



ERG response to the European Commission's
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

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Section 1

Executive Summary

1.1 This response to the Commission's consultation of 3 April is submitted on behalf of the European Regulators Group and the Independent Regulators Group¹². It follows and is consistent with its response³ (the "first ERG Response") to the Commission's earlier call for input.

1.2 The Spanish Member of ERG and IRG (CMT) has stated that it is unable to subscribe to this response.

1.3 ERG supports the Commission's approach to tackling the issue of high roaming prices by means of an EC Regulation. As recognised by the Commission mobile operators have been aware of the concerns, shared by national regulators, about the high level of roaming prices. The proposal for regulation to tackle these issues should not therefore come as a surprise to the mobile industry.

1.4 ERG has put considerable effort into analysis of roaming services using the tools provided by the current Framework⁴. ERG believes that the Framework is generally sound, as it has already noted in its response to the Commission's call for input on its review of the Framework dated 25 November 2005. In particular, it believes that regulatory remedies should be applied by NRAs taking full account of national circumstances. Nevertheless, in the exceptional case of international roaming markets, the Framework does not provide effective regulatory tools. Given the urgent need to resolve the roaming pricing issue, the ERG agrees with the Commission that an EC Regulation is the only appropriate approach.

1.5 ERG has developed six high level criteria, based on the principles of regulatory best practice, which it believes should be used to assess possible forms of regulation. ERG considers that any regulation should be:

- (a) Coordinated: implemented at the same time and in a consistent way across the EU;
- (b) Effective: in reducing retail roaming prices substantially and quickly;
- (c) Avoid distortion: in other, potentially competitive, mobile markets;
- (d) Simple to implement: to avoid lengthy delays and provide legal certainty;

¹ The European Regulators Group comprises 25 authorities from the EU Member States. The Independent Regulators Group comprises those 25 authorities plus authorities from Iceland, Liechtenstein, Norway, Switzerland, Bulgaria, Croatia, Romania and Turkey

² Purely for ease of reading, views in this paper are attributed to "ERG", rather than to "ERG and IRG"

³ http://europa.eu.int/information_society/activities/roaming/docs/comments/erg.pdf

⁴ ERG document ERG(05)20Rev1 - available at: erg.eu.int/doc/publications/consult_wholesale_intl_roaming/erg_05_20_rev1_wir_common_position.pdf

- (e) Flexible: to protect incentives for continued investment and innovation; and
- (f) Subject to review: in line with good regulatory practice, to allow for an exit from regulation when appropriate.

1.6 ERG considers that wholesale roaming markets are very similar throughout Europe and are susceptible to a uniform approach. However, this is not true of retail markets. Consistency with principles of best regulatory practice requires flexibility to take account of national circumstances.

1.7 The principles underlying the Framework lay down that retail regulation should be imposed only to the extent that wholesale remedies are ineffective. ERG believes that this principle should be respected in framing the proposed Regulation. Given well-designed wholesale regulation, market forces should be able to play a strong role in bringing down retail tariffs. Nevertheless, ERG recognises that this cannot be left to chance. This viewpoint has informed the proposals set out in this response.

Preliminary conclusions

1.8 Against the background of the objectives and criteria set out above ERG has the following reaction to the proposals consulted upon by the Commission:

- (a) ERG believes that wholesale roaming charges (Inter Operator Tariffs for handling roaming calls) paid by one mobile network operator (MNO) to another should be controlled by means of a uniform European price cap. The alternative approach suggested by the Commission – a requirement for charges to be cost-oriented – cannot be implemented and enforced quickly and with sufficient certainty. Consequently, this would risk disruption to the market and may prove ineffective in achieving the main regulatory goal of a reduction in *retail* prices paid by end-users.
- (b) ERG proposes that the cap should be set at twice the level of the 75th percentile of the national average rates for mobile termination. The current rate would be about €0.30 per minute. ERG has chosen this benchmark as it considers that it is an expedient proxy for the cost of provision of wholesale international roaming services. However, ERG believes that the actual costs of an efficient MNO are below this benchmark so there should be no question of any MNO being required to offer services below cost. The rate is well below current average market levels which ERG believes are around €0.75 per minute.
- (c) ERG proposes construction of a robust and authoritative index of retail international roaming charges so as to allow movements in average charges to be monitored over time. In particular, this would permit transparency as to whether wholesale price reductions were being passed through to reductions in retail roaming prices. It will be necessary to require MNOs to supply data regularly to the respective NRAs so as to allow monitoring of the index mentioned above.
- (d) ERG believes that these measures, coupled with further pressure from authorities, will be sufficient to persuade the MNOs to pass through the bulk of wholesale cost savings to the retail level in the form of substantially reduced retail roaming prices and to substantially cut any retail margins which are currently above a reasonable level. It therefore does not believe it necessary, as proposed by the Commission, to apply retail price regulation from the outset. In this context ERG notes the recent announcements from some mobile operators of retail price reductions. While in

ERG's view these are not yet sufficient to remove the need for appropriate regulation, they do represent an encouraging step in the right direction.

- (e) However, ERG recognises that if market forces prove insufficient to guarantee substantial pass through of wholesale reductions to the retail level within a relatively short period (six months should be adequate), a form of retail price control might be needed. In that event, ERG does not support the Commission's proposal to require MNOs to adopt the "Home Pricing Principle". ERG considers that this is likely to be ineffective at reducing retail prices as, under the Principle, the bulk of roaming calls will be charged the same as mobile international direct dial (IDD) calls made from the home member state. Charges for such IDD calls are generally also high, and consumers do not appear to be particularly sensitive to mobile IDD price variations. ERG also believes that there are various highly undesirable market distortions which could result from application of the Home Pricing Principle. It has analysed these in Section 3 of this response.
- (f) ERG considers that, in general, retail prices vary amongst Member States for good reasons. Consumer preferences may play a large part. In the event that retail price regulation proves necessary, it would therefore be inappropriate to apply a highly prescriptive form of regulation of retail roaming which applied uniformly across Europe.
- (g) Therefore, ERG proposes the following form of retail regulation, if it should prove necessary in the future:
 - (i) A uniform cap on the price per minute of every roaming call, set at a "safeguard" level, identified separately for making and receiving calls. The cap should be set at a level that constrains the maximum price per minute that could be charged for all intra-EU roaming calls, which is still significantly below the current European average charge, so as to guarantee significant retail price cuts. The objective of the regulation is to deliver a substantial reduction in average retail roaming rates, however, as a cap on the *maximum* charge for any roaming call, the level of the safeguard cap should be set significantly above the intended *average* European retail roaming price per minute. ERG believes that this can be achieved in a manner consistent with Commissioner Reding's aspiration of a 40%-60% reduction in current retail rates.
 - (ii) ERG proposes that National Regulatory Authorities (NRAs) should be given discretionary powers to impose a lower cap on their national MNOs, in accordance with national circumstances. This could be employed by those NRAs where, due to differences in national retail markets, a lower national cap than the European maximum would be appropriate to ensure that wholesale reductions are passed through to the retail level, if market forces fail.

1.9 ERG believes that there could be merit in including such a provision for "backstop" retail regulation in the EC Regulation, even though ERG recommends that it should not be applied from the outset. In the event that it should prove necessary, it would be inconvenient and inappropriate for the Commission to have to propose a further Regulation to deal with it. Therefore, ERG proposes that an appropriate process for triggering application of the retail pricing provisions should be included in the Regulation. This is so that those provisions can be applied without delay, if it becomes clear that they are necessary.

1.10 ERG looks forward to assisting the Commission further during the coming months on further development of the detail of the regulatory proposals and in its work on a Regulatory Impact Assessment.

Section 2

Background & Introduction

Introduction

2.1 Following various initiatives aimed at increasing competitive pressure in the international roaming market, the European Commission has announced its intention to present a draft Regulation for mobile roaming services to the European Parliament and the European Council by the summer of 2006.

2.2 The Commission published a first call for input to its proposal for a Regulation, with a deadline for comments of 22 March, in order to seek views from interested parties as to the form and application that a proposal for regulation might take.

2.3 ERG provided a response to that call for input outlining its thoughts on the best approach for an EC Regulation. This response should be read in conjunction with that earlier ERG document. In summary, ERG suggested that any regulation should focus first and foremost on the wholesale market for international roaming given that ERG considers competition concerns exist primarily at the wholesale level. ERG agreed that a coordinated European approach to roaming regulation is warranted due to the fact that wholesale roaming markets are very similar throughout Europe and are therefore susceptible to a uniform approach. Furthermore, an approach focusing first at the wholesale level is more in line with good regulatory practice and the underlying principles of the EU Framework for electronic communications regulation which notes that retail regulation should only be imposed in situations when wholesale remedies have proven ineffective.

