



Commission for  
**Communications Regulation**

# **Draft Determination in a dispute between Cloud 9 and Vodafone**

Concerning Vodafone charges for facilities and services for the  
separate sale of regulated retail roaming services

**Draft Determination**

**Reference:** 14/106

**Date:** 16 October 2014

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## Redacted Information

Please note that this Draft Determination is a **non-confidential** version and contains no redactions.

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# 1 Glossary

Term	Definition
<b>(EC) No 717/2007</b>	Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC (OJ L 171/32, 29.6.2007).
<b>(EU) No 531/2012</b>	Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 (2012/531/EC, OJ L 172, 30.6.2012, p.11).
<b>(EU) No 1203/2012</b>	Official Journal of the European Union (Non-legislative acts) Commission Implementing Regulation (EU) No 1203/2012 of 14 December 2012 on the separate sale of regulated retail roaming services within the Union (OJ L 347, 15.12.2012, p.1)
<b>ARP</b>	Alternative Roaming Provider.
<b>BEREC</b>	Body of European Regulators for Electronic Communications, established by Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009.
<b>BoR (12) 107</b>	BEREC Guidelines on the application of Article 3 of the Roaming Regulation - Wholesale Roaming Access, 27 September 2012.
<b>BoR (12) 109</b>	Roaming Regulation – Choice of Decoupling Method. BEREC opinion on article 5 implementing act, (BoR (12) 109, 27 September 2012).
<b>BoR (13) 15</b>	BEREC Guidelines on Roaming Regulation (EC) N 531/2012 (Third Roaming Regulation) (Excluding articles 3,4 and 5 on wholesale access and separate sale of services), March 2013.
<b>BoR (13) 82</b>	BEREC Guidelines on Roaming Regulation (EC) N 531/2012 (Third Roaming Regulation) (Articles 4 and 5 on Separate Sale of Roaming Services), 5 July 2013.
<b>Cloud 9</b>	Cloud 9 Mobile Communications Limited.
<b>Communications Regulation Acts</b>	Communications Regulation Act 2002 (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act 2007 (No. 22 of 2007), the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (No. 2 of 2010) and the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011)
<b>ComReg</b>	the Commission for Communications Regulation.

Term	Definition
<b>Domestic Mobile Network</b>	a terrestrial public mobile communications network situated in a Member State other than that of the roaming customer's domestic provider that permits a roaming customer to make or receive calls, to send or receive SMS messages or to use packet switched data communications, by means of arrangements with the home network operator;
<b>Domestic MNO</b>	a public communications network located within a Member State and used by the roaming provider for the provision of regulated retail roaming services to a roaming customer.
<b>ETSI</b>	European Telecommunications Standards Institute
<b>ETSI Standards for the implementation of SSRRRS</b>	Standard technical interfaces, protocols and processes for SSRRRS including but not limited to implementation, provisioning and billing (produced maintained and updated from time to time by ETSI) which are publicly available through the cooperation platform maintained by ETSI <sup>1</sup>
<b>Framework Directive</b>	Official Journal of the European Communities, Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (2002/21/EC, OJ L 108, 24.4.2002, p.33) as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities and 2002/20/EC on the authorisation of electronic communications networks and services (2009/140/EC, OJ L 337, 18.12.2009, p. 37).
<b>Framework Regulations</b>	European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011)
<b>Member State</b>	Member State of the European Union
<b>MNO</b>	The Operator of a terrestrial public mobile communications network situated in a Member State
<b>Mobile Roaming Regulations</b>	Communications (Mobile Telephone Roaming) Regulations 2013 (S.I. No. 228 of 2013)
<b>NRA</b>	National Regulatory Authority
<b>Vodafone</b>	Vodafone Ireland Limited
<b>SSRRRS</b>	separate sale of regulated retail roaming services

<sup>1</sup> [http://docbox.etsi.org/Reference/Cooperation\\_Platform\\_Separate\\_Sale\\_of\\_Roaming\\_Services/](http://docbox.etsi.org/Reference/Cooperation_Platform_Separate_Sale_of_Roaming_Services/)

Term	Definition
<b>Roaming Provider</b>	an undertaking that provides a roaming customer with regulated retail roaming services
<b>regulated data roaming service'</b>	a roaming service enabling the use of packet switched data communications by a roaming customer by means of a mobile device while connected to a visited network. A regulated data roaming service does not include the transmission or receipt of regulated roaming calls or SMS messages, but does include the transmission and receipt of MMS messages;
<b>regulated retail roaming services</b>	regulated roaming services offered by Roaming Providers to Roaming Customers
<b>regulated roaming SMS message</b>	an SMS message sent by a roaming customer, originating on a Visited Mobile Network and terminating on a public communications network within the Union or received by a roaming customer, originating on a public communications network within the Union and terminating on a visited network;
<b>regulated roaming call</b>	a mobile voice telephony call made over a communications network within the Union or received by a roaming customer, originating on a public communications network within the Union and terminating on a visited network
<b>regulated roaming services</b>	Collectively, regulated data roaming services; regulated roaming calls and regulated roaming SMS
<b>roaming call</b>	a mobile voice telephony call made or received on a Visited Mobile Network
<b>Roaming Customer</b>	A customer of a Roaming Provider
<b>Framework Directive and Specific Directives</b>	Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services (Framework Directive), Directive 2002/20/EC (Authorisation Directive), Directive 2002/19/EC (Access Directive), Directive 2002/22/EC (Universal Service Directive) and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) <sup>2</sup>

<sup>2</sup> OJ L 201, 31.7.2002, p. 37.

