



EUROPEAN COMMISSION
Information Society and Media Directorate-General

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SECOND PHASE PUBLIC CONSULTATION

on a

Proposal for a Regulation (EC) of the European Parliament and of the Council on mobile roaming services in the Single Market

This is a working document of DG Information Society and Media, and is without prejudice to the final position of the European Commission.

Second phase public consultation on a Proposal for a Regulation (EC) of the European Parliament and of the Council on mobile roaming services in the Single Market

The European Commission intends to come forward, before Summer 2006, with a proposal to the European Parliament and Council for a Regulation pursuant to Article 249 of the Treaty to regulate prices for mobile roaming services in the Single European Market. The Regulation would have as its basis Article 95 of the Treaty.

The Commission published on the Europa website a first call for comment on 20 February 2006 on the form regulation could take, ie whether wholesale or retail charges or both should be regulated; the most effective and simple regulatory and pricing mechanism (or control) to achieve the desired objectives; and the impacts, positive and negative, that regulation could have.

The Commission has to date received 51 responses to this call: 25 from market players, one from the European Regulators Group, one from a national regulatory authority (NRA), six from ministries or government departments, one from a member of a national parliament, seven from user or trade associations, and 10 from individual consumers. Those comments which the authors have expressly agreed can be made public have been published on the Europa website¹.

Given the specific expertise of the national regulatory authorities of the Member States, acting together in the European Regulators' Group (ERG), which was set up to advise and assist the Commission, the latter will take particular account of the data that the Group may bring forward during the course of the drafting of the proposal for a Regulation and the accompanying impact assessment report.

The Commission services now invite interested parties to provide comment on a specific concept for a regulation, as set out below.

1. Why the need for regulation?

The EU regulatory framework for telecoms services² is designed to ensure that competition drives the provision of quality services, choice and lower prices to consumers. A series of reports³ on the implementation of the framework shows that consumers are indeed benefiting from ever lower prices for fixed and mobile voice services, with one notable exception, international roaming.

¹ http://europa.eu.int/information_society/activities/roaming/index_en.htm

² Directives 2002/19/EC, 2002/20/EC, 2002/21/EC, 2002/22/EC and 2002/58/EC of the European Parliament and of the Council

³ Most recently, the 11th Implementation Report, COM(2006) 68

For several years now, many stakeholders have complained that consumer prices for international roaming in Europe are unjustifiably very high, and show no signs of diminishing. Consumers and business users have been particularly critical, as has the European Parliament, which held a public hearing on the issue in March 2005. A further cause of user and consumer concern is that travellers face charges for *receiving* mobile calls while they are abroad, contrary to the usual principle in Europe that the person *making* the call pays for it (“calling party pays” principle).

The Commission has in recent years given a number of warnings in relation to high prices for roaming. These have taken the form of specific calls from the Commission for action by the industry to remedy the situation, and action under the EC competition rules. For instance, the findings of a sector inquiry on international roaming in 2001 stressed the high roaming tariffs applied across the EU, among other problems. More recently, in 2004 and 2005, the Commission opened formal proceedings and sent statements of objection to three undertakings alleging that their wholesale tariffs on international roaming were abusive and thus infringed Article 82 of the Treaty. These operator-specific proceedings are continuing, following submission of the parties’ defence and pending a final decision by the Commission. At present the Commission is also investigating certain alliances between EU operators and related agreements under Article 81, which bans restrictive agreements.

The Commission has also attempted to stimulate competition in this market by enhancing consumer transparency through the publication of a consumer-oriented website⁴. The site not only corroborates the fact that these charges are in many cases very high, but shows a range of prices across the EU that cannot be justified for calls with identical characteristics in terms of quality, time of day, and duration. The latest version of the site, made available on 28 March, confirms that little progress has been made on these charges, and that in fact retail prices have remained at virtually the same high level since the site was first published in October 2005. Even where special tariff packages are offered, the consumer has in most instances to opt in and in some cases to pay a fee.

International roaming services differ from virtually all other telecoms services in one respect. The customer buys the services of an operator in one Member State; however, when the customer travels abroad, he or she is connected to the network of a foreign operator, which provides facilities for making and receiving calls and bills the home operator for this ‘wholesale’ service. The price of these wholesale services has been traditionally high, with high retail charges to the customer when he or she is billed by the home operator.