ERG proposal

2.4 With this in mind, ERG considered that wholesale regulation could consist of a uniform Europe-wide cap set at a specified level. One way of setting a wholesale cap might be with reference to Mobile Termination Rates (MTR). In its previous response ERG suggested taking twice an average European MTR as a reference to setting a wholesale cap which would result in a cap in the region of €0.30 per minute. This proposal is set out in more detail in ERG's previous response to the Commission. ERG also proposed that such wholesale regulation should be accompanied by the construction of an authoritative retail price index in order to monitor the extent to which wholesale price reductions are passed through by way of retail roaming price reductions. ERG remains firmly of the view that retail charge regulation at this point in time – without providing the opportunity for wholesale regulation to have an effect – would be premature and disproportionate. Recent announcements of significant price reductions by some MNOs indicate that voluntary action by the MNOs may well be sufficient, although it is too early for this to be clear.

2.5 The ERG response noted however, that if there was clear evidence that market forces proved insufficient to deliver a substantial reduction in retail roaming prices within a given period of wholesale regulation, a form of retail price regulation might be appropriate. Given differences in national retail markets, ERG believes that giving NRAs a significant degree of flexibility in retail regulation is likely to be appropriate to ensure that any retail regulation is both effective and proportionate. Since its first response, ERG has developed

initial thoughts on what form retail price regulation might take, should such a need arise in the future. These thoughts are presented in Section 5 of this response.

2.6 ERG also recommended that there should be provision within the Regulation to support a future review of the roaming market after an appropriate period of time (for example after 2-3 years) to assess whether any regulation is still required, with the potential for modification in light of market circumstances.

ERG Criteria

2.7 The ERG proposal was formulated against the following six criteria listed in the previous ERG response to the Commission. Based on the principles of regulatory best practice, the criteria are that any regulation should be:

- (a) Coordinated: to allow for a coordinated approach across the EU, both in terms of the regulation applied and the timing of its implementation;
- (b) Effective: to meet the objective of lowering retail roaming prices substantially and quickly;
- (c) Non-distorting: to avoid distortion in other mobile markets;
- (d) Simple: to allow for ready implementation and deliver a high level of legal certainty;
- (e) Flexible: to take account of prevailing national circumstances at the retail level and protect incentives for continued investment and innovation; and
- (f) Subject to review: allowing for an exit from regulatory intervention should the market reach a point that no longer warrants regulatory constraints.

Commission 2nd phase consultation and proposal for an EC Regulation

2.8 On 3 April, the Commission published a second phase consultation providing more details on its preferred regulatory approach, including details of regulation at both the wholesale and retail level. This second consultation contains further details of the Commission's proposal and recognises that as the components of the international roaming service are made up of elements supplied in at least two Member States, no single NRA has powers in relation to both price components. There is therefore a risk that, in the absence of co-ordinated action across Europe, divergent national measures could be put in place which could act as a barrier to the development of the single market for telecommunications services, and more particularly roaming services across borders in the EU.

2.9 In providing for the regulation of retail prices for roaming services in EU Member States, the Commission wishes to ensure that prices for consumers are transparent, readily comprehensible, and as close as possible to the domestic prices in a consumer's home country. The Commission articulate this desire through its proposal for applying the "*Home Pricing Principle*" (HPP). Under this proposal a subscriber roaming abroad should expect to pay no more for making calls than he would do were he in his home country and should not be charged for receiving calls:

- (a) Making a call home: should be charged at the same rate as a mobile international call from home to the visited country;

- (b) Making a local call (within the visited country): should be charged at the same rate as a mobile local call in the home country;
- (c) Making a call to a third EU country: should be charged at the same rate as a mobile international call from home to that country;
- (d) Receiving a call: should have no retail charge.

2.10 The Commission expects however that HPP would only apply to calls made and received by EU consumers whilst roaming within the EU (and by extension EEA) countries.

2.11 The Commission notes that this retail regulation requires that regulation at the wholesale level is also put in place. In the absence of wholesale regulation Mobile Network Operators (MNOs) could be faced with a situation where they were forced to sell retail roaming services below the cost of purchasing the necessary underlying wholesale elements of the service (a situation referred to as “margin squeeze”), which may potentially result in MNOs no longer providing roaming services to certain types of consumers (e.g. pre-pay subscribers), rather than offering a loss-making service.

2.12 The Commission’s consultation suggests that wholesale regulation supporting its HPP proposal could take the form of either a cost-orientation obligation or some form of wholesale cap. It further suggests that a cap might be applied on a transitory basis whilst NRAs formulate the level of cost-orientation regulation.

2.13 Finally, the Commission also suggests re-evaluating the inclusion of other services, such as SMS, in its proposed Regulation.

This response

2.14 This document forms ERG’s response to this 2nd phase consultation, and is submitted on behalf of ERG and IRG. One NRA, CMT in Spain, has not been able to agree with this submission.

Section 3

ERG assessment of Commission proposal

3.1 In its second phase of consultation the Commission commented that despite a number of initiatives to increase competition in the international roaming market, including the ongoing Article 82 investigations and attempts to increase consumer transparency, little reduction in retail roaming tariffs has been seen. This has motivated the Commission to set out its preferred regulatory approach, including details of regulation at both the wholesale and retail level.

3.2 In this section, ERG considers in greater detail the proposals for both wholesale and retail regulation put forward by the Commission.

Wholesale regulatory proposals

3.3 ERG believes that in line with good regulatory practice regulation at the wholesale level should be considered prior to the application of regulation at the retail level. This is because regulation should be targeted, in the first instance, at those services that are not competitively supplied and which have the potential to hinder the development of competition in other downstream services. ERG noted in its response to the Commission's first consultation that high wholesale international roaming rates appear to drive the current high price level of retail roaming rates and that in many cases MNOs have limited ability to reduce retail roaming rates in the absence of reduced wholesale charges.

3.4 In its second phase consultation, the Commission recognises the need for parallel wholesale regulation if retail regulation is to be applied and highlights two possible approaches to wholesale regulation: a cost-orientation obligation or some form of wholesale cap (potentially on a transitional basis).

3.5 ERG considers this approach below.

Wholesale Cost-Orientation

3.6 While cost orientation is a standard practice in many types of wholesale regulation, ERG views it to be less suitable in these circumstances, for three main reasons:

- (a) **Coordination:** in its previous response ERG recognised the need for wholesale regulation to be coordinated across the EU, both in terms of the regulation applied and the timing of its implementation, given the cross-border aspects of wholesale international roaming and the similarity of these markets throughout Europe⁵. It is unlikely that the implementation of a cost-orientation obligation could be well coordinated across Member States, due to the different timelines for the necessary cost analysis in different markets. Should divergent national measures be put in

⁵ In contrast, retail roaming markets differ significantly in different Member States, and the degree of uniformity justified at the retail level is likely to be very much less than at the wholesale level.

place as a result of differences in implementation by Member States, this may not be helpful to the development of the single market for roaming services, which is the underlying objective of the proposed regulation.

- (b) **Effectiveness and simplicity:** in order to be effective, wholesale regulation must facilitate the objective of lowering retail prices substantially and quickly which requires it to be relatively simple and straight-forward to implement. In general, whilst a cost orientation obligation may be effective in determining the appropriate charge level to which wholesale roaming prices should be reduced, it could take significant time and effort to be implemented given the requirement to understand relevant costs, develop cost models, and determine an appropriate allocation of common costs. The need to achieve this quickly across 25 Member States in order for the wholesale regulation to be effective causes particular difficulties in the case of international roaming. Furthermore, in smaller Member States, a detailed cost-modelling exercise is likely to be extremely resource intensive for both NRAs and operators and may be disproportionate if a sufficient, more pragmatic and expedient solution can be identified by means of a wholesale benchmark cap. The complexities involved in detailed cost modelling, and experience gained from regulation of mobile termination rates, suggests that there is a significant possibility that cost-orientation regulation would not be effective in reducing prevailing wholesale roaming charges by the summer of 2007, the timeframe within which the Commission expects to observe the results of regulation.
- (c) **Avoidance of distortion:** ERG previously articulated its concerns that some regulatory options may lead to distortions and unintended consequences. The possible lack of coordination in the timing of wholesale regulation may lead to inconsistencies with retail charges (especially if these are regulated in a very different manner) and also raise competition concerns due to the possibility that some operators may be subject to tighter regulation in the sale of international roaming but less so in the purchase of international roaming. This is likely to disadvantage smaller non-aligned operators relative to those that are part of pan-European Groups or Alliances since an operator with access to a group or alliance partner in the roaming country may still benefit from lower purchasing prices by negotiating bilaterally with its local partner, but a non-aligned operator may struggle in comparison. This will impact upon the profitability of non-aligned operators and may affect their ability to compete at the retail level in their domestic market.