Term	Definition
<b>Specific Regulations</b>	The Framework Regulations, the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011), the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (S.I. No. 335 of 2011), European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011 (S.I. No. 337 of 2011), the European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 (S.I. No. 336 of 2011). <sup>3</sup>
<b>Single-IMSI</b>	Single International Mobile Subscriber Identity. A technical modality to implement the separate sale of roaming services as a bundle that involves the sharing of one IMSI between the Domestic MNO and the ARP. Single-IMSI is the standard technical modality for implementing the separate sale of regulated retail roaming services, under (EU) No 531/2012 and (EU) No 1203/2012.
<b>SMS message</b>	a Short Message Service text message, composed principally of alphabetical and/or numerical characters, capable of being sent between mobile and/or fixed numbers assigned in accordance with national numbering plans
<b>Visited MNO</b>	a terrestrial public mobile communications network situated in a Member State other than that of the roaming customer's domestic provider that permits a roaming customer to make or receive calls, to send or receive SMS messages or to use packet switched data communications, by means of arrangements with the home network operator;

<sup>3</sup> As defined at Regulation 2 of the Framework Regulations.



## 2 Introduction

- 1 This document sets out the Draft Determination of the Commission for Communications Regulation (**'ComReg'**) in a dispute between Cloud 9 Mobile Communications Limited (**'Cloud 9'**) and Vodafone Ireland Limited (**'Vodafone'**).
- 2 This dispute relates to mobile roaming. Traditionally when roaming, mobile users are connected to a Visited Mobile Network and can make and receive calls, send and receive SMS and use data services. The Visited Mobile Network is different from the Domestic Mobile Network that the mobile user would use while at home. In general, a Visited Mobile Network Operator (**'Visited MNO'<sup>4</sup>**) will only allow a roaming user to connect to its network if there is a roaming agreement in place between the Domestic Mobile Network Operator (**'Domestic MNO'**) and the Visited MNO. Such agreements are required as the Visited MNO has no billing relationship with the roaming user. Under the roaming agreement, wholesale charges relating to the users activities while roaming on a Visited Mobile Network are charged by the Visited MNO to the user's Domestic MNO who, in turn, charges the user the retail amount. When abroad, the roaming user may have a choice of Visited Networks this is typical where the roaming user's Domestic MNO has roaming agreements in place with a number of Visited MNOs.
- 3 In these circumstances the Domestic MNO is both a Roaming Provider, charging for mobile services used when abroad and a Domestic Provider, charging for mobile services used when not abroad.
- 4 In the past, Domestic MNOs have offered domestic services and roaming services as a bundle. If a customer chooses a particular MNO for their domestic service, a roaming service was provided as part of the bundled offer. It was not possible for a customers to choose one operator for domestic service and a different operator as their roaming provider.
- 5 Recently, Regulation (EU) No 531/2012 of the European Parliament and of the Council<sup>5</sup> (**'(EU) No 531/2012'**) set out that that mobile users should have a choice in their provider of roaming services. Therefore, mobile users can either buy roaming services from their Domestic MNO bundled with a domestic service or can choose to have the Domestic MNO as their domestic provider only and buy roaming services from an Alternative Roaming Provider (**'ARP'**). This 'unbundling' of domestic services from roaming services allows domestic and roaming services to be sold separately.
- 6 (EU) No 531/2012 requires that any operator providing roaming services to mobile users (both MNOs and ARPs) must put measures in place to facilitate a change of roaming provider. MNOs are also required to put in place measures that will allow ARPs to offer

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<sup>4</sup> For the purpose of this document where the term Mobile Network Operator or MNO is used it also refers to Mobile Virtual Network Operator unless stated otherwise.

<sup>5</sup> Official Journal of the European Communities, Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 (2012/531/EC, OJ L 172, 30.6.2012, p.11).

roaming services to a MNO's customers as an alternative to the roaming services already offered by the MNO.

- 7 Cloud 9 wishes to become an ARP and sell roaming services to Vodafone customers as an alternative to the roaming services offered by Vodafone to its customers. Cloud 9 requires facilities and services that will allow Cloud 9 to sell roaming services to Vodafone customers
- 8 This dispute relates to charges<sup>6</sup> that Vodafone proposes to levy on Cloud 9 for access to facilities and services that will allow Cloud 9 to sell roaming services to Vodafone customers.
- 9 The scope of the dispute was published on the ComReg website on 8 August 2014 as follows:

Whether it is permissible for Vodafone to impose the following on Cloud 9 for facilities and support services for the separate sale of regulated roaming services:

- (a) One-off connection and set-up charges.
- (b) Monthly/Recurring charges.
- (c) Wholesale charges for the making of regulated roaming calls.

- 10 This document is structured as follows:

- **Chapter 3:** provides an executive summary of the main points of the determination.
- **Chapter 4:** provides a brief overview of the framework for the regulation of roaming.
- **Chapter 5:** discusses the background to the dispute.
- **Chapter 6:** provides analysis of the subject of the dispute, the submissions of the parties and sets out ComReg's preliminary conclusions.
- **Annex 1:** provides ComReg's Draft Determination.

