



## **GSM Europe**

The European interest group of the GSM Association

<http://www.gsmeurope.org>

# **GSM Europe comments on the ERG Remedies Paper**

## **1. Introduction**

GSME welcomes the intention of the Commission and the ERG to find a consistent approach to the application of remedies, which is specific enough to provide practical guidance and flexible enough to leave room for regulatory differentiation according to circumstances and markets. We understand that the ERG call for input is only the first step in formulating guidance on this subject and that there will be an opportunity to make further more detailed submissions on an ERG / EU-Com draft paper at a later date. Hence, GSME have responded to this consultation by outlining general principles and procedures to be followed and thereby trying to better understand the issues involved with the application of remedies under the New Regulatory Framework.

Both the Access Directive (22/2002/EC) and the Universal Service Directive (19/2002/EC) provide for a range of regulatory instruments that NRAs “shall” [imperative in Art. 8 Access and Art. 17 US] apply where justified and proportionate to remedy an identified market failure. Under the new Directives, the guiding principle for the imposition of specific remedies is the principle of proportionality. In view of the wide discretion that NRAs enjoy under the new Directives, guidance by the ERG and the Commission on how this principle will be applied and which minimum set of criteria should be examined by NRAs when imposing remedies will be most helpful to ensure consistency of approach between Member States. Of course, such guidance cannot in any way restrict rights conferred by Community law on individuals and undertakings and is without prejudice to the application of the competition rules of the Treaty and to any interpretation of the New Regulatory Framework or the competition rules that may be given by the European Court of Justice and the Court of First Instance of the EC.

GSME would like to highlight the obligations imposed on NRAs in deciding whether or not to impose ex ante regulation and to set out broad principles to which NRAs must adhere if they are to comply with the regulatory objectives in Article 8 of the Framework Directive and spirit of the new regulatory regime. Despite the need for a harmonised approach, NRAs must always take decisions based on specific national situations by allowing for divergences in the national markets being considered. In particular they should bear in mind that the same remedy may bring about significantly different results in different Member States leading to more divergent markets.

It is essential that NRAs follow the mechanism indicated in the new Directives to ensure a consistent approach to market analysis. This process is composed of a sequence of phases where the completion of one constitutes the beginning of the next. GSME emphasises the importance of NRAs following the process:

1. Determination of the relevant markets (products and geographical reach)
2. Analysis of competition in that market (level of competition and then identification of any market failure)
3. Determination on any operators with SMP
4. Analysis of the option to solve the identified failures through use of competition law
5. Determination of regulatory measures
  - Proportionality test (including a cost benefit analysis)
  - Duration of its imposition

## **2. The Decision to apply remedies**

Recital 25 of the Framework Directive states that ex ante obligations may be needed in certain circumstances only, to ensure development of competitive markets and Recital 27 provides that it is essential that they should be imposed only where there is not effective competition, i.e., where there is one or more undertakings with SMP and where national and Community competition law remedies are not sufficient to address the problem.

There needs to be clear guidance as to the circumstances in which national and Community competition law will be deemed insufficient to address market failure, and on the definition of ‘sufficient’ in this context.

It is important that the ERG, the Commission and the NRAs recognise that currently and for some time to come, there is a gap to be bridged between the principles of the New Regulatory Framework and their application to the markets identified for sector-specific regulation.<sup>1</sup> As long as the sufficiency of competition law has not been examined in detail either at European or at national level, NRAs must therefore consider, in every market situation, whether competition law remedies may suffice to solve the problem in the market before sector-specific remedies can be imposed. This is especially important in relation to markets, which have evolved in a competitive environment and have market characteristics distinct from the traditional fixed telephone network. This is the case, in particular, for mobile markets, which have been characterised by infrastructure competition from the beginning and have developed favourably without “core economic regulation” for more than a decade.