3.7 A brief assessment of the Commission's proposed regulation against ERG's six regulatory assessment criteria, as well as the Commission's own criteria as outlined in the second consultation, is presented in Annex 1.

3.8 The above issues suggest that it is likely to be difficult to achieve the benefits the Commission desires within the required timescales, delivered in a coordinated manner across Europe, through a cost-orientation obligation.

Conclusion on wholesale proposal

3.9 ERG agrees with the Commission that wholesale regulation is required in order to address high prices in the roaming market, and that a pan-European initiative is the approach most likely to be successful in leading to reduced roaming charges.

3.10 However, as discussed above, cost-orientation is unlikely to deliver the desired benefits within the stipulated time period.

3.11 The Commission discusses in its second phase consultation that a wholesale cap might be used on a transitional basis until NRAs are able to develop cost methodologies and enforcement mechanisms for cost orientation.

3.12 ERG's view is that a wholesale cap is the most appropriate approach to wholesale regulation in this circumstance since it meets the requirements for harmonisation and has the practical benefit of being far simpler to implement in a coordinated manner and can therefore be achieved within the timescales envisaged. As ERG has previously stated, a wholesale cap addresses the identified concerns in the short term. Even in the longer term, if competition in retail markets can be facilitated through a wholesale cap, then there may be limited justification for expending considerable resources in developing and implementing cost models to achieve a similar result. This is particularly likely in the case that ERG's proposal for determining an appropriate level for the wholesale cap is adopted, given that it has regard to underlying costs through significant cost modelling work already undertaken in the context of regulation of mobile termination rates. After an appropriate elapsed time, ERG believes that a review should be undertaken to determine how the market has evolved, taking account of relevant technical developments, and whether existing wholesale regulation is still required, or whether more or less stringent regulation is merited.

Retail regulatory proposals

3.13 As noted above, ERG believes that retail price regulation is premature. Moreover, should it in practice prove to be necessary, ERG considers that the Commission's proposed retail approach may well be ineffective for the vast majority of roaming calls made (calls made back home) and could even result in these roaming prices (and other retail charges) increasing. ERG's concerns are considered in more detail below.

Objective of the proposed regulation

3.14 The Commission suggests that any regulation of mobile roaming should focus on retail prices, and that to avoid diverging approaches this needs to be set out in an EC Regulation.

3.15 ERG considers that while the case for very close co-ordination of regulation in wholesale international roaming markets is undeniable, the case at the retail level is very much weaker. ERG considers that, in general, retail prices vary amongst member states for good reasons. Consumer preferences may play a large part. Regulation should take full account of these variations in national circumstances. In the event that retail price regulation proves necessary, it would therefore be inappropriate to apply a form of regulation of retail roaming which applied uniformly across Europe.

3.16 ERG believes that it is not yet appropriate that regulatory intervention needs to focus on retail charge regulation to ensure reductions in retail prices to consumers. Moreover, as stated in its previous response, ERG considers that wholesale regulation should be implemented in the first instance, combined with an authoritative index of roaming charges at the retail level. Only if there was clear evidence that this approach did not result in substantially lower retail prices would it be appropriate to consider retail charge regulation. Such an approach is consistent with the principles underlying the current regulatory Framework which state that retail regulation should be imposed only to the extent that wholesale remedies are ineffective⁶.

Home pricing principle

3.17 The Commission has stated that its proposed approach to regulation is the Home Pricing Principle (HPP). ERG understands that under this approach consumers would pay to make calls as if they were in their home country, and that receipt of calls would be at no charge.

3.18 ERG suggests that the Commission should reconsider its proposal to adopt the Home Pricing Principle. In the view of ERG, it will be generally ineffective at achieving the regulatory objectives sought, namely a significant reduction in typical roaming tariffs. Around 80% of roaming calls are to the home country. Under the HPP, these will be charged at the same level as mobile international direct dialled calls from the home country. Charges for such calls are typically high, in some cases higher than the charge for the corresponding roaming call.

3.19 Further, in its previous response ERG stated it was not in favour of mechanisms that tie the retail price for roaming to the retail price of other services. In general, tying remedies suffer from various implementation challenges – it can be difficult to calculate and monitor the appropriate price of the tied services – and more significantly, it is likely to lead to distortion of the prices of the unregulated services.

3.20 The following section discusses application of the Commission's proposal to different call types and ERG's specific concerns.

Receiving calls - abolition of retail roaming charges

3.21 The Commission proposes to abolish retail roaming charges for receiving calls. The Commission has based this aspect of its proposals on the calling party pays principle which prevails for other types of retail voice services, and argues that the same principle should apply to international roaming charges.

⁶ The Commission's explanatory memorandum to its Recommendation on relevant product and service markets susceptible to ex-ante regulation in accordance with framework Directive (2002/21/EC) state "NRAs have powers as a last resort and after due consideration to impose retail regulation on an undertaking with significant market power. However, regulatory controls on retail services should only be imposed where NRAs consider that relevant wholesale or related measures would fail to achieve the objective of ensuring effective competition."

3.22 At the wholesale level, when a standard domestic call is received by a mobile subscriber their mobile operator charges the originating operator a national termination rate that is based on the cost of terminating a call within the home country and is independent of location within that country. When an international roaming call is received however, there are additional costs incurred by the recipient's home mobile operator who effectively terminates the call on their own network, but then originates a new call destined for the mobile network on which their subscriber is roaming. These additional costs include the national mobile termination rate of the network on which the subscriber is roaming and international transit charges and are not generally covered by the mobile termination rate set for the subscriber's own network.

3.23 If these additional costs were to be recovered from the calling party, this might imply that the caller should pay a higher rate when calling a mobile subscriber who is travelling abroad. However, implementing such an approach is likely to be technically complex and highly undesirable from a consumer perspective since the caller may well have no knowledge of whether the recipient is in their home country or travelling abroad resulting in confusion and lack of awareness of the charge they are likely to pay for the call.

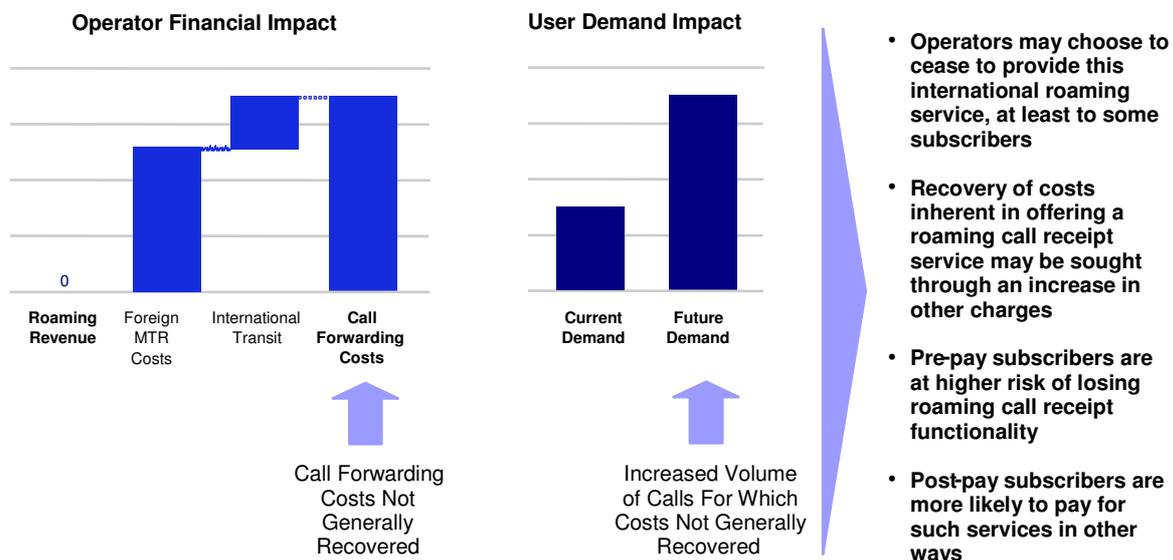
3.24 The objective of any regulation should be to ensure that services are priced taking account of underlying costs and that any justifiable costs are able to be recovered from those who cause the costs to be incurred. If the proposed Regulation states that the recipient should not be required to pay for the costs of the call, then the MNO would be justified in seeking to recover the relevant costs elsewhere.