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<sup>6</sup> The charges proposed by Vodafone were predominantly one-off charges. Monthly recurring charges were also proposed but the amounts for these were marked as "TBC". The full list of charges is at Figure 1 below.

### 3 Executive Summary

- 11 This dispute, brought by Cloud 9 regarding Vodafone, concerns whether Vodafone can levy charges on Cloud 9 for facilities and services for the separate sale of regulated retail roaming services ('**SSRRRS**') to Vodafone customers.
- 12 Cloud 9 seeks access to Vodafone facilities and services for SSRRRS pursuant to Article 5 of (EU) No 531/2012. Vodafone proposes to levy charges on Cloud 9 for access to such facilities and services.
- 13 Cloud 9 argues that Article 5 of (EU) No 531/2012 sets out that facilities and support services necessary for SSRRRS shall be free of charge. It is Cloud 9's position that the proposed charges are not compliant with Article 5 of (EU) No 531/2012.
- 14 Vodafone argues that the proposed charges are for the implementation and testing of facilities and support services necessary for SSRRRS. Beyond implementation and testing, facilities and support services necessary for SSRRRS are free of charge. It is Vodafone's position that the proposed charges are justified.
- 15 Pursuant to Regulation 31 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations, 2011<sup>7</sup> ('**the Framework Regulations**'), where a dispute arises between undertakings providing electronic communications networks or services in the State in connection with existing obligations, ComReg shall, upon request, initiate an investigation and make a determination which ensures compliance with the obligation and resolves the dispute.
- 16 In making its Determination, ComReg considered:
  - a. What facilities and support services are necessary for SSRRRS?
  - b. Are the charges proposed by Vodafone for facilities and support services necessary for SSRRRS?
- 17 The full text of ComReg's Draft Determination is at Annex: 1. A summary of the Draft Determination is as follows.

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<sup>7</sup> European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011)

- (i) Access includes connection as set out in the Access Directive and directly cross referenced in (EU) 531/2012.
- (ii) The facilities and services necessary for the implementation of SSRRRS are provided for in the ETSI Standard for the implementation of SSRRRS.
- (iii) Regarding the Vodafone implementation of SSRRRS:
  - (a) Where access to a facility or service is necessary for SSRRRS, Vodafone shall not charge, pursuant to Article 5(1) of (EC) 531/2012.
  - (b) Where access to a facility or service is not necessary for SSRRRS under the ETSI Standard, it is optional. A party requiring an optional facility or service shall bear the cost. A party offering an optional facility or service may charge fair and reasonable prices.
  - (c) Where access to network elements, associated facilities, relevant services, software and information systems, is necessary for the provision Wholesale Roaming Resale Access, pursuant to Article 3(4) of (EC) 531/2012, Vodafone may only charge in accordance with Articles 7, 9 and 12 of (EC) 531/2012.
  - (d) Where a component is not necessary for the provision Wholesale Roaming Resale Access, Vodafone may charge fair and reasonable prices pursuant to Articles 3(4) of (EC) 531/2012.
- (iv) Each party is individually responsible for its own compliance with obligations under (EC) 531/2012 and Regulation 23(3) of the Universal Service Regulations. Neither party shall charge for the testing of access to facilities and services necessary for the implementation of SSRRRS.

## 4 Regulation of Roaming

- 18 This section provides a brief overview of the framework for the regulation of roaming. This overview is limited to the scope of those regulations specifically applicable or related to the circumstances of this dispute. Additional consideration of specific regulations and relevant legislation will be considered at Section 6 below.

### 4.1 (EU) No 531/2012

- 19 In (EU) No 531/2012, the European Commission set out its view that charges for roaming were significantly higher than domestic charges and may act as an obstacle to consumers using mobile devices when travelling within the Union thereby constituting a significant barrier to the internal market. The envisaged sale of retail roaming services, separate from domestic services, in the view of European Commission, would increase competition and lower prices for consumers creating an internal market for roaming services in the Union with no significant difference between domestic and roaming charges<sup>8</sup>.
- 20 Article 1(4) of (EU) No 531/2012 states that the regulations contained therein are a specific measure within the meaning of Article 5(1) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March, 2002, on a common regulatory framework for electronic communications networks and services<sup>9</sup> (**‘the Framework Directive’**). For Reference, Article 5(1) of the Framework Directive provides that **the Framework Directive and the Specific Directives<sup>10</sup>** are without prejudice to any specific measure adopted for the regulation of international roaming on public mobile communications networks within the Community.

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<sup>8</sup> Recital 2 of (EU) No 531/2012.

<sup>9</sup> Official Journal of the European Communities, Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (2002/21/EC, OJ L 108, 24.4.2002, p.33) as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities and 2002/20/EC on the authorisation of electronic communications networks and services (2009/140/EC, OJ L 337, 18.12.2009, p. 37).

<sup>10</sup> As set out at Article 2 of the Framework Directive, 'Specific Directives' means Directive 2002/20/EC (Authorisation Directive), Directive 2002/19/EC (Access Directive), Directive 2002/22/EC (Universal Service Directive) and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).

- 21 Article 5 of (EU) No 531/2012 relates to the implementation of SSRRRS but does not specify the technical details of how SSRRRS should be implemented. Instead, Article 5(2) of (EU) No 531/2012 sets out that the European Commission will adopt a technical solution for the implementation of SSRRRS in an implementing act following a consultation with the Body of European Regulators of Electronic Communications ('BEREC'). At Article 5(3) of (EU) No 531/2012 the European Commission sets out the criteria that the technical solution for the implementation of SSRRRS shall meet.