---

<sup>1</sup> It is also far from certain, whether at national level a thorough analysis by NRAs of the criteria for application of sector-specific regulation will take place. However, such an analysis becomes necessary where an electronic communications market at national level does not satisfy the three criteria even though it is listed in the Annex to the Recommendation, i.e. where an NRA finds that at national level there are either no high durable barriers to entry or the relevant markets tends towards effective competition or competition law remedies suffice to address the possible market failures.

The primary objective of a NRA imposing remedies, or indeed taking other action, should be to ensure choice, price and quality for end-users, which can in fact only be measured at retail level. The situation on retail markets is therefore relevant for the decision whether to impose, maintain or withdraw remedies at wholesale and/or retail level.

Therefore, when examining wholesale markets, market failure should always be examined in the light of the actual market outcome of the corresponding retail market(s).

Indeed, the Commission in its Recommendation on relevant markets of 11.02.2003 has adopted a similar approach. The explanatory memorandum sets out that "the starting point is a characterisation of retail markets, following by a description and definition of related wholesale markets [...]"<sup>2</sup>. This relationship between retail and wholesale markets is crucial also with regard to the imposition of remedies to avoid unfocused and unnecessary intervention at wholesale level.

Where there is doubt as to the need for regulation, NRAs should avoid ex ante regulation. The option of conducting a further market review is always available to NRAs if subsequent experience reveals market distortions that may justify regulatory intervention. Indeed, NRAs are under an obligation to review markets regularly, therefore they should regulate only as far forward as they can foresee with reasonable certainty and the NRAs should attach a sunset clause to any imposed remedy. Experience shows that the market positions of operators can change rapidly as can the competitive nature of the market itself. This can mean that regulations soon become out of date and can be harmful to competition and the market.

### **3. Application of Remedies – Proportionality**

The New Regulatory Framework requires that any obligation imposed shall be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive. The European Court of Justice has expressed the concept of proportionality as meaning that:

".. measures [must be] appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued."  
(Judgement of the Court (Fifth Chamber) of 13 November 1990 - R v MAFF, ex p Fedesa [Case C-331/88])

GSME submits that there should be a clear undertaking on the part of the ERG to apply a proportionality test (including a cost-benefit analysis) to each competition problem in the market where effective competition does not exist and there is also a real concern, based on appropriate analysis, that the stand alone application of the competition rules might not suffice. Within this analysis, the parties involved have to be granted their rights in a due process. Transparency of the decisions has to be guaranteed. Predictability and legal certainty are of utmost importance in creating a

---

<sup>2</sup> Explanatory Memorandum on the Commission Recommendation on Relevant Product and Service Markets, p. 7-8 and 15

favourable environment for investments. The proposed proportionality tests including the cost-benefit analysis therefore have to be accompanied by the requirement for NRAs to provide a full reasoning for their decisions. Such a test should address the following questions.

### **3.1. Is the imposition of an SMP obligation appropriate and necessary to achieve a legitimate objective?**

Due to the forward-looking nature of ex ante regulation it is essential that adequate consideration is given to the full extent of the future impact of remedies taking especially into account all related costs and benefits.

- 3.1.1. Assuming that a market failure of some kind has been identified, NRAs should consider whether the market without regulatory intervention is becoming more or less competitive and if so, how quickly. . This is because it is important that any obligations imposed are effective and actually address the problem as it manifests itself to users.
- 3.1.2. In considering remedies, if the market is moving towards increased competitiveness sufficient time should be given for the market to deliver the expected improvements. This is because under the New Regulatory Framework competition is the preferred way of addressing perceived problems.
- 3.1.3. The impact of the remedy on other markets should be carefully considered, as there is the possibility that unintended effects may occur on adjacent markets.
- 3.1.4. In particular, it should be noted that the Directives set out categories of obligations that have different affects. Therefore, an NRA may choose from a whole range of obligations from for example "transparency" or "non-discrimination", according to the market failure identified, always taking into account the minimum level of regulatory intrusion..
- 3.1.5. In addition it is important that remedies are focused on the problem identified and do not become the vehicle for intervention relating to more general concerns that regulators may have. An (extreme) example of this would be remedies that are directed at changing the fundamental structure of the industry when this would go far beyond the market problem identified. The primary aim of the remedies is to ensure consumer benefits, the measures must only extend to the point where they address the specific segment of consumers who are subject to the market failure that has been identified.
- 3.1.6. Finally, in considering the appropriateness of remedies, account needs to be taken of certain external policy choices that have been made (e.g. level of infrastructure competition) which affect the way markets develop and their impact should be factored in to any regulatory assessment.

