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**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

**on the outcome of the review of the functioning of Regulation (EC) No 717/2007 of the
European Parliament and of the Council of 27 June 2007 on roaming on public mobile
telephone networks within the Community and amending Directive 2002/21/EC**

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(Text with EEA relevance)

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1. INTRODUCTION

The completion of the single market and the achievement of the Lisbon Strategy goals to make the EU “the most dynamic and competitive knowledge-based economy in the world” remain at the heart of the European Commission’s objectives. Facilitating cross-border communications is a key enabler to ensure that these goals are met. Regulation (EC) No 717/2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC (hereafter “the Regulation”)¹, which entered into force in June 2007, is also a prime example of the Commission’s policy agenda, “A Europe of results”, which aims to bring benefits to all Europe’s citizens, building on the achievements that have been attained by the EU to date.

The Regulation will expire on 30 June 2010 unless extended by Parliament and the Council on the basis of a proposal from the Commission. The Regulation therefore required the Commission to review its functioning and report to the European Parliament and the Council no later than 30 December 2008². The Commission is charged with evaluating whether the objectives of the Regulation have been achieved, reviewing developments in wholesale and retail charges for the provision to roaming customers of voice and data communication services, including SMS, and making recommendations regarding the need to regulate those services, if appropriate, bearing in mind the interests of consumers.

This Communication reports on the results of the Commission’s review of the functioning of the Regulation, explains the main policy changes it proposes to give effect to its conclusions and is accompanied by a legislative proposal for the Regulation to be amended accordingly. The details and underlying reasoning can be found in the legislative proposal and associated Impact Assessment. As was the case for the Regulation itself, the legal basis for the new proposal is Article 95 of the EC Treaty.

2. BACKGROUND

2.1. Current Regulation

The specific cross-border characteristics and structure of the intra-Community roaming markets have made it very difficult for national regulatory authorities (NRAs) to deal effectively with the lack of competitive pressures and the resulting high prices for Community-wide roaming services. The European Regulators’ Group (ERG), which was established to give expert advice to the Commission on regulatory issues with a single market dimension, acknowledged this problem and called on the Commission to act at European level. The Commission adopted its proposal for a Regulation on public networks within the Community on 12 July 2006³. In June

¹ OJ L 171, 29.6.2007, p. 32.

² Article 11 of the Regulation.

³ Proposal for a Regulation of the European Parliament and of the Council on roaming on public mobile networks within the Community and amending Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services - COM(2006) 382, 12.7.2006.

2007, the European Parliament and the Council adopted the Regulation which contributed to the smooth functioning of the internal market while achieving a high level of consumer protection, safeguarding competition between mobile operators and preserving both incentives for innovation and consumer choice.

The Commission has now completed its review of the functioning of the Regulation against its main objectives, which are to promote competition, consolidate the single market and ensure that consumers do not pay unjustifiably high charges compared to domestic charges when crossing a border.

In its review, the Commission was also tasked with considering whether regulation for SMS and data services was necessary in the light of developments following the entry into force of the Regulation.

2.2. Overview of the market

The EU market for mobile roaming services can be divided into voice services, SMS and data services. The three segments together in 2007 accounted for €6.54 billion in revenues⁴. This corresponds to approximately 4.7% of the total EU mobile market. While in terms of revenues, roaming services are less important to the mobile industry than domestic services, the roaming share of an operator's revenue pie is still significant and typically more attractive than other services from a profit-margin perspective.

In terms of revenue, voice roaming services constituted 79.1% of the overall roaming market in 2007 with SMS and data roaming taking the remaining 12.3% and 8.6% respectively. Voice and SMS growth largely reflects the maturity of these market segments; growth for data roaming services is however dynamic and at least in line with domestic mobile data services growth. The data segment will therefore overtake SMS to become the second-biggest roaming segment in one to two years.

While prices for voice roaming have decreased as a result of the Regulation, the same trend cannot be seen for SMS roaming, since prices have in general shown little movement over the past year despite political pressure on operators to act to avoid regulation.

On the other hand, prices for roaming data services continue to be high even though prices at wholesale and retail level have shown a downward trend. There is a particular problem relating to the lack of transparency for data roaming prices and the resulting "bill shocks". Competitive prices for data roaming are essential in order to remove barriers to accessing mobile Internet services when crossing borders.

⁴ This figure is derived from a detailed data-collection exercise undertaken by the national regulatory authorities and the European Commission. Data was collected from 27 NRAs on an individual operator basis and were then aggregated by means of a bottom-up approach.