## 4.2 BEREC opinion BoR (12) 109

- 22 Pursuant to Article 5(2) of (EU) No 531/2012, BEREC published its recommendations on technical solution for the implementation of SSRRRS in the BEREC opinion on Article 5 implementing act<sup>11</sup> ('BoR (12) 109').
- 23 BEREC opined that there was no single technical solution which met all of the criteria specified by the European Commission at Article 5(3) of (EU) No 531/2012. BEREC therefore recommended the combination of two technical modalities to meet all of the criteria.
- 24 The first of these technical modalities, known as the 'Single-IMSI technical modality', was recommended for use in circumstances where regulated roaming services are provided as a bundle. Under the Single-IMSI technical modality, the implementation of SSRRRS is provided by the Domestic MNO on a wholesale basis, to the ARP. The ARP then resells the services to the roaming customer at the retail level. The Single-IMSI technical modality relies on Wholesale Roaming Resale Access in that the Domestic MNO resells wholesale roaming access to the ARP<sup>12</sup>. The ARP cannot control which Visited Networks are to be used in preference to others.
- 25 The second technical modality relates to the provision of data roaming services to roaming customers directly on a Visited Network. The second technical modality is not relevant to the scope of this dispute and is not considered further.

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<sup>11</sup> Roaming Regulation – Choice of Decoupling Method. BEREC opinion on article 5 implementing act, (BoR (12) 109, 27 September 2012).

<sup>12</sup> Article 3 of (EU) No 531/2012 relates to Wholesale Roaming Access and envisages two types of access, 'Direct Wholesale Roaming Access' and 'Wholesale Roaming Resale Access'. Under Direct Wholesale Roaming Access the ARP has direct agreements with Visited Networks. Under Wholesale Roaming Resale Access, the Domestic MNO resells Wholesale Roaming Access to the ARP. Technical limitations of the Single-IMSI technical modality limit ARPs to Wholesale Roaming Resale Access. Other technical modalities which may have facilitated Direct Wholesale Roaming Access were considered by BEREC and the European Commission but were set aside.

### 4.3 (EU) No 1203/2012

- 26 In accordance with Article 5(2) of (EU) No 531/2012, having considered the opinion of BEREC, the European Commission adopted the technical solution for the implementation of SSRRRS by way of the Commission Implementing Regulation (EU) No 1203/2012<sup>13</sup> ('**(EU) No 1203/2012**').
- 27 (EU) No 1203/2012 provides greater detail regarding the implementation of SSRRRS previously provided for at Article 5 of (EU) No 531/2012 setting out the technical modalities applicable when implementing SSRRRS provided as a bundle<sup>14</sup> and when implementing access to local data roaming services on a Visited Network.
- 28 Article 3(1) of (EU) No 1203/2012 relates to the implementation of SSRRRS provided as a bundle. It sets out that Domestic MNOs must provide necessary network elements and relevant services to allow for SSRRRS to customers by ARPs without the need for customers to change SIM Card<sup>15</sup> or mobile device.
- 29 Article 3(2) of (EU) No 1203/2012 provides a non-exhaustive list of some of the necessary network elements and relevant services to allow for SSRRRS that must be provided by Domestic MNOs:
- (a) Facilities to support a customer changing roaming provider.
  - (b) Facilities for to support billing of roaming services.
  - (c) Facilities to support the bill shock measure for roaming Data services.

These are considered further at Section 6 below.

### 4.4 Mobile Roaming Regulations

- 30 EU Regulations, both (EU) No 531/2012 and (EU) No 1203/2012 have binding legal force throughout every Member State, on a par with national laws. Unlike EU Directives, action by National governments is not required to implement EU Regulations, they have immediate legal force in every member state upon their effective date. However, on 18 June 2013, the Communications (Mobile Telephone Roaming) Regulations 2013<sup>16</sup> ('**the Mobile Roaming Regulations**') gave full effect to (EU) No 531/2012 in the State.
- 31 Regulation 5 of the Mobile Roaming Regulations specified that, in the event of a dispute arising between undertakings in connection with obligations laid down in the Mobile Roaming Regulations, the dispute resolution procedure laid down in Regulations 31 and

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<sup>13</sup> Official Journal of the European Union (Non-legislative acts) Commission Implementing Regulation (EU) No 1203/2012 of 14 December 2012 on the separate sale of regulated retail roaming services within the Union (OJ L 347, 15.12.2012, p.1).

<sup>14</sup> The Single-IMSI technical modality.

<sup>15</sup> Subscriber Identity Module ('SIM') Card.

<sup>16</sup> Communications (Mobile Telephone Roaming) Regulations 2013 (S.I. No. 228 of 2013).

32 of the Framework Regulations applies and those Regulations are to be read accordingly.

## 4.5 BEREC Guidelines on (EU) No 531/2012

32 (EU) No 531/2012 provides for BEREC to issue guidelines on the regulations. BEREC has issued three sets of guidelines to date:

- (a) BoR (12) 107<sup>17</sup> covering wholesale roaming access set out in Article 3 of (EU) No 531/2012.
- (b) BoR (13) 82<sup>18</sup> relates to the separate sale of roaming services at Articles 4 and 5 of (EU) No 531/2012.
- (c) BoR (13) 15<sup>19</sup> covers the remainder of (EU) No 531/2012.