3.25 Given this scenario, there could be several unintended consequences of the proposed regulation.

- (a) Since roamers would no longer have to pay for receiving calls, it is likely that demand for such services will grow. Additionally, some subscribers may substitute making calls for receiving calls, by using either formal, or informal, 'call-back' arrangements (as a simple example, mobile subscribers roaming abroad may be incentivised to send a text message asking to be called, rather than making the call themselves). The increase in receiving call volumes may exacerbate the losses that the operator incurs in enabling their subscribers to receive calls whilst abroad but not being able to charge for the service.
- (b) A significant risk of not allowing cost recovery is that operators may choose to cease to provide this international roaming service, at least to some subscribers. Pre-pay subscribers may be particularly at risk of losing the ability to receive international roaming calls: whilst operators have the option to increase the monthly subscription fee to fund unrecovered roaming costs from contract consumers, they cannot use the same mechanism to recover costs from pre-pay consumers. Additionally, there are numerous very low usage pre-pay cards in circulation and it is likely that an operator would seek to reduce their exposure to such pre-pay cards being used to receive loss-making calls.
- (c) Other consequences can also be envisaged. For example, while the international roaming service may still be offered, the recovery of the costs inherent in offering

such a service may be sought through an increase in other charges, such as existing mobile termination rates⁷ or rates for other retail services.

Figure 1 – Market impact of Commission proposal – receiving calls



Making Calls – applying the Home Pricing Principle (HPP)

3.26 ERG considers that the rationale for this approach is inconsistent with good regulatory practice for two main reasons:

- (a) Regulatory practice, as most often adopted by the Commission and NRAs, provides, where necessary, for the setting or stipulation of charges with regard⁸ to the underlying costs. The largest component of relevant costs for making calls while abroad is the wholesale international roaming charge levied by the foreign mobile operator. Even if foreign wholesale tariffs were to be regulated on a cost oriented basis, as per the proposed Regulation, these tariffs are unlikely to bear any relation to domestic retail prices in the home country.
- (b) Any regulation that ties a charge to the unregulated charge of another service carries the risk of a “spill-over” effect, where incentives to influence the price of the regulated service results in operators changing the price of the unregulated service. This risk is significantly exacerbated if “home prices” are the result of a competitive market, but prices for roaming services do not reflect the outcome of a competitive environment. In such a case, there is a risk that the lack of competition in roaming may spill-over

⁷ In the case of regulated mobile termination rates, MNOs may seek to argue that NRAs should revisit the existing regulation to reset termination levels to include a surcharge for the recovery of additional costs associated with receiving roaming calls.

⁸ This does not of course imply that all regulatory charges should be cost-oriented, which would be a tighter condition.

into home prices, causing these home prices to increase and consequently roaming prices not to fall significantly, potentially rendering the regulation ineffective.

3.27 Some specific examples of the unintended consequences of such regulation are discussed in detail below with regard to specific types of calls.

Calls home and calls to a third country

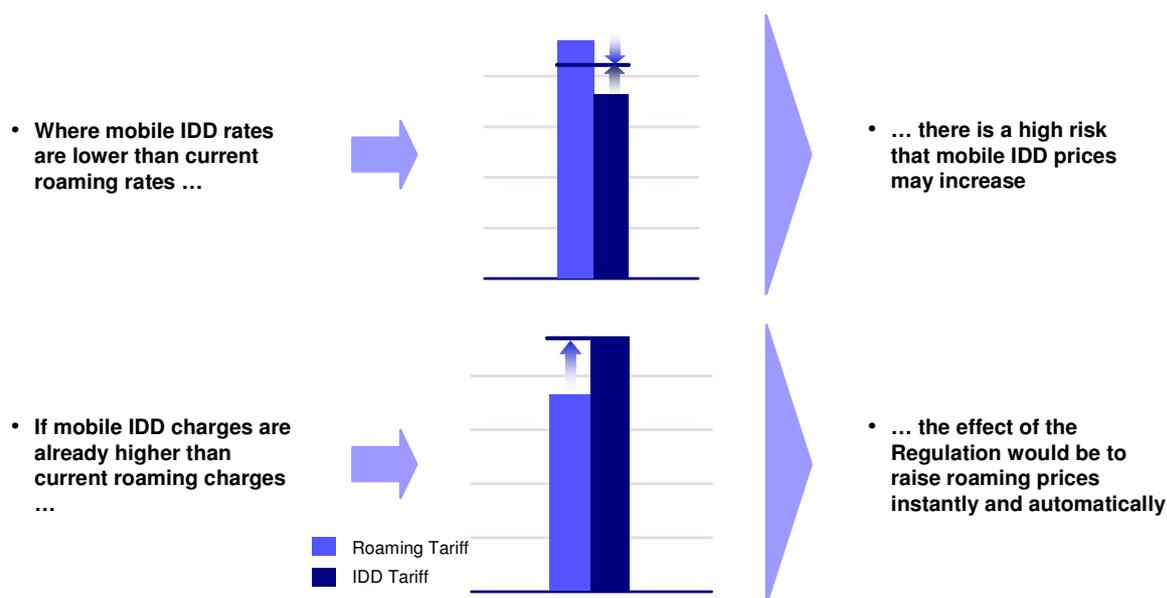
3.28 Calls made home or to a third country whilst roaming are by their very nature international calls. HPP seeks to link the retail price of these calls to mobile International Direct Dialling (IDD) prices for the equivalent calls made from the subscriber's home market.

3.29 However, mobile-originated IDD calls are a very different service from roaming calls made home whilst abroad and have very different demand characteristics. In many Member States, mobile users rarely use IDD, instead choosing to make international calls from fixed lines, or via an indirect access operator. As a result volumes of mobile IDD calls are often very low – in some major EU Member States these make up less than 1.5% of total mobile-originated minutes. In contrast, the vast majority (around 80%) of roaming calls made in a foreign country are calls back home, and hence, although the absolute level of roaming calls is relatively low compared to non-roaming calls, the volume of roaming calls home can be significantly higher than mobile IDD volumes (for example, at present UK subscribers generate approximately twice as many roaming minutes as mobile IDD minutes).

3.30 Even if current mobile IDD rates are lower than the current roaming rates (and typically mobile IDD rates are much higher than mobile domestic calls), then by tying the price of roaming calls home (and to a third country) to the price of mobile IDD calls, there is a high risk that mobile IDD prices (which are unregulated) may increase, thereby failing to reduce roaming prices significantly as intended. Such an increase is all the more likely given that consumers do not appear to be sensitive to mobile IDD price variations.

3.31 Of even greater immediate concern, if mobile IDD prices are already higher than current roaming charges, for these tariffs, the unintended effect of the proposed Regulation would be to raise roaming prices instantly and automatically, thus rendering regulation counterproductive for these call types and causing consumers to pay even higher charges. For instance, ERG found it straightforward to identify a number of tariffs available in several EU Member States where the current mobile IDD rate for making a mobile call from home to other European countries is about 25% higher than the corresponding current roaming rate for calling back to the home country from these European countries.

Figure 2 – Market impact of Commission proposal – calls home & to a 3rd country



In-country calls

Making a local call (Roaming calls to a local subscriber in the visited country)

3.32 Under the Commission’s proposals, calls made within the roaming country to a subscriber on a mobile or fixed network in the foreign country are to be charged as if the roaming customer were making a national call to a fixed or mobile network when in their home country.

3.33 National tariffs differ significantly between EU countries due to a variety of reasons including different demand conditions and differing levels of competition in the retail mobile markets as well as differences in broader economic conditions. For example, not all operators in the EU offer the same suite of domestic tariffs and as such there will always be markets with higher tariffs for certain call types and markets with lower tariffs for equivalent calls.