2.3. Developments since the adoption of the Regulation

After the adoption of the Regulation, the Commission worked closely with the ERG to monitor its implementation. The ERG initiated an extensive data collection exercise which formed the basis for two Benchmark Reports⁵.

The Commission also commissioned a study by independent consultants on data roaming services and this was published on 27 June 2008⁶.

The Commission, on its own initiative, collected data from more than 120 operators.

2.4. Consultation process

An extensive public consultation was launched on 7 May 2008 with the Commission asking for comments on the review of the Regulation and on its possible extension to SMS and data roaming services. 39 questions were raised about the general functioning of the Regulation as well as specific issues such as inadvertent roaming, the effect on smaller operators and domestic prices and the issue of actual vs. billed minutes. 45 responses were received. The non-confidential responses have been published⁷.

These responses, including the ERG's response, were considered in the preparation of this review.

In the responses to the public consultation, there was strong support for the view that voice regulation should be extended beyond the 2010 deadline. The ERG, individual NRAs, Member States and consumer organisations argued for retaining both wholesale and retail regulation. Smaller operators also favoured extending the duration of the Regulation, at least at the wholesale level.

There was similar support for regulation of SMS roaming services, particularly in the light of lack of movement in retail prices. While the GSM Association and most mobile operators were generally against the continuation of voice roaming regulation and its extension to data and SMS roaming services, some operators came out in favour of wholesale regulation for SMS roaming services.

With regard to data roaming services, there was near consensus on the need to eliminate "bill shock" and concerns were expressed regarding high prices.

3. REVIEW

Apart from evaluating the objectives of the Regulation, and deciding on whether to propose regulation for SMS and data roaming, the Commission was also called upon to assess whether, in the light of developments in the market and with regard to both competition and consumer protection, there is need to extend the duration of the

⁵ http://www.erg.eu.int/documents/docs/index_en.htm.

⁶ http://ec.europa.eu/information_society/activities/roaming/docs/study_data_roaming.pdf.

⁷ Website:

http://ec.europa.eu/information_society/activities/roaming/regulation/consult08/contributions/index_en.htm.

Regulation or to amend it, taking into account the developments in charges for mobile voice and data communication services at national level and the effects of the Regulation on the competitive situation of smaller, independent or newly started operators. The Regulation further stipulates that if the Commission finds that there is such a need, it must submit a proposal to the European Parliament and the Council.

3.1. Achievement of objectives

The Regulation's stated objectives were to introduce a common approach to ensuring that users roaming within the Community do not pay excessive prices when making and receiving calls, thereby contributing to the smooth functioning of the single market while achieving a high level of consumer protection, safeguarding competition between mobile operators and preserving both incentives for innovation and consumer choice.

Implementation and the transition to the "Eurotariff" in particular went smoothly, with only a few exceptions noted by NRAs. The Commission's monitoring of implementation indicates that the obligations set out in the Regulation are being met and consumers have access to a Eurotariff at or below the price caps permitted by the Regulation. Customers have benefited from cheaper roaming tariffs for making and receiving calls. In particular, prior to the entry into force of the Regulation, the average price for making a call was €0.7692 while the price for an incoming roaming call was €0.417. The entry into force of the Regulation meant customers benefited from lower rates for both making and receiving calls since the maximum price limits for the Eurotariff were set at €0.49 (excluding VAT) for making a call and €0.24 (excluding VAT) for receiving a call. These have since been reduced to €0.46 (excluding VAT) and €0.22 (excluding VAT) respectively.

When the Regulation entered into force, 400 million customers benefited from the Eurotariff, making it the standard default tariff in the EU. Customers can also avail themselves of special offers but when doing so they pay on average approximately the same price per minute as customers on the Eurotariff. As a result, consumers under the Eurotariff on average save 36.4% for outgoing calls and 42.9% for incoming calls when compared to prices for EU roaming services that prevailed in early 2007.

The Regulation has also succeeded in improving transparency for consumers despite the fact that a minority of operators were unable to resolve technical problems related to the transparency provisions on time. Most operators, however, complied on time and where operators had implementation difficulties, NRAs monitored the situation to ensure that remedial action was taken in a timely manner.

However, the problems such as switching costs and lack of adequate substitutability that prevail in the voice roaming market have remained intact, competition has not developed and prices have in general clustered around the caps. There is therefore a significant risk that allowing the Regulation to expire could lead to an increase in prices.

3.2. Specific issues

Inadvertent roaming

Inadvertent roaming has continued to be a contentious issue in border regions. In this regard, the transparency obligation to inform customers of the price when they are roaming has helped to make consumers aware that they are inadvertently roaming. NRAs and Member States' administrations have also responded by working bilaterally to tackle the issue and several agreements have been reached.