National telecoms regulatory authorities, which are required under the EU framework to define and analyse telecoms markets and impose regulatory obligations where competition is not effective, have so far been unable to act in relation to this particular market. The fact that the components of the service are made up of elements supplied in at least two Member States, the home and the visited, means that no one national regulatory authority has powers in relation to both price components.

In these circumstances there is a risk, given the calls from national regulators for action to be taken in regard to high consumer prices, that divergent national measures could be put in place which could act as a barrier to the development of the single market for

⁴ http://europa.eu.int/information_society/activities/roaming/index_en.htm

telecommunications services, and more particularly roaming services across borders in the EU.

The issue is now particularly pressing in the light of the call from the European Council, meeting on 23 – 24 March 2006, for roaming prices to be brought down in the interests of the competitiveness of the European economy.

The Commission accordingly now intends to act to ensure a resolution of this issue at European level by means of a single market measure. This will be without prejudice to any current or future action under the competition rules of the EU.

2. What are the objectives of the proposed regulation?

Any action at national level to regulate or legislate for the issues raised here could focus on retail prices, not least through the application of national provisions on consumer protection. In order to avoid diverging approaches being taken at national level, the Commission's objective at this stage is, then, first to regulate retail prices and to bring about substantial reductions in retail prices for consumers. At European level, despite claims by the industry that the wholesale market is becoming more competitive, the evidence suggests that if savings are being made at wholesale level these are in many cases not being passed through to the consumer at retail level.

In adopting regulation of retail prices for roaming services in other EU Member States, the Commission would wish to ensure that prices for consumers are transparent, readily comprehensible, and parallel to the extent possible those domestic prices (ie prices in the consumer's home Member State) to which the consumer is accustomed.

Action would also be required to bring down charges at wholesale level, since otherwise operators could be faced with a situation where they were forced to sell retail roaming services at a loss. In other words, with retail regulation alone, the retail prices operators would be allowed to charge could be brought down but the wholesale prices could remain high. Faced with this situation many operators could cease to provide the service at retail level.

3. What would be the scope of the regulation?

3.1 Roaming calls

The regulation would apply to three types of roaming calls – calling home from the visited EU country; making a local (national) call within the visited EU country; and calling to a third EU country while roaming.

The regulation would apply only to the price of calls made to destinations within the EU and, by extension, the EEA, given that operators cannot entirely control the costs of sending calls to jurisdictions outside the single market.

3.2 Calls received while roaming

Because of the fact that travellers face charges for *receiving* mobile calls while they are abroad, contrary to the usual principle in Europe that the *calling party* pays, the regulation would also abolish retail charges for calls received by citizens travelling in another Member State.

3.3 Other services

The concerns brought to the Commission to date have related almost exclusively to mobile voice services. The possibility of including SMS and other data services within the regulation may need to be re-evaluated in the light of the responses to this public consultation.

4. How could the regulation work?

4.1 Roaming calls - retail

At this stage the Commission's services' preferred approach to the regulation of roaming calls, in line with the objectives described above of transparency, comprehensibility for the consumer and parallelism with home-country prices, is to 'peg' retail roaming prices to the customer's home prices for comparable domestic mobile services.

Under this 'home pricing' approach, a Belgian customer, for example, roaming in Spain and making a local call (i.e. a call to a Spanish number) would be charged a rate not exceeding the rate (as charged by his or her home network) for a local call in Belgium. The same customer roaming in Spain and making a call home to Belgium (i.e. a call to a Belgian number) would be charged a rate not exceeding the rate (as charged by his or her home network) for an international call⁵ to Spain from Belgium.

Example of a Belgium customer roaming in Spain	
Type of roaming call	'Home pricing'
Making a call home	Customer is charged an international rate –Belgium to Spain
Making a local call	Customer is charged a local call rate – local Belgian rate
Making a call to another EU country	Customer is charged the relevant Belgian international rate to that country
Receiving a call	No retail charge

4.2 Roaming calls – wholesale

⁵ Not a roaming rate but the rate that a Belgian subscriber would pay for making an international mobile call to Spain from Belgium

Under this approach to retail regulation, action would need to be taken in parallel to ensure that prices for the services provided by the visited network ('wholesale' prices) were also regulated, otherwise market distortions could ensue.