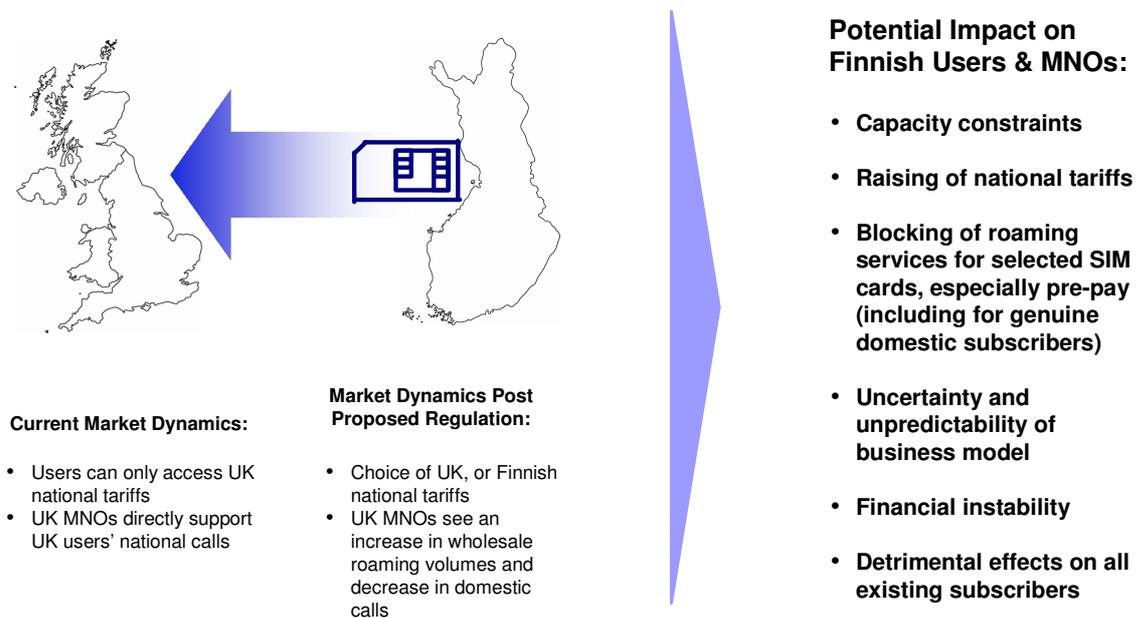
3.34 One of the unintended consequences of the proposed Regulation would be to provide incentives for consumers (or potentially third party commercial entities) to arbitrage the differences in national tariffs between different Member States. For example, local call tariffs for UK mobile consumers are generally much higher than those experienced by Finnish mobile consumers. UK consumers would be incentivised to obtain a Finnish SIM card for the purpose of making domestic calls whilst at home in the UK since by masquerading as a Finnish subscriber making in-country roaming calls in the UK it would be possible to access the significantly lower call tariffs available to Finnish subscribers at home (rather than paying the higher UK local call tariffs).

3.35 This could result in the migration of many European subscribers to the EU MNOs with the lowest national tariffs, a result which might create a capacity constraint for these MNOs and necessitate various responses to this increasing demand such as the raising of their national tariffs, or the blocking of roaming services to selected SIM cards. In the latter case, pre-pay SIM cards are likely to present a particular problem as it can be challenging to locate the movements of pre-pay SIM cards which might even lead an MNO to prohibit

roaming for all pre-pay SIM cards (including genuine domestic subscribers) in order to constrain the arbitrage potential. Failure on the part of an operator to take such steps may result in significant uncertainty and unpredictability to their business model, potentially leading to financial instability and detrimental effects on all their existing subscribers (including both roaming and non-roaming customers).

3.36 Whilst there may be a limited proportion of consumers prepared to take advantage of these arbitrage opportunities directly, there are commercial entities that already exist whose business model is to leverage the arbitrage opportunities between different tariff structures in different countries. In extreme cases, MNOs themselves may look to exploit arbitrage opportunities, for example if by so doing they can increase their competitors' costs.

Figure 3 – Market impact of Commission proposal – in-country calls



Making a local call (Roaming calls to another roamer in the visited country)

3.37 According to the HPP, calls made between two users from the same home country roaming in the same visited country would be charged at international rates applicable from the home country to the visited country since the HPP depends on the mobile number called rather than the actual geographic location of the recipient. For example, two Belgian consumers on holiday in Spain (or travelling together on business) would need to pay their mobile IDD rate for calling from Belgium to Spain in order to speak to each other, rather than the price of a local call even though they are making a call in the same country. This scenario is likely to be relatively common and may appear counter-intuitive and therefore confusing to consumers.

3.38 Further, as discussed in the earlier example, if mobile IDD rates on certain routes are higher than the current roaming charge, this might have the immediate unintended

consequence of increasing roaming charges from their current levels at least for the calling party⁹.

Other concerns

3.39 There is a risk of other unforeseen consequences on the wider market and it is difficult to predict how large the impact of these consequences might be. If the consequence of attempting to reduce retail roaming prices through regulation is to increase the prices of other services, it may suggest imposing further regulation (potentially in markets that are currently free from regulatory controls) to reduce the opportunities for MNOs to raise other prices. However, there are significant drawbacks of increasingly tighter and more intrusive regulation, both in terms of costs of implementation and compliance (for both regulators and industry) especially if a simpler, lighter-touch approach can be adopted to achieve the desired outcome of a reduction in retail roaming prices.

3.40 For instance, MNOs could simply decide to reset all mobile IDD rates to equal their prevailing roaming rates. In such circumstances, the Commission's proposed regulation would have no effect on prices for the vast majority of calls in the roaming market (including calls made back home), and would raise concerns over the (potentially increased) level of mobile IDD charges. Similarly, preventing MNOs from charging to receive roaming calls may cause them to levy an additional monthly subscription fee for roaming services on contract tariffs and no longer offer the service on pre-pay tariffs.

3.41 It is also unclear whether the HPP would allow for an exit strategy to withdraw from regulation at a later stage if market developments are deemed to be sufficient to ensure that the Commission's objectives are achieved, and what form such a strategy might take. Given this, there is a risk of not only entrenched regulation in roaming services, but possibly extension of regulation to other retail services.

3.42 Finally, any further regulation to limit the effects of the unintended consequences stands a high risk of legal challenge as the effects are likely to be felt in markets hitherto free from specific regulatory constraints.

3.43 ERG believes that it is good regulatory practice to anticipate the consequences of any proposed regulation and that these considerations must be borne in mind in the Commission's impact assessment of its proposals.

Conclusion on Commission's retail proposal

3.44 The ERG has significant concerns regarding the Commission's retail regulation proposals. The abolition of charges for receiving calls and the application of the HPP may lead to several unintended consequences such as the refusal to supply roaming services, an increase in current roaming prices or the possible increase of, or slowing of reductions in, other retail prices. If any of these unintended consequences were to result, consumers as a whole may be worse off due to:

⁹ ERG recognises that under the Commission's proposals, unlike at present, the recipient would not be charged for receiving the call.

- (a) A possible reduction of consumer choice between roaming services, distorting the incentives of consumers between choosing pre-pay/post-pay tariff packages, and reducing the consumption of roaming services;
- (b) A possible increase in the overall cost for consumers either through an increase in monthly subscriptions or through increases in other retail prices; and
- (c) A dis-benefit to non-roamers (who make up the considerable majority of mobile subscribers) following a possible increase in retail prices which out-weighs the benefit experienced by roamers following a reduction in roaming prices.

3.45 ERG is of the view that implementation and monitoring of such a proposal is very challenging.

3.46 The next Section discusses the ERG proposal and its relative suitability as a regulatory tool for international roaming services.

Section 4

ERG Proposal

4.1 ERG set out its proposal for an EC Regulation in its response to the Commission's initial call for input dated 22 March. ERG refers the Commission to this earlier response for further details, although an overview of this proposal is included in Section 2 above.

4.2 This Section sets out how ERG's proposal addresses the Commission's objectives in contrast to the concerns raised in relation to the Commission's proposal set out in Section 3 and expands further on ERG's suggestion of a retail price index to measure pass-through of wholesale reductions to the retail level.

Suggested approach – wholesale price cap

4.3 ERG's response to the first public consultation suggested setting a benchmark cap on wholesale prices at twice an average European mobile termination rate (75th percentile). This might be applied to the average wholesale price taken over all intra-EU routes on which two MNOs trade with each other. This would provide both MNOs flexibility in the sale and purchase of wholesale roaming between each other, allowing them to set rates below the level of the cap for specific routes which may be lower cost or more competitive.