The Commission will continue to monitor the situation to ensure the smooth functioning of the single market.

Impact on smaller operators

The Regulation has ensured that smaller operators have access to lower wholesale roaming charges. This has had a positive effect on smaller operators, enabling some operators to introduce some of the cheapest retail offers in the market. During the public consultation, one issue that came to the fore is the difficulty for newly established operators to enter into new roaming agreements with all operators in a timely manner. This is important where subscribers are unable to exchange roaming SMS messages with subscribers of a mobile network in another Member State as a result of the absence of an agreement enabling the delivery of such messages.

NRAs are able to intervene under Article 5 of the Access Directive⁸ on their own initiative in order to ensure compliance.

Traffic steering

During the course of the review of the functioning of the Regulation, the Commission has not identified or had reported to it cases of traffic steering being used to the detriment of consumers. Since operators' Eurotariffs must comply with a maximum price limit, most operators have opted to offer the same tariff irrespective of the visited network being used, thus increasing price transparency for consumers who do not have to worry about switching manually to a cheaper network.

Outermost regions

From the Commission's review, it has emerged that there has been no negative impact with regard to outermost regions. In this regard, it is apparent from the public consultation and the Commission's contacts with the French authorities that the issue for France has been addressed since legislation has been enacted to ensure that citizens residing in the outermost regions will not be at a disadvantage when they call metropolitan France.

⁸ OJ L 108, 24.4.2002, p. 7.

Domestic prices

The Commission has also looked into whether there has been any increase in domestic prices that could be attributed specifically to the Regulation. It emerged that it would be very difficult to pinpoint any increase in domestic tariffs directly due to the introduction of the Regulation. The ERG notes that it is unlikely that domestic mobile prices will rise, because they are the main focus of competition for consumers. The 13th Progress Report on the implementation of the regulatory framework also concluded that prices for mobile services continued their downward trend in 2007⁹.

Unitisation

While the price limits in the Regulation are expressed in terms of amounts “per minute”, it has become evident that the billing practices of certain operators, whereby they charge for voice calls by reference to minimum periods of up to 60 seconds rather than on a per second basis, are diluting the effects of the Regulation and that some operators have changed their billing practices since the adoption of the Regulation to increase this diluting effect. Indeed, the ERG has estimated that per minute billing practices add around 24% to a typical retail bill for calls made and 19% for calls received using the Eurotariff.

3.3. Extension of the Regulation in time and scope

Voice

As can be seen above, the fundamental problems which existed prior to the Regulation still remain. There is some competition but these offers have made only small inroads into the market.

While voice roaming services may be an important source of revenues and profits for a mobile operator, from the point of view of consumers prices for voice roaming are only one element of a larger mobile bundle and are a less important element of the bundle than, say, domestic voice, domestic SMS or a handset subsidy. This limits the ability of operators to use attractive roaming prices as an effective tool for customer acquisition. Furthermore, the presence of switching costs and the lack of adequate substitutability for voice roaming once the customer is abroad reduce the degree of expected competition.

The unitisation issue (per minute billing), as described above, has shown that operators have exploited a perceived latitude in the drafting of the Regulation to maximise their returns to the detriment of other operators (at the wholesale level) and consumers. A common set of rules regarding unitisation of Eurotariff bills is therefore needed to further strengthen the single market and provide a common level of protection to consumers.

⁹ COM(2008) 153, 19.3.2008.

The proposal

1. Extension of voice wholesale and retail regulation up to 2013

The Commission is proposing to extend the Regulation by a further three years from 2010 to 2013 to ensure that consumers are not charged excessive prices while providing sufficient time for competition to develop. The maximum levels of the Eurotariff for both calls made and calls received will continue to decrease annually in a linear fashion during the extended period of validity of the Regulation¹⁰.

To try and facilitate further competition, the Commission has sought to provide a greater margin at the retail level by reducing wholesale rates more aggressively. This should increase the scope for operators to compete on price at the retail level, thereby maximising the chances that a properly competitive market will emerge.

To tackle the unitisation issue, at the retail level operators will be required to bill their customers on a per second basis subject only to the possibility to apply an initial charging period of 30 seconds for calls made. No initial charging period is justified in the case of calls received. Similarly, operators should charge each other on a per second basis for the wholesale provision of regulated roaming calls.

SMS

Prices for roaming SMS services have shown little movement over the past years, despite political pressure.. The average price for an SMS while roaming in the EU has only decreased marginally from 29 cents in the third quarter of 2007 to 28.5 cents in the first quarter of 2008. Moreover, there seems little prospect of prices decreasing significantly in the future on the basis of industry action alone, given the responses from operators to the public consultation.

