

Competition Law

Antitrust law and policy in a global market *insight*

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published in the 26 September 2006 issue of
Competition Law Insight

Published by

Informa Professional
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London W1W 7RE
United Kingdom

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Mobile roaming

The Commission's proposals for regulation

by **Peter Dunn***

On 12 July 2006, the European Commission published its proposals for the regulation of international mobile roaming prices. This proposal followed a consultation process dating back to February 2006, when the Commission's frustration with the lack of progress by the mobile industry in delivering lower roaming prices was expressed very clearly in a speech to the European Regulators Group (ERG) by the European information society commissioner, Viviane Reding, in which she said: "In spite of many warnings and policy initiatives, roaming prices remain unjustifiably high at the retail level".

This article reviews and critiques the Commission's proposals, particularly with regard to the possible wider implications of the Commission's approach in this case.

Background

International roaming is one of the key features and benefits offered by GSM mobile technology. As the European mobile industry has developed, bringing almost ubiquitous coverage and near universal penetration, so the use and importance of international roaming has grown dramatically. Thus, it should be no surprise that the prices charged by mobile operators for the international roaming service should come increasingly under the scrutiny of consumers, politicians and regulators.

In particular, in January 2000, the European Commission Competition Directorate launched a sector inquiry into mobile roaming charges. Questionnaires were sent to mobile operators and other interested parties and a working document on the initial findings of the inquiry was published in December 2000. In July 2001, Commission officials launched simultaneous unannounced inspections (dawn raids) at the premises of nine mobile operators, an action which the Commission deliberately publicised widely. However, it then took a further three years before the Commission officially announced any further steps. In July 2004, it issued two separate statements of objections to the mobile operators Vodafone and O2 in the UK, following this in February 2005 with similar statements of objections issued to Vodafone and T-Mobile in Germany. Those investigations continue in progress. However, there has been no official word as to the progress or status of the broader sector inquiry and, since 2001, no documents have been published on the Commission's roaming sector inquiry website.

The EU regulatory framework

Under the EU's 2002 regulatory framework for the electronic communications sector (as set out in the Framework Directive, 2002/21/EC), the main instrument for justifying *ex ante* regulation is the market analysis approach set out in article 16 of the Framework Directive. National regulatory authorities (NRAs) are obliged to carry out analyses of the relevant markets to determine whether the markets are effectively competitive.

Unless there is a finding of SMP ("significant market power" which is, effectively, competition law "dominance"), article 8 of the Access and Interconnection Directive (2002/19/EC) sets out that NRAs shall not impose various obligations on operators, including obligations for cost-oriented prices. The "relevant markets" are set out in the Commission's recommendation on relevant product and service markets (2003/311/EC), and include (as market 17) the "wholesale national market for international roaming on public mobile networks".

Somewhat strangely, given the high profile of the roaming issue and concerns about roaming prices, at the time that the Commission began consultations on its proposed regulations, the Finnish NRA was the only EU NRA to have notified the results of its review of the roaming market to the Commission. At the end of August, only seven of the 25 EU NRAs have made notifications in respect of the roaming market and not one NRA has found there to be SMP in this market.

The Commission's proposals

The Commission current proposal moves away from the competition law approach of the market analysis method and seeks to regulate roaming prices by means of an article 95 regulation. An article 95 regulation is an internal market instrument, ie the legislative measures proposed must "have as their object the establishment and functioning of the internal market". Furthermore, a regulation comes into effect across the whole EU as soon as it is adopted by the European parliament and Council of Ministers and is published in the Official Journal, and does not require any transposition by the individual member states into national law.

The proposed regulation introduces a mechanism to seek to ensure that prices for roaming are not unjustifiably higher than the charges payable by customers when calling within their home country (something the Commission calls the "European home market approach"). This approach is similar in principle to that relied upon in the Commission's 2001 regulation on crossborder payments in euro (EC/2560/2001).

There are four major elements to the proposed price control:

- a benchmark per minute price level (say, price A) is established by calculating the average SMP operator regulated mobile termination rate across the EU;
- wholesale charges for roaming (the inter-operator charges paid by the home network of the roaming customer to the visited network which carries a roaming call) are capped to a level of twice A for roaming calls made within the same visited country and three times A for roaming calls made from the visited country to any other EU member state;
- retail charges for calls originated by roaming customers are capped at 130% of the maximum wholesale charge for that call (ie either Ax2 or Ax3, as applicable);

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- retail charges for calls received by roaming customers are capped at 130% of the benchmark price (ie 130% of price A)
- The Commission's own press release praises the proposed regulation for giving mobile users a fairer deal, tackling one of the last borders within Europe's internal market and enhancing the competitiveness of Europe's industry. The Commission also claims that the proposed price control will reduce roaming prices by a total of €5bn (from a total market worth €8.5bn).

