition were involved in the drafting of this document.

The second chapter sets out the remedies that can be imposed on an SMP operator under the directives. It focuses on those remedies that are outlined in the Access Directive. These are transparency, non-discrimination, accounting separation, access to and use of specific network facilities and price control and cost accounting obligations. It also highlights the remedies that can be imposed on SMP undertakings according to the Universal Service Directive.

The third chapter outlines the principles that should guide NRAs in their selection of remedies. These are that remedies should be based on the nature of the problem identified. NRAs should support the transition to sustainable competition when infrastructure competition is feasible. When infrastructure replication is not considered feasible NRAs should focus on protecting consumers against potential abuses of market power. NRAs should produce reasoned decisions in a transparent manner; and remedies should be designed, where possible, to give the SMP operator strong incentives to comply.

The final chapter ties the previous three chapters together. It looks at the problems identified in chapter 1, and using the principles outlined in chapter 3 it attempts to match the competition problems normally encountered in communications markets to the available remedies.

3. Areas where submissions are particularly invited

In order to focus responses the ERG and the Commission Services would particularly welcome views on the following issues.

Chapter 1: Typology

- Do you agree that the description of the competition problems provides the requisite level of detail? If not, please highlight areas where you would like more detail to be included in the final document.
- Are there relevant examples of competition problems that are not covered by this framework? If you believe that there are, please provide details.

Chapter 2: Remedies

- Do you agree with the description of remedies provided, in particular, does it provide the requisite level of detail?

Chapter 3: Principles for imposing remedies

- Are there any further principles, in addition to those set out in Ch. 3, that you wish to propose? If so, please justify them on the basis of the Directives.
- Looking at the objectives in Article 8(2) of the Framework Directive, what are your views about how NRAs can balance short term and long term objectives? Do you think that there are any trade-offs between short-run service competition and long run infrastructure competition? If yes, please highlight

potential areas and provide relevant examples. In this context, what are your views on the approach that NRAs should take in relation to (short term) business failures?

- Do you agree with the proposed treatment of emerging markets? If not, please provide details.
- Are there any special considerations which should be taken into account in designing appropriate and proportionate remedies for the markets in accession countries?

Chapter 4: Matching problems and remedies

- Do you agree with the description of problems and related remedies? If not please provide an alternative analysis.
- Do you agree that the document offers sufficient guidance concerning the approach on remedies to be taken by NRAs? If not, please highlight those areas where you would wish to see more guidance provided.
- Does the document provide sufficient guidance on which particular cost accounting methodology would be appropriate for those competition problems for which NRAs may consider price regulation?² If not, please highlight those areas where you would wish to see more guidance provided.
- Is sufficient guidance provided in relation to mobile call termination in chapter 4? If not, please outline what issues would require further elaboration. Please express your views on the principles that should guide NRAs in dealing with new entrants and/or smaller players in mobile termination markets.³
- Does the document provide sufficient guidance with the text boxes on bitstream, re-selling access lines and international roaming in Ch. 4?⁴
- Do you agree that the principles developed also apply in cases of joint dominance? Do you have observations regarding specific remedies that may be appropriate in situations of joint dominance?

² The ERG and the Commission services are reviewing the Recommendation on cost accounting and accounting separation. The results will be submitted to public consultation in the first half of 2004.

³ Based on previous work, the members of IRG have developed principles of implementation and best practices on the application of remedies in the voice call termination market, which can be found at http://irgis.icp.pt/site/en/conteudos.asp?id_conteudo=21297&id_l=274&ln=en&id_area=277&ht=Documents. This PIB does not pre-empt the present consultation on the joint document on remedies.

⁴ The ERG has taken an interim common position on bitstream access, which can be found at erg.eu.int. This interim common position does not pre-empt the present consultation on the joint document on remedies.

- Do you think that the discussion in Chapter 4 will assist NRAs in achieving a consistent application of the framework? In particular, is it sufficient to focus on harmonisation of outcomes or should there also be harmonisation of regulatory approaches?

4. Other comments

Please provide a concise description of any other issues that you believe the document should address or a critique of any other aspects of the document that you consider relevant. In doing so please refer to actual or potential problems encountered in electronic communications markets, as well as to relevant case law and other precedents.