The Commission, in its review, has concluded that the levels of both wholesale and retail charges are not justified by the underlying costs and, as in the case of voice roaming services, there appears to be insufficient competitive pressure on operators to bring prices down.

¹⁰ The wholesale charge for making a call will decrease from 26 cents prevailing on 1 July 2010 to 23 cents, 20 cents and 17 cents respectively. The price cap for the Eurotariff for making calls will decrease from 43 cents to 40 cents, 37 cents and 34 cents respectively while the price cap for receiving calls will decrease from 19 cents to 16 cents, 13 cents and 10 cents respectively.

The proposal

2. Extension to include regulation of SMS roaming at wholesale and retail levels up to 2013 and improved transparency

The Commission is proposing to extend the Regulation in scope by proposing a price cap at both wholesale and retail levels for SMS roaming¹¹.

The Commission is also proposing that customers should be automatically alerted, by means of a message service, each time they enter a Member State other than their own, to basic personalised pricing information that applies to the sending of an SMS message by that customer in the visited Member State.

Data roaming services

Prices for data roaming services were already high when the Commission proposed the Regulation in 2006. However, the situation has become more marked over the past year with the advent of high-speed internet access or mobile broadband particularly for laptop users. This has led to the problem of bill shock for users who are accustomed to flat-rate tariffs at home but can be charged on a per-MB basis while roaming. Concerns over the level of charges for such services indicate that action is necessary in particular to improve transparency and eliminate bill shock, in the interests not only of consumers but also of the mobile operators.

Moreover, the persistence of particularly high wholesale charges for such services on non-preferred networks is caused by traffic steering difficulties leaving operators with no incentive to decrease wholesale prices unilaterally since traffic would be received irrespective of the price charged. This constrains the ability of home operators to predict their wholesale costs and to provide their customers with transparent and competitive pricing packages. A wholesale safeguard price limit should therefore be set that will decrease exorbitant wholesale prices but still be high enough not to distort competition or prevent its development.

The proposal

3. Increasing transparency and introducing a wholesale safeguard mechanism up to 2013 to combat bill shock for data roaming

The Commission is proposing measures to ensure that roaming customers are kept adequately informed of the charges that apply for data roaming services by means of an automatic message.

By 1 July 2010 at the latest, operators must also provide customers with a facility to set a financial limit in advance for their data roaming.

¹¹ The wholesale charge that should apply for roaming SMS from 1 July 2009 should not exceed 4 cents per message on average between any two operators which reflects wholesale costs actually incurred. From the same date, the retail charge for a roaming SMS should not exceed 11 cents, ensuring both a fair return for operators as well as consumer protection.

The Commission is also proposing that in order for operators to be able to adopt transparent pricing arrangements with the assurance that they can anticipate with more certainty their wholesale costs, a safeguard wholesale price limit on data roaming services should be set at a level which does not exceed €1 per MB on average between any two operators.

4. CONCLUSION

Despite the results achieved by the Regulation, the dynamics of the roaming market have not changed sufficiently since the introduction of the Regulation to enable the Commission to recommend that the Regulation be allowed to expire in 2010.

To improve the smooth functioning of the single market, it is proposed to extend the Regulation to include SMS and data roaming services. Prices for roaming SMS services have shown little movement over the past years and there seems little prospect of prices decreasing significantly in the future on the basis of industry action alone. Concerns over the level of charges for data roaming indicate that action is necessary in particular to improve transparency and eliminate bill shock.

The Commission is proposing wholesale and retail regulation for voice and SMS roaming. The proposal aims to maximise the chances that a competitive market may finally emerge by increasing the maximum margins between wholesale and retail charges. It is also proposing to further protect consumers who are overcharged through per-minute billing. However, it is proposing a different approach for data roaming services given the specific nature of the problems encountered. In particular, it has considered that bill shocks are unacceptable and urgent action is necessary both to improve transparency and to remove exorbitant wholesale prices which lead to appreciable distortions of competition.

Roaming markets exhibit unique characteristics which justify exceptional measures. Given its exceptional nature, this intervention should therefore be time-limited so as to expire on 30 June 2013. The Commission will continue to monitor the development of the intra-Community roaming market and proposes a further review with a report to the European Parliament and the Council in 2011.

It is the Commission's intention to do its utmost to assist the European Parliament and the Council in reaching an agreement on the abovementioned elements in the shortest possible timeframe to ensure that European users of mobile communications services can benefit from these proposals by the summer of 2009. This is important to meet citizens' expectations of the EU and ensure that Europe delivers results for its citizens.