Analysis

There are a number of aspects of the proposed regulation which are worthy of further consideration, particularly when one considers the potential longer-term implications for regulation in the electronic communications sector, notably: (1) the move away from competition law tools; (2) reliance on regulated mobile termination rates; and (3) the decision to regulate at retail price level. In addition, one might question some of the assumptions of the regulatory impact assessment conducted by the Commission and published alongside the draft regulation.

The move away from competition law tools

The Commission justifies its move away from the standard market analysis approach in the case of roaming by pointing out that roaming has specific characteristics and is cross-border in nature. What this appears to mean is that roaming is considered a special case because the retail roaming prices paid by customers are dependent on the inter-operator (wholesale) roaming charge, which is set by the visited (overseas) mobile network. A local NRA can only address one part of this charging structure because either the retail price or the wholesale charge will be set by a mobile operator based in another member state and which is therefore outside its jurisdiction. This "gap" can only be addressed by a pan-European regulation. However, what this analysis does not explain is what is the new basis for the pan-European regulation now proposed. The Commission speaks in general terms about roaming charges being substantially higher than underlying costs but it has undertaken no detailed cost analysis, other than to assume that the underlying costs for roaming must be similar to those for local domestic services. Furthermore, in a situation where the NRAs which have carried out market analyses have concluded that there is no SMP, what is the basis for the regulator's insistence that prices should reflect costs? Without further detailed explanation of what makes the roaming problem so structurally unique (if indeed it is), one must be concerned that this regulation could simply represent an expedient way for the Commission to deal with what it considers to be an important political issue, regardless of the niceties of economic or competition law analysis.

Reliance on regulated mobile termination rates

In a similar way, the selection of the mobile termination rate as the benchmark price for the purposes of the proposed roaming regulation smacks of expediency. There is no reason to believe that the mobile termination rate is the best indicator of the underlying costs of a roaming call; it seems to have been selected merely because it is generally a regulated charge and therefore (1) it has been based on some calculation of underlying costs, and (2) figures are easily available to construct an average

benchmark price. Operators should rightly be concerned that this kind of expedient approach could become the model for any future regulation, as well as embedding the need for continued regulation of mobile termination charges. Equally, however, NRAs should be concerned at the problems that could arise from explicitly linking the prices of different mobile services and the subsequent risks of market distortion.

The decision to regulate at retail price level

In economic regulation, the general approach is to regulate the wholesale market and then to leave the retail market to resolve itself through the effects of competition. However, in the case of roaming, the Commission has proposed a retail price cap at the same time as a wholesale price cap (the regulation actually states that the retail cap will apply six months after the regulation comes into force). This unusual approach is the Commission's response to concerns expressed by NRAs that mobile operators have not in the current market been passing wholesale roaming price reductions through to consumers. One might question why the Commission was so anxious to mandate retail price reductions without allowing the operators competing in the market the opportunity to resolve this issue themselves. One could also question how the Commission considers this approach to be consistent with its assumption that operators will compete to offer lower retail prices below the price cap and with the assumptions (in the impact assessment) of price elasticity in the roaming market (if there is any significant level of elasticity, operators would of course be incentivised to compete). It would certainly not be a good precedent if NRAs in future were to impose retail price regulations before it could be demonstrated that they were truly required.

Regulatory impact assessment

A full analysis of the Commission's regulatory impact assessment document would require a separate and longer analysis than is possible here. However, a few questions should be raised:

- Has the Commission given proper consideration to the recent roaming price changes proposed separately by a number of mobile operators before deciding to continue with its own regulation?
- Could these offers not form the basis for the co-regulatory approach rejected by the Commission?
- Is it right for the Commission wholly to reject the risk that mobile operators will seek to rebalance domestic tariffs to recover some of the projected €5bn revenue reduction?
- Has the Commission properly considered the impact of this regulation on the relative competitiveness of the European mobile industry which, until now, has been one of the EU's economic success stories?

Conclusions

The Commission's proposals, intended to be approved and to come into force before summer 2007, will have a significant impact on the mobile roaming market in Europe. Consumer prices and operators' roaming revenues are likely to fall dramatically. However, there is also a risk of a longer term impact on the regulatory environment if this proposed regulation becomes a precursor of more intrusive, politically-based and expedient regulatory interventions.