33 A National Regulatory Authority ('**NRA**') (including ComReg) is required to take the utmost account of BEREC Guidelines when resolving disputes. The sections of the BEREC Guidelines relevant to this dispute are considered at Section 6 below.

## 4.6 ComReg's Dispute powers

34 ComReg was established under Section 6 of the Communications Regulation Acts 2002 to 2011<sup>20</sup> ('**the Communications Regulation Acts**'). ComReg is the regulator for the electronic communications and postal sectors. It is charged with the regulation of amongst other things, fixed and mobile electronic communications service providers in the State. ComReg is the NRA in the State. The functions of ComReg are set out in section 10 of the Communications Regulation Acts.

35 Regulation 31 of the Framework Regulations sets out ComReg's powers regarding to disputes between undertakings in connection with existing obligations under the Framework Regulations, Framework Directive and Specific Directives or Specific Regulations<sup>21</sup>. ComReg's determination in the dispute must ensure compliance with the obligation and resolve the dispute.

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<sup>17</sup> BEREC Guidelines on the application of Article 3 of the Roaming Regulation - Wholesale Roaming Access, 27 September 2012.

<sup>18</sup> BEREC Guidelines on Roaming Regulation (EC) N 531/2012 (Third Roaming Regulation) (Articles 4 and 5 on Separate Sale of Roaming Services), 5 July 2013.

<sup>19</sup> BEREC Guidelines on Roaming Regulation (EU) No 531/2012 (Third Roaming Regulation) (Excluding Articles 3, 4 and 5 on wholesale access and separate sale of services), 25 February 2013.

<sup>20</sup> Communications Regulation Act 2002 (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act 2007 (No. 22 of 2007), the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (No. 2 of 2010) and the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011).

<sup>21</sup> The Framework Regulations, the European Communities (Electronic Communications Networks and Services) (Access) Regulations 2011 (S.I. No. 334 of 2011), the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (S.I. No. 335



- 36 In accordance with Regulation 31(2) of the Framework Regulations, ComReg published Dispute Resolution procedures in ComReg Document No. 10/18 R<sup>22</sup>.

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of 2011), European Communities (Electronic Communications Networks and Services) (Universal Service and Users' Rights) Regulations 2011 (S.I. No. 337 of 2011), the European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 (S.I. No. 336 of 2011).

<sup>22</sup> Response to Consultation and Decision Notice, Dispute Resolution Procedures - Framework Regulations (Response to Consultation Document No. 09/85) (Document No: 10/18, Decision No: D03/10 Date: 29 March 2010).

## 5 Background to the Dispute

### 5.1 Investigative process to date

37 Below is a an outline of ComReg’s investigation to date

30 July 2014	Cloud 9 submits a request for dispute resolution.
1 August 2014	ComReg notifies Cloud 9 that the dispute is accepted.
8 August 2014	Cloud 9 is notified of the scope of the dispute. Vodafone is notified of the dispute, the scope of the dispute and is provided with a non-confidential version of the Cloud 9 submission and given until 22 August 2014 to respond. An information Notice (ComReg 14/81) is published on the ComReg website setting out the scope of the dispute.
22 August 2014	Vodafone provides its response.
29 August 2014	ComReg issues information requests to Cloud 9 and Vodafone.
5 September 2014	Cloud 9 and Vodafone provide their responses to the information requests.

### 5.2 Summary of the Cloud 9 Submission of 30 July 2014

38 This section summarises the Cloud 9 submission of 30 July 2014. Further submissions were received from Cloud 9 on 5 September 2014 in response to a ComReg information request and these are considered at Section 6 below.

39 The Cloud 9 submission of 30 July 2014 sets out that Vodafone proposes to charge for facilities and services for SSRRRS. These proposed charges are evidenced in a copy of the ARP Agreement offered to Cloud 9 by Vodafone.

40 The charges proposed by Vodafone could be categorised as one off/set up charges and monthly recurring charges. ComReg noted that the monthly recurring charges proposed by Vodafone had no associated amount. They were included in the ARP Agreement but marked as ‘TBC’<sup>23</sup>

41 In relation the proposed charges, Cloud 9 referenced Article 5 of (EU) No 531/2012 which sets out that facilities and services necessary for SSRRRS should be provide free of charge:

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<sup>23</sup> ‘To Be Confirmed’

*“C9M [Cloud 9] takes the view that these charges are contrary to Article 5 of the Regulation [(EU) No 531/2012] – this clearly states, on the ordinary meaning of the words used in the Regulation that ARP’s are to be given everything ‘necessary’ for an ARP service free of charge, and anything not necessary but extra must be a ‘fair and reasonable’ charge.”*

- 42 As set out at paragraph 35 above, ComReg’s dispute powers specifically relate to existing obligations and any determination should resolve the dispute and ensure compliance with those existing obligations. The Cloud 9 submission included issues which were beyond the scope of a dispute under Regulation 31 of the Framework Regulations. In the same regard, the outcome of a dispute is limited, consequently a number of the desired remedies sought by Cloud 9 could not be considered in the context of a dispute. As discussed further at paragraph 48 below, when responding to the Cloud 9 submission, Vodafone provided its position on some of these out of scope issues. ComReg’s consideration of matters beyond the scope of the dispute are not included in this Draft Determination.