Wholesale regulation could take the form of cost-orientation obligations, in particular in relation to calls assimilated to local calls in the home country, or a capping mechanism, possibly on a transitional basis until regulatory authorities had developed the cost models and enforcement mechanisms to verify and implement cost orientation.

4.3 Received calls

As stated above, the regulation would abolish charges to consumers for receiving calls while roaming in another EU Member State.

While settlement of charges made at wholesale level for the termination of calls in the visited network, as well as for the termination of calls in the home network, would continue in the normal way, it would no longer be permissible for operators to levy charges on end customers receiving calls while roaming in the EU. Moreover, callers originating calls in the home country should not face any additional charge as a result of this provision.

5. Assessment of impact of proposed approach

The Commission services will assess the impact of this approach, in accordance with the rules on Better Regulation⁶, in terms of the following criteria:

- Outcomes for users and consumers in terms of prices
- Financial impact on the sector
- Effects on competition
- Effects on levels of service at retail and wholesale level
- Enforceability at European and national level
- Overall impact on the competitiveness of the European economy

6. Address for responses

⁶ Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission, COM(2002) 704; Better regulation for growth and jobs in the European Union, COM(2005) 97

Contributions to this public consultation exercise should be sent by Friday 12 May 2006 in electronic format to

info-roaming@cec.eu.int

marked "Second phase public consultation" in the subject line.

Contributions will be placed on the Europa website unless confidentiality is specifically requested.

Annex 1 - Synthesis of contributions received following the call for
comment launched on 20 February

Proposed legislative initiative on international roaming prices

Summary report of contributions received to the ‘Call for Input’

1. INTRODUCTION

Following Commissioner Reding’s announcement that she intended to propose a Regulation under Article 95 of the EC Treaty to address the continuing high level of prices for mobile international roaming services in the EU, DG Information Society launched a Call for Input on the scope, form and potential impact of such a regulation. The deadline for responses was 22 March 2006.

In total just over 50 responses were received, including two contributions from regulators (a submission by the European Regulators Group (ERG) and a separate submission from the Spanish regulator CMT), six contributions from national Ministries, one from a member of a national parliament, seven from Associations representing the interests of consumers or operators, 25 submissions from market players and some 10 responses from members of the public.

A list of respondents who submitted substantive, non-confidential input can be found at the end of this document.

2. REGULATION –YES OR NO?

In general terms it can be said that the Commissioner’s initiative to focus attention on the issue of international roaming prices was broadly welcomed by the national Ministries which responded, by the NRAs (by means of the submission from the ERG), by the consumer and user associations (INTUG, BEUC and German Telecom e.V.), by members of the public and by some smaller mobile operators who saw themselves at a disadvantage by reason of their limited bargaining power at wholesale level (due to their limited size and independence from the major pan-European operators or alliances).

Those who supported in principle the idea of a Regulation to address the international roaming charges included the ERG, the Ministries from Denmark, Ireland and Norway, the user and consumer associations and the majority of members of the public who responded.

On the other hand, the Spanish regulator CMT and the associations representing operators (the GSM Association, ETNO, BITKOM (German e-communications and new media association) and VAT (Austrian telecom operators association)) were opposed to a Regulation, as were the large majority of individual operators who responded.

Other approaches suggested

The national Ministries from the United Kingdom and Finland indicated a preference for alternative solutions to the problem of high roaming prices, at least in the first instance. The Finnish Ministry favoured an approach based upon an SMP analysis of a cross-border market for international roaming services, while the UK’s DTI favoured voluntary or co-regulatory solutions focussed on robust arrangements for price transparency. The CMT (Spanish NRA) also favoured action under the existing regulatory framework,

involving market analysis of the wholesale national market for international roaming (market 17) or the definition of a new national or trans-national relevant market.

The operators' associations (GSMA and ETNO) and a large number of respondent operators recommended the completion of the NRAs' reviews of market 17 currently under way. BITKOM also referred to the possibility of defining a trans-national market under the existing regulatory framework.

Some operators also recommended action under the competition rules where appropriate to address anti-competitive or discriminatory behaviour in the international roaming market.

Much emphasis was placed by operators opposed to a Regulation on the effective competitiveness of the roaming markets at wholesale and retail levels, evidenced in their view by the results to date of market analyses by NRAs, price reductions and the introduction of new tariff packages aimed at roaming customers, traffic direction and volume discounts at wholesale level, as well as the challenges from new technologies such as WiFi and VoIP.