4.4 Setting such a pan-European benchmark removes some of the regulatory difficulties associated with cost-orientation in the context of an objective to see substantially lower roaming prices in a short period of time. In particular:

- (a) **Coordination, effectiveness and simplicity:** The ERG proposal of the benchmark cap is based on wholesale termination charges across EU countries. Given that the costs associated with mobile termination are relatively well understood by NRAs, (indeed many NRAs already regulate mobile termination rates in their countries based on an assessment of underlying costs) this proposal does not require further cost modelling and is relatively simple to implement, enabling significant reductions to be effected in a coordinated fashion across the EU.
- (b) **Flexibility:** A cap set in such a manner may provide sufficient mark-up above underlying costs to protect incentives for MNOs to innovate and make use of relative efficiencies, thus not stifling market developments. It is also likely to be sufficiently generous to allow MNOs to sell and purchase international roaming below the cap and hence not constrain the development of further competition in wholesale international roaming.
- (c) **Review:** If competition can be fostered in such a manner, a wholesale cap allows the possibility for regulation to be withdrawn after an appropriate review of market developments.
- (d) Further, with regards to simplicity, a benchmark cap also avoids the lengthy process required in the development, construction, validation and acceptance of cost models by different NRAs: by basing the regulated rate on a charge that is already regulated in many countries, it is less likely to suffer from contentious debate over detailed issues.

4.5 To summarise, the main benefit of wholesale price-cap regulation is the simplicity of implementation throughout Europe. This aspect is critical in this particular situation where a practical and expedient approach is necessary in order to address the Commission's concerns in the short time envisaged.

4.6 Given that the wholesale regulation must benefit the end-users, any savings resulting from lower wholesale input prices should be passed on to the retail market. ERG has reason to believe that MNOs are likely to pass wholesale price reductions onto the end-user, given the competitive state of the retail market in a number of Member States, recent developments with a number of MNOs offering tariffs with generally lower roaming rates, and the increasing political pressure exerted on the MNOs to lower retail roaming rates substantially. In particular, ERG notes the announcements made this month by MNOs of reduced retail roaming prices as examples of the potential for such pass-through.

4.7 However, as described in its response to the Commission's first phase consultation, ERG recognises that there is a risk, particularly in Member States with less competitive retail markets, for wholesale price reductions to be, in part or in whole, converted to retail profits rather than end-user benefits. Additionally, given that movements in retail prices are hard to assess owing to the complexity and diversity of retail tariffs, ERG considers that it would be necessary to develop an authoritative and robust index of retail roaming prices which could be used to monitor price movements. Only if substantial reductions in retail roaming prices are not observed following the imposition of wholesale regulation (for example by monitoring such a retail price index) would it be appropriate to consider the possibility of implementing retail price regulation.

4.8 A retail price index is discussed further below.

Retail price index

4.9 Given the desirability for an index that would be relatively straightforward to calculate, ERG previously discussed that one possible starting point could be the average revenue per roaming minute, which would be determined by 'total retail roaming revenues' divided by 'total retail roaming minutes' taking account of revenues (including fixed fees for bundles of roaming minutes and subscription fees to special discounted offers) and volumes associated with calls both made and received by each MNO's subscribers whilst roaming.

4.10 However, since total retail revenues and minutes are made up of a number of sub-categories of tariffs and call types, determining an index based on the average charge for all roaming tariffs for all call types may be too broad and may not capture the reductions for particular roaming services and calls. There are broadly:

- (a) three types of tariff packages within which roaming is provided – pre-pay; post-pay and business;
- (b) two types of roaming services associated with each tariff package – receiving roaming calls and making roaming calls.

4.11 Considering all these different categories within a single basket index carries the risk that reductions in the average revenue from some categories may be traded off for increases in the average revenue of other categories. This may not bring about the desired result: for example, one objective may be to ensure that pre-pay consumers are not charged very high prices for roaming, however, it would still be possible for an MNO to demonstrate reductions in the single roaming index by offering significant reductions to business customers whilst

maintaining high prices to pre-pay consumers. On the other hand, having separate indices for each category would not only be more complex to administer and monitor, but would also remove some of the flexibility for operators to set prices based on consumer behaviour and sensitivity.

4.12 However, each type of consumer, irrespective of the tariff package they are on, can both make and receive calls. The decision to make or receive calls is not dependent on the characteristic of any consumer, but on the sensitivity of consumers to these prices. Making and receiving calls may be relatively substitutable from the consumer's perspective and allow operators to set different levels that are related to consumers' sensitivity.

4.13 ERG considers that while a retail index should help to ensure that the benefits of wholesale regulation are felt by all types of users, it may not be necessary to be prescriptive about which types of roaming services they benefit from.

4.14 ERG considers that retail indices for the following services may be the most important to consider given that business users are typically offered greater discounts:

- (a) residential pre-pay users (making and receiving calls); and
- (b) residential post-pay users (making and receiving calls).

4.15 Furthermore, ERG recognises that the benefits of price reductions in wholesale roaming need not completely flow through to only retail roaming services; end-users may also benefit if the reductions are passed on through other services (e.g. through increased handset subsidies). Nevertheless, ERG is supportive of the Commission's view that significant reductions from current retail roaming prices are necessary. Given this, the ERG considers that NRAs should be responsible for monitoring reductions in retail roaming prices through the use of the index in order to assess the extent of benefit to consumers taking into account national circumstances.

4.16 To the extent that wholesale price reductions may lead to consumer benefits through reduced prices for other services, NRAs may wish to consider monitoring the price levels of other mobile services also.

Further retail remedies

4.17 As stated in the previous ERG response, the extent to which further remedies at the retail level are considered necessary is dependant on the extent to which MNOs are prepared to respond positively to the measures advocated above, by voluntarily reducing (or committing to reduce) retail roaming prices alongside the wholesale reductions arising from the measures recommended above. For that reason, ERG believes that it would be inappropriate to implement any form of retail price control before allowing the combination of the above measures and market forces to work. Further discussion of potential retail remedies are discussed in Section 5 of this response.

4.18 As also stated in the previous response, ERG recognises that a mechanism should be identified to effect retail charge regulation if sufficient reductions in retail roaming charges are not observed following wholesale reductions. ERG continues to believe that stipulation of a mechanistic process may risk failing to take account of significant differences in the extent of competition and pricing structure of retail markets in different Member States and a process which incorporates appropriate judgment of developments in the relevant retail market is likely to be more appropriate.

Review

4.19 ERG continues to believe any regulation should be reviewed following an appropriate period of time (such as 2-3 years), to assess whether it is still required and such regulation should be capable of modification in the light of market circumstances at that time.

Section 5

Further Issues

5.1 ERG would like to make the following further points in this response.

Retail regulation

5.2 ERG notes that the Commission's proposal for an EC Regulation encompasses both wholesale and retail regulation. As stated above, as well as in ERG's previous response to the Commission, ERG is of the view that the best approach for intervention is to initiate a step-change reduction in wholesale prices, coupled with the right incentives on MNOs to pass-through savings in the form of reduced retail prices which would include a robust metric to measure genuine reductions in prices paid by consumers for retail roaming. If, and only if, there was clear evidence that the regulation on wholesale roaming prices had not had the desired effect on delivering substantial reductions in retail roaming prices, would it be appropriate to consider some form of retail charge regulation.

5.3 ERG does not believe that a long period should be necessary to assess the effect of wholesale regulation. Six months after the application of such regulation should be sufficient.

5.4 Nevertheless, should such retail charge regulation be appropriate (for example, if substantial reductions in retail roaming prices are not observed following implementation of wholesale regulation), ERG considers that the formulation of retail charge regulation should take account of the issues discussed in Section 3 of this response and also the further considerations below.

Overall Considerations

5.5 ERG understands the potential attraction to consumers of tariff simplicity, such as envisaged under the "Home Pricing Principle" proposed by the Commission. However, as discussed in Section 3, ERG sees sufficient problems arising from this approach as to make it unsuitable for regulation. More broadly, ERG is not in favour of mechanisms which tie the retail price for international roaming to the retail price of other services (for example domestic mobile services) given the likelihood that this will lead to distortions in the pricing of the unregulated services and other unwanted effects.

5.6 Furthermore, the Commission will also need to take account of any obligations under the EC Treaty, for example, ensuring that any Regulation does not adversely affect competition in related markets throughout the EU.

Potential Retail Regulation of Roaming Calls

5.7 If retail regulation needed to be applied, ERG believes that a form of price cap regulation would be preferable to a tying mechanism. Setting an appropriate cap not only ensures that consumers benefit from lower charges for the services in question, but also ensures that MNOs retain reasonable flexibility in pricing between services and consumer types. ERG believes that, on balance, it would be best to apply a 'safeguard' cap to the price of each call but analyses below the relative advantages and disadvantages of various capping mechanisms.