### **5.3 Scope of the Dispute**

- 43 Having considered the Cloud 9 submission and the scope of ComReg’s Dispute powers, and within the context of (EC) 531/2012, the scope of the dispute was defined as follows:

Whether it is permissible for Vodafone to impose the following on Cloud 9 for facilities and support services for the separate sale of regulated roaming services:

- (a) One-off connection and set-up charges.
- (b) Monthly/Recurring charges.
- (c) Wholesale charges for the making of regulated roaming calls.

- 44 This scope was published on the ComReg website on 8 August 2014.

### **5.4 Summary of the Vodafone Submission of 22 August 2014**

- 45 Following the definition of the scope, the Cloud 9 submission of 30 July 2014 was provided to Vodafone. On 22 August 2014, Vodafone provided its response. This section summarises the Vodafone response of 22 August 2014. Further submissions were received from Vodafone on 5 September 2014 in response to a ComReg information request and these are considered at Section 6 below.

- 46 In relation to the charges proposed by Vodafone in the ARP Agreement, Vodafone contended that these were attributable to the implementation or ‘on-boarding’ of Cloud 9 as an ARP and that for Cloud 9 must bear some responsibility for these specific costs. Vodafone should be able to recover the costs which are specific to the configuration work for Cloud 9’s proposed roaming service.

*“The Roaming Regulation stipulates that network operators are not allowed to levy additional charges upon ARPs for access to the facilities and support services that are relevant for the separate sale of roaming services. In practice, this would mean that the existing infrastructure facilities and support services that a MNO will need to have in place in order to support the sale of roaming services in general (whether by the MNO itself or a third party access seeker) would be in scope of the aforementioned requirement. However, the requirement clearly does not cover connection costs that are specific to an individual ARP and that would differ (potentially significantly) by each ARP according to the nature of that ARP's individual systems and platforms.”*

- 47 Vodafone also references recovering costs for connecting ARPs to their network in the context of a ‘common regulatory framework’:

*“In determining whether mobile network operators are allowed to recover the costs of connecting individual ARPs to their network, it is necessary to review both well-established commercial practice when dealing with access seekers on the domestic wholesale access market as well as the provisions of the overarching pan-European harmonised common regulatory framework for electronic communication services in the European Union (“CRF”).*

*In the current context, it is clear from the terms of the Roaming Regulation itself that it is not to be looked at on its own. In fact, the Roaming Regulation emphasises that it is a constituent part of the CRF by direct cross-reference:*

*“Regulation (EC) No 171/2001 is not an isolated measure, but complements and supports, insofar as Union-wide roaming is concerned. The rules provided for by the 2002 regulatory framework for electronic communications.”*

- 48 Vodafone included submissions in response to matters which were not included in the scope of the dispute as published on the ComReg website, as referenced at paragraph 42 above. . While ComReg welcomes Vodafone’s position on these matters, they are not relevant to the dispute and are not considered further in this Draft Determination.

## 6 Analysis and preliminary conclusions

49 This section includes ComReg's consideration of the subject of the dispute and presents the preliminary conclusions which lead to ComReg's Draft Determination at Annex: 1 below.

### 6.1 The charges proposed by Vodafone

50 The following is a table of Set-up and Monthly/Recurring charges proposed by Vodafone in the ARP Agreement offered to Cloud 9:

Item.	Charge Description	Amount	Type	Additional Description <sup>24</sup>
1	Configuration - Tibco Reverse Proxy - ARP specific	€45,000	Set-up	<ul style="list-style-type: none"> <li>• Mainly IBM specific costs – mini/small project specific to each 'on-boarding' ARP</li> <li>• New Reverse proxy configuration for new ARP (for Provisioning)</li> <li>• New VIP creation on Load Balancers for new ARP configuration on both reverse proxy servers</li> <li>• Service exposure on Tibco for new ARP</li> <li>• ARP application configuration for new ARP</li> <li>• Test and support of above with ARP</li> <li>• Perform IT monitoring implementation for new ARP Interface</li> </ul>
2	Configuration - Comms - Firewalls \ VPN	€10,000	Set-up	<ul style="list-style-type: none"> <li>• New VPN to be created for ARP</li> <li>• Set up and Test of VPN with ARP - in both Test and Production environments</li> <li>• Public IP. firewall rules and comms from VPN to reverse proxy and back</li> <li>• Requires 3rd Party Remote access agreement documentation/approval and then a build test and troubleshoot:</li> <li>• Agreeing build</li> </ul>

<sup>24</sup> Additional Descriptions provided to ComReg in Vodafone submission of 5 September 2014.