One or two respondents referred to the possibility of mandating some form of wholesale access to the visited network for other operators as an alternative to regulating international roaming prices themselves. One market player argued that price regulation could stifle the MVNO business model and make new market entry more difficult.

3. WHOLESALE OR RETAIL REGULATION OR BOTH?

Of those who indicated a preference for the type of regulation to be imposed, only a small number expressed a wish to see regulation at both wholesale and retail level (Irish Ministry, INTUG, Telecom e.V., one smaller operator).

The great majority of respondents who addressed the issue favoured the imposition of regulation at wholesale level only (ERG, Danish, Norwegian, Finnish and United Kingdom Ministries), at least in the first instance and in the absence of clear proof that wholesale regulation was not working. The ERG argued that regulation at wholesale level only was in line with good regulatory practice and the principles in the existing regulatory framework.

Almost all operators who responded on this point favoured wholesale level regulation only, although the large majority of those did so only on the hypothesis that some form of price regulation was inevitable. The ERG and some operators suggested that if there was to be retail regulation, then wholesale regulation would also be required, in order to prevent negative margins or price squeeze.

The CMT indicated a preference for retail regulation only, as a last resort, arguing that competition is not effective at retail level and that wholesale regulation alone will not guarantee a decrease in retail prices.

4. COMMENTS ON POSSIBLE PRICING MECHANISMS

Mechanisms for wholesale regulation

While considering the comparative merits of a variety of options, the ERG favoured a uniform EU-wide wholesale price cap mechanism; set (for example) at twice the average of EU mobile termination rates (MTRs). This was on the basis that the cost of mobile call origination is very similar to and no higher than the cost of mobile termination. They also suggested that it may be prudent to take the 75th percentile of average MTRs, in order to provide confidence that the level was not set at below operator costs. The ERG stressed the need for flexibility in the mechanism used, which militated against tying the wholesale prices directly to domestic charges.

The Norwegian Ministry stated that a price cap by reference to national wholesale access prices would risk distorting domestic retail prices and suggested that an EU-wide benchmark price cap on wholesale charges was therefore the best option, allowing competition to deliver lower prices in time and leaving some flexibility for market dynamics to evolve. The Finnish Ministry also expressed a preference for a framework involving a form of best practice benchmarking, leaving some room for national adjustment.

Most operators, being opposed to any form of price regulation, did not comment on the specific mechanisms that might be used to regulate at wholesale level. Two operators, however, explicitly suggested an MTR-based mechanism to be the most appropriate. Some others (such as Vodafone) stressed the need to ensure that any price control imposed allowed operators the flexibility to compete and differentiate their offers below the threshold set.

Telecom e.V. suggested that for wholesale prices a comparison should be made with fixed network charges with a small mark-up permitted; alternatively the price control could be based on the costs of the mobile operators, based on best practice.

Telefónica argued that cost orientation of wholesale tariffs was the most severe regulatory obligation that can be imposed and could only be done on the basis of market analysis which showed the proportionate need for such a measure; it was impossible for the Commission to determine a cost-oriented price cap in the time available; if this was left to the NRAs, there would be disparities in the time taken and the results achieved, distorting competition across the EU. Moreover, the most efficient NRAs would disadvantage their own operators to the benefit of operators and end-users in other Member States.

T-Mobile indicated that a price cap would reduce the scope for negotiation of rebates on wholesale rates. One operator⁷ argued that to impose the same prices for international roaming as apply to national calls, given the different cost structures involved, would be contrary to the non-discrimination principle and disproportionate.

⁷ An operator which did not lift confidentiality

A number of the smaller, non-aligned⁸ operators suggested that a non-discrimination obligation should be imposed at wholesale level, to ensure that those who did not have an international footprint or membership of a cross-border alliance were not disadvantaged in the negotiation of wholesale roaming rates. In one case the operator suggested this obligation should be accompanied by accounting separation requirements.

Mechanism for retail regulation

While not favouring the imposition of retail price regulation, at least in the first instance, the ERG did propose that an authoritative index of retail roaming tariffs was necessary in order to monitor retail price movements on an ongoing basis. Such an index could for example be based on total retail roaming revenues divided by total retail roaming minutes. Such an approach would need to be backed up by data provision obligations on mobile operators.