### **3.2. Are the costs of imposing the obligation less than the benefit expected from it?**

3.2.1. To ensure proportionality it is essential that a cost-benefit analysis of regulatory action be undertaken. Every measure should be analysed with regard to its long-term impact on the overall electronic communications market. To achieve this NRAs will need to assess the regulatory options by undertaking the following actions:

3.2.1.1. Clearly define whether and to what extent there is a market failure that they want to remedy.

3.2.1.2. Undertake a forward-looking long-term analysis of allocative, productive and dynamic efficiency on a market with and without the envisaged intervention.

Measuring the costs and benefits of a measure is a precondition to establishing whether it is a suitable remedy. Where a measure is found to produce higher overall costs than benefits, it must be abolished or, in case of a new obligation, it must not be introduced. Measures that either do not serve to remedy the identified market failure or produce higher costs than benefits are not suitable and therefore not proportionate. This may be the case for requests for access by operators which either are not triggered by a real demand or which prospectively will not contribute to lower prices, more choice or better quality of products for end-customers in the first place. As a result of this examination, the NRA will be able to assess the appropriateness or otherwise of a remedy and determine whether in fact regulatory intervention would exceed the benefits expected and therefore that no action should be taken.

### **3.3. Is the chosen measure the least onerous?**

3.3.1. Careful consideration must be given to the relevant impact of remedies on the market under consideration. The least onerous remedy in one Member State may not be the least onerous in another (due for example to geographic reach, number of operators, degree of possible substitution). This suggests that a simple list of remedies and their perceived impact is not a suitable way of ensuring a consistent approach.

3.3.2. The examination of proportionality and the necessity of a measure requires a classification of remedies in view of their intrusiveness with regard to the operator concerned in particular and the market in general. Where there are several measures that are expected to produce benefits and remedy the market failure identified and a degree of uncertainty remains as to which of the measures is better suited to address the market problem, the NRA should choose the measure which is least intrusive in view of the rights of the undertaking concerned. This may mean sacrificing rapid, short term fixes for slower-acting remedies that produce longer term benefits.

## **4. Conclusion**

GSME believes that the New Regulatory Framework means applying ex ante regulation only where it is absolutely necessary. Where other tools are seen to be successful in addressing a problem, it is unnecessary to regulate. Therefore, ex ante regulation should be a last resort, used only where its absence has led to and continues to cause proven market failures that competition law is insufficient to address.

Where there is doubt as to the need for regulation, NRAs should exercise forbearance in view of the fact that they always have available the option of further market reviews.

In summary the main principles should be as follows:

- 4.1. NRAs should seek to apply the minimum regulation that addresses the problem. The onus should be on allowing the market to operate without interference. Only where absolutely necessary should NRAs intervene in a market. Any intervention necessarily has distortive effects, some of which may be unplanned or unintended. These distortions should be avoided and this means regulating at the minimum level to achieve the desired outcome.
- 4.2. In choosing the least onerous remedy, NRAs should examine the level of regulatory intervention associated with a particular course of action, both in relation to the undertaking(s) involved and in relation to the market more generally
- 4.3. NRAs should impose remedies only for such a time period for which they can foresee, with reasonable certainty, that problems will remain (using sunset clauses).
- 4.4. Only remedies that promote competition should be chosen as remedies that replace competition would lead to the necessity of indefinite regulation.
- 4.5. Adequate analysis must be undertaken to understand the forward impact of a proposed remedy in relation to other options, adjacent markets and in terms of overall cost benefit.

GSM Europe

4 July 2003