Item.	Charge Description	Amount	Type	Additional Description <sup>24</sup>
				<ul style="list-style-type: none"> <li>• Co-ordinated Build and test</li> <li>• Firewall rule request for flows</li> <li>• Testing and troubleshooting.</li> </ul>
3	Signalling and connectivity with Online Charging System (ARP OCS)	€5,000	Set-up	<ul style="list-style-type: none"> <li>• Set up and testing of connectivity to ARP specific Online Charging system.</li> </ul>
4	End to End Testing of ARP call routing \ provisioning	€32,000	Set-up	<ul style="list-style-type: none"> <li>• 40 days by 2 contractor resources</li> <li>• See separate schedule of sample test cases (attached/enclosed as part of answer to Question 2) that we expect to work through with each ARP. Level of testing to be agreed with ARP and then tests to be done on both Test Lab and Production.</li> <li>• Costs also include 3rd party vendor support to deal with issues found during testing.</li> </ul>
5	Security audits to ensure that ARP systems comply with Vodafone Security policies	€12,000	Set-up	<ul style="list-style-type: none"> <li>• 20 days - 1 resource - (Vodafone External Security vendor)</li> <li>• New 3rd party connectivity to any Vodafone system, Security audits are mandatory</li> <li>• All external 3rd Parties requesting connectivity to Vodafone internal systems are required to be approved</li> <li>• Vendors/suppliers etc In this case the ARP needs to connect to both: Front end Business to Business Gateways AND Backend-end Core Networks for Diameter.</li> <li>• Security Due diligence is required prior to any connectivity being executed. This requires a multiple step process of self-assessment questionnaires through to a Security Audit (which aligns with IS 27001 standard) and may require a site visit. This is required to ensure that 3rd parties do not introduce any additional risk to Vodafone systems and that they have in place Security</li> </ul>

Item.	Charge Description	Amount	Type	Additional Description <sup>24</sup>
				framework and controls commensurate with their business and aligned with Industry best practice.
6	Set up of new ARP on our Finance \ SAP systems	€2,000	Set-up	No additional description provided
7	Recurrent charges to cover O&M and Incident Management e.g. for calls made to Customer Care by ARP customers or from ARP to 2nd/3rd level line support for roaming issues	TBC	Monthly/ Recurring	No additional description provided
8	Charges for reporting and KPI requirements - Increased monitoring and reporting specific to individual ARPs	TBC	Monthly/ Recurring	No additional description provided

Figure 1 - Table of Set-up and Monthly/Recurring charges proposed by Vodafone in the ARP Agreement offered to Cloud 9

51 The charges in the table above are considered in the following sections.

## 6.2 Access to facilities and services for the implementation of SSRRS

52 In addition to requiring Wholesale Roaming Resale Access, ARPs wishing to implement SSRRS will require facilities and services that will allow them to interface with the Domestic MNO and allow the ARP to provide and bill for separate regulated roaming services. Guideline 37 of BoR (13) 82 offers examples of the type of interface required between the ARP and the Domestic MNO:

- (a) Online charging systems interconnection to allow ARPs to manage prepaid customers using their own on-line charging system. This interface should be provided by using standard real time protocols;
- (b) Support needed from the Domestic MNO for customer provision related to the required collaboration among actors for customer subscription/un-subscription and basic support for billing information both on prepaid and postpaid necessary to perform retail billing by the ARP;
- (c) Basic support for allowing the ARP to implement the bill shock measure<sup>25</sup>.

53 Article 3 of (EU) No 1203/2012 requires that domestic providers operating a terrestrial public mobile communication networks (in this case Vodafone) shall implement the Single IMSI technical modality for SSRRRS. Article 3 of (EU) No 1203/2012 also imposes obligations regarding the network elements and services that are necessary must be provided by Domestic MNOs when implementing SSRRRS. These correspond to the recommendations of BEREC at Guideline 37 of BoR (13) 82:

- (a) facilities necessary for the procedure to change the roaming provider in accordance with Article 5(5) of (EU) No 1203/2012;
- (b) facilities related to customer information, such as location data of the customer and customer data records for billing support, that are necessary for the provision of retail roaming services;
- (c) Facilities necessary to support the implementation of the financial limits for the specified period of use of data roaming services in accordance with Article 15 of Regulation (EU) No 531/2012.

54 Article 5 of (EU) No 1203/2012 also sets out that roaming providers are to cooperate in order to ensure the interoperability of interfaces for the implementation of SSRRRS, on the basis of common agreed standards. The reference documents and procedures used must be publicly available and must conform to the requirements of (EU) No 531/2012 and (EU) No 1203/2012.

55 In response to Article 5 of (EU) No 1203/2012, a cooperation platform was established jointly by BEREC, the European Telecommunications Standards Institute ('ETSI') and Industry including a large number of MNOs. The platform allowed stakeholders in the implementation of SSRRRS to provide their input into the common agreed standards for the implementation of SSRRRS. The purpose of this cooperation was to ensure the interoperability of the interfaces used when implementing SSRRRS.

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<sup>25</sup> A real-time subscriber spend notification and a cut-off mechanism triggered when a customer's spend reaches a defined limit. See Article 15(3) of (EU) 531/2012.