The ERG was not in favour of mechanisms which would tie the retail price for international roaming to the retail price of other mobile services, given the likelihood that this would lead to distortions of the prices of the tied services. They also stated the need to ensure that the retail charge control be set above the level of rates for domestic calls, in order to avoid the risk of arbitrage. They referred to the possibility of tighter national caps than the EU threshold could be set by NRAs where appropriate.

The CMT was against the option of a single uniform European retail price as it may create distortion among operators and end users. They proposed a formula under which the maximum retail price of the home operator would be equal to the average retail price in the visited country for a similar international call plus a mark-up allowing flexibility to take account of different national conditions.

INTUG recommended that retail prices be pegged to the cost of mobile to fixed calls within the home country.

The VAT (association of Austrian new entrants) argued that retail price regulation based on tariffs for domestic calls would favour the more inefficient, uncompetitive operators and countries and disadvantage those with the lowest domestic tariffs. One operator argued that international roaming involves specific cost element which are not present in national calls, and this should be taken into account.

Similarly, Telefónica stated that the cost of international roaming services wholesale substantially higher than the cost of providing domestic international mobile calls, and that operators without an EU footprint who couldn't internalise their costs may be foreclosed from providing international roaming services. Operators needed to be afforded the maximum flexibility to differentiate their offers and adapt their pricing structures to supply and demand.

One operator argues that retail regulation (if any) should be asymmetric, so that it did not apply to the smaller, most recent entrants to the market. That operator also favoured the regulation of the retail margins applied to wholesale charges.

⁸ In this document the term 'non-aligned' denotes operators which are not part of an international group of mobile companies with operations in several member states and are not members of a cross-border alliance.

Mechanism for received calls

Most of the responses did not explicitly address the issue of the treatment of the charges levied on the roaming customer for received calls. INTUG, however was clear that such charges should be abolished. The Norwegian Ministry, on the other hand, suggested that the issue should be tackled through a transparency obligation.

Orange states that abolishing the charges for receiving roaming calls does not take account of the costs (transit and termination) involved and would therefore be inequitable. Orange also refer to the complexity, cost, price transparency and privacy issues involved that would be in informing the calling party that the person called is not on his home network. One operator also argued that abolishing such charges would be disproportionate and illegal, since it would require the home operator to provide a service below cost. It could also involve large losses in revenue and cause unpredictable changes in calling patterns.

5. IMPACT OF REGULATION

Impact on consumers

Those who supported the idea of a regulation emphasised the beneficial effects that a lowering of international roaming charges would have on consumers and business users, not only with regard to the actual level of expenditure incurred, but also the transparency and predictability of that expenditure (INTUG, BEUC). The regulation would also increase the volume of communications between Member States, thereby contributing to a general improvement of economic and social development (Irish, Norwegian Ministry) and the development of the internal market (INTUG, Telecom e.V.), particularly of benefit to SMEs and the tourism industry (Finnish Ministry).

On the other hand a number of authorities (ERG, Norwegian, Finnish, UK Ministries) stressed the need to ensure that price regulation of international roaming services did not lead to distortions or increases in retail prices for domestic mobile services.

This was also a major theme for operators and their associations who opposed any price regulation. Vodafone stressed the potential “waterbed” effect of tying of the prices of different services, which may force operators to increase prices for other services, referring to experience in this area in Australia and New Zealand. Many operators contended that retail international roaming services were part of an interdependent package of services purchased by end users in the general mobile services market, and therefore any price regulation of roaming would have knock-on effects on the commercial conditions of other services. Some referred in particular to the difficulty in predicting and guarding against the unintended consequences of price regulation. Some also predicted a stifling effect on product innovation and quality of service (e.g. through ‘least cost routing’), and on the ability of operators to adapt their offers to meet particular user demands. Some operators referred to the risk of termination of roaming services if the economics of service provision no longer functioned. One suggested that those on lower incomes would bear the brunt of any consequential price rises in the retail market.

BEUC referred to its identification of increases in the level of domestic bank transfer charges in some counties following the adoption of Regulation 2560/2001 on cross-border payments in Euro, and called on the Commission to carefully consider this aspect when devising its proposals.

Impact on operators and investment

Some respondents (e.g. Finnish, Norwegian Ministries, INTUG, members of the public) pointed to the likelihood that decreases in roaming prices would stimulate demand and traffic volumes, which would compensate for the lost revenues resulting to the mobile operators from the lower retail prices. The Norwegian Ministry referred to a study on use of mobiles abroad which suggested that consumers would use their phones more if they knew that prices were lower.