5.8 In principle, a cap could be applied either to a basket of MNO tariffs, or to each individual tariff that an MNO offers:

- (a) Applying an overall cap to international roaming tariffs for a basket of all types of users would leave MNOs with the flexibility to vary charges to different types of users as long as the overall cap conditions were met. However, such a cap may leave some users, such as pre-pay consumers (who may make relatively few roaming calls and are less likely to choose their network provider on the basis of roaming tariffs) more exposed to high prices for roaming. This is because MNOs may be more likely to seek to meet the overall cap by offering preferential rates to more price sensitive customer segments such as business users who make much greater use of roaming services.
- (b) Alternatively, if the cap is applied to each and every individual tariff offered by an MNO it would be a simpler and more direct way of safeguarding that any potentially vulnerable users are not charged excessively.

5.9 The cap could be applied to the difference between retail price and wholesale costs. Alternatively, the retail price could be capped directly. The administrative complexity of these approaches differs significantly.

- (a) A capped mark up on wholesale costs more directly regulates the retail profits that MNOs could potentially make from roaming calls, and ensures that, where underlying costs are lower, such benefits are passed on to the consumer. However, monitoring such an approach for compliance would be more onerous since it would involve the cross referencing of relevant underlying wholesale roaming charges with retail rates, and would also be more complex to communicate to consumers. It would also require a robust analysis (which has not generally been attempted so far) of the costs incurred at the retail level in the provision of roaming.
- (b) A straightforward cap on the absolute level of any retail roaming charge would be substantially easier to implement and administer. Whilst such a cap may not be as reflective of underlying costs as a cap on the mark-up over wholesale costs (and therefore less economically efficient), it would be effective in delivering substantial reductions in retail roaming rates and would be easier for consumers to understand. Moreover, the difference in economic efficiency is unlikely to be significant in practice.

Approaches to Setting a Cap Level

5.10 As discussed in the ERG First Response, there is considerable variation in retail tariff structures, not only between operators but also across Europe. This may to a large extent reflect national market features and consumer preferences. For example, in some Member States, consumers are highly attracted to frequent renewal of their handsets at no (or highly subsidised) cost to themselves. In other Member States, such subsidies are not offered, either because they make little commercial sense or because they are forbidden by law. Other things being equal, it cannot be expected that retail tariffs for making and receiving calls would be the same in two Member States where such practices were different. Roaming tariffs may be expected to show very high levels of variation, as there is likely to be considerably less elasticity in respect of roaming services than, say, in respect of national calls.

5.11 ERG does not believe it is the role of the regulator to frustrate such national preferences. Therefore, it believes that a highly prescriptive and uniform approach to retail price regulation would be inappropriate. However, it recognises the potential need to impose some constraint on tariff levels, in order to meet the objectives of regulation, in this case to achieve a substantial average reduction in retail roaming rates and to prevent exorbitant charges to consumers.

5.12 In the event that market forces fail to deliver the objectives, ERG considers that they would be delivered by the following package of measures:

- (a) A uniform cap on the price per minute of every call, set at a “safeguard” level¹⁰. This would constrain the maximum price per minute that could be charged for all intra-EU roaming calls and ought to be set significantly below the current European average charge, so as to guarantee significant retail price cuts, especially for those consumers who are paying relatively higher roaming charges at present. An objective of the Regulation is to achieve a substantial reduction in average retail roaming rates; for example, Commissioner Reding has expressed an aspiration for a 40%-60% reduction in current retail rates. However, as a cap on the *maximum* charge for any roaming call, this safeguard cap should be set significantly above the intended *average* European retail roaming price per minute so as to not constrain unduly tariff flexibility and innovation or the development of competition. For example, in terms of domestic mobile tariffs in a given Member State, it is not unusual to find highest per minute rates which are as much as three times the average per minute rate, as a reflection of different tariff packages catering to different consumer preferences and demand characteristics. In setting such a uniform EU-wide safeguard cap, ERG consider that it would be necessary to take account of prevailing national domestic rates so as to avoid the potential for significant arbitrage opportunities between the level of domestic charges and international roaming charges, which could potentially lead to distortion to some national domestic rates. ERG has identified existing domestic mobile tariffs in the EU which are as high as about €0.75 per minute. Such domestic tariff levels should be taken into account in determining an appropriate level for a retail safeguard cap to apply across Europe.
- (b) A power for an NRA to set a lower national cap to be applied to its national MNOs. This could be employed by those NRAs where, due to differences in national retail markets, a lower national cap than the European maximum would be appropriate, or where there is a significant risk that MNOs would use their discretion to price all calls at the level of the European cap, contrary to the regulatory intention. ERG would be happy to develop regulatory principles to be used by NRAs in setting such a national cap. By taking account of prices paid for using mobiles in the home country, such national caps could for example reflect the spirit of the Home Pricing Principle, without the disadvantages articulated in Section 3.

¹⁰ If such an approach is adopted, in order to avoid potential margin squeeze, it may be worth considering the merit of imposing a safeguard cap on the maximum wholesale charge permitted, set at a higher level and in addition to the ERG proposal of an average wholesale benchmark cap of twice the average mobile termination rate.

5.13 This combination of measures would therefore ensure that retail regulation properly reflects national circumstances, as well as achieving throughout Europe the objectives mentioned in paragraph 5.11. ERG considers that it conforms well to the spirit of the current Framework.

5.14 In order to ensure implementation of a retail cap is relatively simple and transparent to the consumer, it may be appropriate to apply a single level to all types of roaming calls which are made (in particular to calls within the visited country as well as to calls back home, given that the differences in underlying costs – international transit – are likely to be relatively small)¹¹. However, given the fundamentally different way in which receiving calls are provisioned, and hence the different underlying wholesale costs, it would be appropriate to set a different level of retail cap for receiving calls from the level of retail cap for making calls.

5.15 ERG recognises that there is a stronger case for immediate regulation of the retail prices of calls received, given that there are no relevant proposals for wholesale regulation which would feed through to retail price reductions for received calls. Nevertheless, ERG considers on balance that the combination of pressure from authorities and the imminence of formal regulation, if significant voluntary reductions are not made, should be sufficient.

Other issues

5.16 ERG is of the view that even if retail regulation is implemented, it is important that monitoring of reductions in retail prices be facilitated through the use of a retail index as described in Section 3. Indeed, since the scope of services included within the cap may be quite broad, a retail index is all the more important to ensure that benefits are passed on to all types of users. Therefore ERG would recommend the introduction of an authoritative index irrespective of the decision on retail charge regulation.

5.17 In addition to the specific concerns about the application of retail regulation set out above, ERG would also like to make a number of additional observations on the Commission's proposal. These are provided below.

Possible inclusion of other services

5.18 ERG is concerned with the possibility that the Commission will seek to extend the Regulation to include additional data services. ERG has limited information on these services in the context of roaming and has not yet had the opportunity to examine these issues fully, nor to consider the impact of their inclusion in the current regulation.

5.19 Given this, and the significant concerns ERG already has in relation to the proposal for voice services, ERG is concerned about any expansion of the scope of the Regulation at this late stage. Whilst the Commission has raised the possibility of including SMS in the Regulation, ERG notes that there appears to be relatively less concern amongst consumers regarding the price of sending SMS whilst roaming and that there is typically no charge for receiving SMS. Moreover, to the extent that SMS roaming substitutes for voice roaming, any

¹¹ It may be appropriate to take account of any set up fee, in order to avoid that nominally low per minute charges are in practice ineffective.

reductions in retail prices for voice roaming may have an impact on retail prices for SMS roaming which should be considered before extending the scope of regulation.

Geographic scope

5.20 ERG notes that the Commission has confirmed that its proposed regulation will apply only to intra-European calls. It is appropriate that this is the case. However, ERG also notes the argument advanced by the MNOs to the effect that whatever the Regulation says, practical ways will be found by which non-European MNOs can benefit from lower intra-European rates illegitimately. Even if this was a possible scenario, it is likely to apply whether the lower rates arise as a result of regulation or market forces and as such, ERG does not consider it a strong argument against regulation.

5.21 ERG re-iterates its belief that it would not be appropriate to apply any regulation to the 'Outermost Regions' of the EU, given that the traffic patterns for subscribers in these areas differ significantly from the rest of the EU.

Tariff Transparency

5.22 Consumer surveys have indicated that a high proportion of mobile subscribers are unaware of retail roaming prices.

5.23 Any steps taken to raise consumer awareness of the level of these charges are therefore likely to increase pressure on MNOs to reduce retail prices for roaming services.