The CMT recommended that the Commission take account of the different impact of regulation on operators in different Member States, due to the different traffic flows of international roaming calls. They referred to the impact that seasonal peaks in roaming traffic may have on the costs and investment needs of certain operators.

The ERG and some operators (e.g. Orange, Vodafone) referred to the need to ensure that arbitrage opportunities did not arise as a result of the level of different price controls, thereby distorting the wholesale and retail markets. One operator referred to the risk that end users might acquire retail relationships with operators in other countries with low network investment needs and correspondingly low prices and roam permanently on the networks of operators who had higher costs and prices.

The VAT suggested that price regulation based on domestic tariffs would favour inefficient, uncompetitive operators with higher domestic tariffs. Many of the operators opposed to price regulation argued that it would distort competition between operators and limit their ability to differentiate their services.

Many of the smaller, non-aligned operators were concerned that they might be disproportionately disadvantaged by price regulation, since unlike operators with an international footprint they would not be able to internalise the wholesale costs of providing international roaming services. This could result in a margin squeeze between their wholesale inputs and their regulated retail prices. Some even suggested that wholesale offers to non-associated companies in other countries might be withdrawn or that smaller operators might be forced to exit the market. Transatel and Travelling Connect argued that price regulation could stifle the development of alternative forms of mobile service provision, such as the MVNO business model or offerings involving WiFi capabilities, and new entry into the mobile services market.

A significant number of operators and associations opposed to price regulation feared a negative impact on investment in networks and services resulting from the regulatory risks involved for operators and their investors. This could also delay technological developments and innovation in mobile services (e.g. mobile broadcasting).

6. NON –VOICE SERVICES (SMS OR DATA)

Few respondents referred specifically to the application of any regulation to non-voice services. However, INTUG recommended that price regulation should be applicable to both voice and data services. A couple of operators and a member of the public complained about the very high level of charges (wholesale and retail respectively) currently applicable to data services when roaming abroad.

7. OUTSIDE-EU IMPLICATIONS

A significant number of respondents stressed the need to take account of the impact of any regulation on relations between EU operators and operators based outside the EU. The ERG recommended that the regulation should apply to intra-EU traffic only. The Finnish Ministry believed the global nature of the international roaming business needed to be taken into account, while the UK's DTI suggested the relevance of WTO obligations needed to be considered.

The GSM Association and many operators indicated that price regulation of calls within the EU could put EU operators at a disadvantage when competing for multinational corporate business, if non-EU operators were able to benefit from regulated EU wholesale prices without any obligation of reciprocity. Some argued that EU operators would lose bargaining power in negotiation of wholesale rates with non-EU operators, to the detriment of EU end users travelling outside the EU. Others postulated that significant net financial outflows towards operators in other parts of the world, where international roaming rates were much higher, could result. A number of operators argued that a condition of reciprocity should be applied to non-EU operators.

8. PROVISION FOR REVIEW/SUNSET CLAUSE?

The ERG recommended that, in line with regulatory best practice, the price control mechanism chosen should allow for a review (say 2-3 years after entry into force) which could result in the withdrawal of regulatory obligations once their objectives had been achieved. It was necessary to consider the risks that the mechanism selected becomes entrenched and difficult to adjust or withdraw if markets become more competitive.

Some operators also suggested that a review clause should be incorporated. Telefónica, Telenor and Vodafone stressed the need for a regulatory exit path: the chosen mechanism must have the flexibility to ensure that regulation can be withdrawn later. Vodafone stressed that the need for a sunset clause argued against a tying of international roaming prices to domestic prices, but rather pointed to some form of price capping mechanism.

9. PROCEDURAL ISSUES

Public consultation

Many respondents argued that the length of time allowed by the call for input was insufficient and not in line with the principles of Better Regulation. They therefore stressed the need for further public consultation on the Commission's detailed proposals and in particular the importance of being able to comment on the actual text of a draft Regulation.

Data/preparatory analysis by Commission and impact assessment

Many operators, and also the CMT, said that the Commission's initiative was not supported by sufficient data or analysis of the conditions applicable to international roaming in the EU to demonstrate the need for regulation.

Both operators and national authorities stressed the need for a thorough regulatory impact assessment which would consider the costs and benefits of any proposal with a view to measuring its proportionality and effectiveness in comparison to all available

options. A number of operators referred in this regard to the principles enunciated by the Commission in its communications on Better Regulation.

10. LEGAL ISSUES

Legal basis (Article 95 EC)

A number of operators questioned the legal basis on which the regulation would be proposed, arguing that the Treaty and case law of the European Court of Justice only allowed for the use of Article 95 EC in cases where harmonisation of national laws was needed because of the existence or likelihood of disparate or divergent national laws that would constitute an obstacle to the single market or distort competition. They argued that no such laws existed in this case or indeed could exist, given that the EU regulatory framework for electronic communications had harmonised the legal framework for regulation of the networks and services concerned. Some argued that the proposal was rather an attempt to directly regulate the commercial conduct of private parties, which was outside the scope of Article 95.

Relationship with the existing regulatory framework

A significant number of operators argued that by proposing the adoption of an *ad hoc* regulation to control international roaming prices, the Commission was ignoring the principles enshrined in the existing regulatory framework, under which *ex ante* economic regulation should only be imposed following the finding of lack of effective competition as the result of a market analysis by national authorities.

Many operators urged that NRAs should be allowed to complete their reviews of the national market for wholesale international roaming (market 17) which was still under way in most Member States. They also referred to the fact that those few NRAs that had concluded their analysis had found that market 17 to be effectively competitive. They therefore argued that the proposal undermined the credibility of the regulatory framework and legal certainty. Some suggested that the proposal would therefore be contrary to the principles of legitimate expectation, proportionality and subsidiarity. One operator, however, stated that the regulatory framework, which was based on the definition and analysis of national markets, was not capable of regulating international roaming effectively, since it was international in nature. Vodafone stated that any regulation should be consistent with the objectives of Article 8 of the Framework Directive.

The CMT expressed the view that the existing regulatory framework was sufficient and adequate to the task of addressing the problems identified by the Commission. The Spanish regulator also shares the above-mentioned view of many operators that *ex-ante* regulation should follow market analysis and that NRAs should be allowed to complete the analysis of market 17, stressing that otherwise there is a risk of incoherent regulation and legal uncertainty.

The ERG said there was a need to clarify the impact that the proposed regulation would have on the ongoing reviews of the wholesale national market for international roaming (market 17) by the NRAs.

A number of respondents also referred to the forthcoming 2006 review of the regulatory framework and suggested that that review was the appropriate forum within which to

consider whether the existing rules were insufficient to address the level of international roaming prices.

LIST OF RESPONDENTS WHO SUBMITTED A SUBSTANTIVE, NON-
CONFIDENTIAL DOCUMENT

Market Players

Cosmote Group

KPN Mobile

Meteor Mobile Communications Ltd

Mobilkom

Mobitel d.d

ONE GmbH

Optimus

Orange

TDC A/S

Telefónica

Telenor

TIM Hellas Telecommunications S.A.

T Mobile

Transatel

Travelling Connect B.V.

Vodafone

NRAs

European Regulators Group (ERG)

Comision del Mercado de las Telecomunicaciones (CMT)

Member States

Department of Communications, Marine and Natural resources, Republic of Ireland

Department of Enterprise, Trade & Investment, Northern Ireland

Department of Trade and Industry, United Kingdom

Ministry of Science, Technology and Innovation, Denmark

Ministry of Transport and Communications, Finland

Ministry of Transport and Communications, Norway

Mr. Melchior Wathelet, Chambre des Représentants, Belgium

Associations

BEUC, the European Consumers Organisation

BITKOM (German e-communications and new media association)

European Telecommunications Network Operators' Association (ETNO)

GSM Association

International Telecommunication Users Group (INTUG)

Telecom e.V (German association of large business users of telecommunications)

Verband Alternativer Telekom-Netzbetreiber (VAT) (Austrian Association of Alternative Telecommunication Operators)

Annex 2 – Roadmap for adoption of regulation by the European Commission and submission to the European Parliament and Council

3 – 12 May	Public consultation on concept for Regulation
5 April	Presentation by Commission services to the Communications Committee of concept and timing of the adoption of the proposed regulation
4 May	Hearing in ITRE Committee of the European Parliament on international roaming
July	Adoption by the Commission in oral procedure of a proposal for a Regulation on prices for mobile roaming services in the Single Market
July	Proposal for a Regulation forwarded to the European Parliament and Council