5.24 There are various options for increasing consumer awareness, some of which may require regulation while others may be achieved through self or co-regulatory measures or through a Europe-wide coordinated regulatory approach. Potential options include (but are not limited to):

- (a) Increased communication of roaming charges at point of sale (eg. in shops);
- (b) Booklets to be included at sale of contracts/ pre-pay SIM cards with current providers roaming charges. Such documents should be updated and re-issued as operator tariffs schemes are revised;
- (c) SMS messages sent by MNOs to subscribers whilst roaming, providing tariff information relevant to the use of mobile services whilst in the country they are visiting; and
- (d) Tariff comparison documents/ websites.

5.25 Several of these options were considered recently by the International Roaming Retail Tariff Transparency Project Team of the ERG. In its report¹² the ERG recommend that NRAs explore the possibility of publishing tariff information on national websites and encouraging MNOs to send SMS messages to customers informing them of relevant retail roaming prices.

¹² Available at: http://erg.eu.int/doc/publications/erg_05_43rev1_irr_ttransparency.pdf

5.26 While many NRAs have already started to publish web sites with prices for the most relevant services in international roaming, further work is needed to develop the other measures, particularly in relation to the use of SMS messages to inform roaming subscribers of the charges that they will incur. Issues for further consideration include:

- (a) access on a so-called 'push' basis where the MNO 'pushes' the information to the roaming subscriber;
- (b) access on a 'pull' basis, requiring the subscriber to request the relevant information;
- (c) the price for such information;
- (d) the balance between usefulness and completeness of information and its complexity and readability, particularly when using SMS as a bearer;
- (e) the likely legal basis for NRAs to require MNOs to offer such services; and
- (f) the technical implications of any planned approach.

5.27 It may be appropriate for the Commission to consider what steps could be taken to facilitate such measures. In particular, it appears that many NRAs do not have powers under national law to oblige such services to be offered, where justified. Although there is a legal basis in the Universal Service Directive, it is at the discretion of the Member States whether to grant such powers to its NRA and many have opted not to do so.

Market Reviews under the Framework

5.28 If the proposals for regulation proceed, there is virtually no merit in further expenditure of resources by NRAs, and industry, on Market Reviews of the wholesale international roaming market (market 17). ERG hopes that the Commission will make an authoritative statement along these lines to avoid any uncertainty on the matter.

Other market structures

5.29 Finally, there is merit in considering whether there are more fundamental structural solutions to the issues identified in international roaming services, such as allowing greater commercial freedom for MNOs to define retail tariffs and attract foreign subscribers to use their network while roaming, which could be developed with a longer term perspective.

Annex 1

Detailed assessment of Commission and ERG proposals

1.1 This annex provides ERG’s preliminary high level views of the Commission’s proposed regulation against both the ERG criteria presented in the previous ERG response and Commission’s criteria as outlined in its second consultation. The Commission has indicated in the Consultation that it intends to undertake a Regulatory Impact Assessment (RIA) of its proposal. ERG strongly supports the undertaking of a RIA before any decisions on regulation are made. ERG looks forward to working with the Commission in this regard.

1.2 Table 1 below gives a general view of the possible impact according to ERG criteria. Table 2 provides the view according to the Commission’s criteria.

Table 1 – Assessment of Commission proposal against ERG criteria

Coordinated	Effective	Avoids distortion	Simple to implement	Flexible	Allows for review
- difficult to coordinate single wholesale remedy across EU	- home pricing principle could lead to increases in roaming call prices, particularly for calls outside the visited country - reduces effectiveness of remedy	- pegging roaming prices to home prices risks domestic price rises; and consequent roaming price increases (eg. IDD charges) - significant variations in EU domestic prices, creates opportunity for arbitrage between domestic national prices in different Member States – potentially distorting domestic national prices - may lead to intervention in other markets	- difficult to coordinate on approach and timing - potential for application of different methodologies - very resource intensive	- removes flexibility for MNOs to offer innovative tariffs	- no obvious mechanism for review to assess competitiveness in the market over time - unclear how the level of competition may be assessed - potential for entrenched regulation

1.3 The table below draws upon the reasoning used by ERG in Sections 2-5 of this response against the Commission's proposal for an EC Regulation. It summarises the main impacts of the proposal and sets them against the criteria. ERG's preliminary view is that the Commission's proposal does not adequately meet its own criteria and therefore is at risk of being considered as a disproportionate response to the issue of high prices in roaming services.

Table 2 - Assessment of Commission proposal against Commission criteria

Effective (outcome for users and consumers in terms of prices)	Financial impact on sector	Effects on competition	Effect on level of service at retail and wholesale level	Enforceability at European and national level	Overall impact on competitiveness of European economy
<ul style="list-style-type: none"> - home pricing principle can result in an increase in roaming prices in some cases 	<ul style="list-style-type: none"> - MNOs likely to suffer losses in roaming if domestic retail prices are lower than relevant wholesale costs - MNOs likely to suffer losses if they are not allowed to recover the cost of received roaming calls 	<ul style="list-style-type: none"> - pegging roaming prices to domestic prices instead of roaming costs carries significant risk of increasing domestic prices in order to recover roaming costs - this will affect competition across all domestic retail services 	<p>Receiving calls:</p> <ul style="list-style-type: none"> - MNOs may refuse to supply the service if they are unable to recover costs - may cherry-pick consumers who can pay premium domestic prices <p>Wholesale level:</p> <ul style="list-style-type: none"> - risk that operators refuse to supply to non-aligned operators 	<p>Difficult due to:</p> <ul style="list-style-type: none"> - need to investigate and/or set cost-oriented wholesale prices - need to monitor and enforce home pricing principle - no retail monitoring index specified - high resource requirements for implementation and compliance 	<ul style="list-style-type: none"> - wholesale regulation will help non-aligned MNOs to compete, but, - potential for increased domestic prices will affect competitiveness of economy

Table 3 – Assessment of ERG proposal against ERG criteria

Coordinated	Effective	Avoids distortion	Simple to implement	Flexible	Allows for review
<p>- proposed wholesale regulation is a single uniform rate across EU and hence is same value for each country – thus coordinated in approach and can be applied immediately and simultaneously</p>	<p>- proposed regulation immediately effective at wholesale level and can lead to reductions at retail level</p> <p>- construction of an index for monitoring retail prices can inform trigger for future retail regulation and provide incentives to reduce retail rates</p> <p>- potential for future retail charge regulation provides further incentives to passthrough wholesale reductions to consumers</p>	<p>- wholesale regulated prices to be based on wholesale termination charges; avoids distorting any other prices</p> <p>- no retail regulation proposed immediately and hence avoids distorting other retail prices</p>	<p>- termination rates already regulated in many countries and so aids implementation of wholesale regulation in roaming</p> <p>- retail monitoring index is simple to implement as it can be based on market data such as average revenue per minute which operators typically track already and can cover a basket of services</p>	<p>- wholesale cap on average price between any two operators taken over all intra-EU routes allows MNOs flexibility to vary prices for specific routes</p> <p>- with no specific retail regulation, MNOs continue to have flexibility in pricing their services and incentives to invest and innovate</p>	<p>- wholesale cap can be reviewed and be withdrawn if markets become more competitive</p> <p>- retail index allows the monitoring and review of retail prices and can indicate appropriateness of regulation based on competitiveness of roaming prices</p>

Table 4 - Assessment of ERG proposal against Commission criteria

Effective (outcome for users and consumers in terms of prices)	Financial impact on sector	Effects on competition	Effect on level of service at retail and wholesale level	Enforceability at European and national level	Overall impact on competitiveness of European economy
<ul style="list-style-type: none"> - wholesale regulation will lead to reduction in wholesale charges and allow the pass-through of wholesale cost savings to the retail level - monitoring index can also provide incentives for reducing retail prices 	<ul style="list-style-type: none"> - wholesale cap can reduce wholesale revenues, but also provide cost savings in purchasing wholesale roaming – operators who are net buyers will be beneficiaries 	<ul style="list-style-type: none"> - wholesale cap will ensure wholesale market is closer to a competitive market – will allow smaller operators to compete equally with larger ones - monitoring index can act provide incentives to make retail roaming services more competitive 	<ul style="list-style-type: none"> - wholesale regulation unlikely to lead to significant change in level of services offered - no immediate retail level regulation implies incentives to offer current services are not reduced 	<ul style="list-style-type: none"> - wholesale cap easy to adopt and implement at EU level. - retail monitoring index simple to set up at EU level; in due course and if necessary, NRAs empowered to set and enforce retail regulation depending on national circumstances 	<ul style="list-style-type: none"> - wholesale regulation will help smaller non-aligned operators to compete and increase possibility of competition in retail services - retail index for monitoring can also provide incentives for greater competition across EU in retail services