- 56 The cooperation platform produced a body of documents which set out standard technical interfaces, protocols and processes for SSRRS including but not limited to implementation, provisioning, billing. For the purpose of this document these standards will be referred to as the '**ETSI Standards for the implementation of SSRRS**'. In accordance with Article 5 of (EU) No 1203/2012 the ETSI Standard for the implementation of SSRRS are publicly available through the cooperation platform maintained by ETSI<sup>26</sup>.
- 57 When considering the facilities and services offered to Cloud 9 for SSRRS, and which of these were necessary for the implementation of SSRRS, ComReg took the preliminary view that the technical interfaces, protocols and processes for SSRRS detailed in the ETSI Standard for the implementation of SSRRS should be considered to represent the facilities and services necessary for the implementation of SSRRS.
- 58 ComReg also noted that the Vodafone ARP Agreement cited the ETSI Standard for the implementation of SSRRS in terms of associated documentation.
- 59 On 29 August 2014, ComReg wrote to Vodafone setting out the preliminary view that the ETSI Standard for the implementation of SSRRS represent the facilities and services necessary for the implementation of SSRRS. ComReg noted that it was not clear to what extent the Vodafone implementation of SSRRS proposed to Cloud 9 differs from the ETSI Standard for the implementation of SSRRS and asked Vodafone to confirm which of the facilities or services proposed to Cloud 9 are not included in the ETSI Standard for the implementation of SSRRS and are therefore potentially beyond those necessary for the implementation of SSRRS.
- 60 Vodafone's response of 5 September 2014 states:
- "[...] Vodafone unequivocally reconfirms the position detailed in our letter dated 22 August 2014 that it has developed a technical solution for separate sale of regulated retail roaming services ("SSRS") that fully complies with the standard interfaces and processes as per the standards and relevant reference documents for implementation of SPRSS as published through the co-operation platform and maintained by ETSI."*
- 61 In the response, Vodafone also restated its position that there is a distinction between the use of the standard interfaces and processes (which Vodafone states will be provided to Cloud 9 free of charge save for traffic costs) and "connecting" activities associated with the connection of a specific access seeker such as Cloud 9 to these interfaces and processes.
- 62 ComReg refers to Article 5 of (EU) No 531/2012 which specifically states that access to facilities and support services necessary for SSRRS shall be free of charge.
- 63 Article 2(1) of (EC) 531/2012 states that for the purposes of this Regulation, the definitions set out in Article 2 of the Access Directive, Article 2 of the Framework Directive, and Article 2 of the Universal Service Directive shall apply. ComReg refers to

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<sup>26</sup> [http://docbox.etsi.org/Reference/Cooperation\\_Platform\\_Separate\\_Sale\\_of\\_Roaming\\_Services/](http://docbox.etsi.org/Reference/Cooperation_Platform_Separate_Sale_of_Roaming_Services/)

both the Access Directive and the Access Regulations which set out that access includes connection to facilities or services.

- 64 It is therefore ComReg's preliminary conclusion that access, including connection, to facilities and services necessary for the implementation of SSRRRS shall be free of charge.
- 65 Having reviewed the ETSI Standards for the implementation of SSRRRS, Items 1, 2 and 3 in Figure 1 relate to access to interfaces set out in the ETSI Standards for the implementation of SSRRRS and access to these interfaces is necessary for SSRRRS. ComReg considers that access to Items 1, 2 and 3 in Figure 1 are necessary for the implementation of SSRRRS and shall be free of charge in accordance with Article 5(1) of (EU) No 531/2012. ComReg therefore concludes that it is not permissible for Vodafone to charge Cloud 9 for Items 1,2 and 3 in Figure 1.
- 66 ComReg also notes that a facility or service may fall outside the ETSI Standard for the implementation of SSRRRS. Access to such facility or service are therefore is not necessary for SSRRRS. These facilities or services may be required by one party or the other but as SSRRRS may be implemented in its absence they are optional. It is ComReg's view that a party requiring an optional facility or service shall bear the cost. A party offering the optional facility or service may charge a fair and reasonable price.

### 6.3 Testing

- 67 Charges for testing were proposed by Vodafone in the ARP Agreement<sup>27</sup>. As noted at paragraph 59 above, at the time of the information request (29 August 2014), it was not clear to what extent the Vodafone implementation of SSRRRS differed from the ETSI Standard for the implementation of SSRRRS. In terms of charges for testing, ComReg asked Vodafone to provide a breakdown of testing charges indicating charges for testing of services or facilities which are not included in the ETSI Standard for the implementation of SSRRRS and charges for testing of services or facilities which are included ETSI Standard for the implementation of SSRRRS.
- 68 As noted above, the Vodafone response of 5 September 2014 sets out that the facilities and services in the Vodafone implementation of SSRRRS are compliant with the ETSI Standard for the implementation of SSRRRS. On this basis it is ComReg's view that the testing proposed by Vodafone relates to testing of facilities and services necessary for the implementation of SSRRRS.
- 69 As discussed above 'access' is defined in the Framework Directive and Framework Regulations as including connection. The testing of access is not included in the definition.
- 70 ComReg considered whether testing is required and it was noted the when implementing SSRRRS, the parties are subject to a number of obligations including but not limited to:

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<sup>27</sup> Item 4 was described as "End-to-end testing" additionally Items 1, 2, and 3 included testing as noted in the Additional Description.

- Article 4(1) of (EU) 531/2012 – Domestic MNOs such as Vodafone must enable their customers to access regulated voice, SMS and data roaming services, provided as a bundle by any ARP.
  - Article 4(2) of (EU) 531/2012 – Roaming customers have the right to switch Roaming Provider in a time not exceeding three working days.
  - Regulation 23(3) of the Framework Regulations – As undertakings providing public communications networks, Vodafone and Cloud 9 are required to take all appropriate steps to guarantee the integrity of their networks, thereby ensuring the continuity of supply of services provided over those networks.
- 71 ComReg cited the requirement for compliance with Regulation 23(3) of the Framework Regulations to the parties in the information request of 29 August 2014 and requested that the parties provide comment on the amount of testing that is necessary to ensure compliance with Regulation 23(3) of the Framework Regulations.
- 72 Both parties responded stating their view that testing would be required however the amount of testing differed between the parties.
- 73 ComReg agrees that testing is required to ensure compliance with these regulatory obligations when implementing SSRRS. As each party is individually responsible for their own compliance it is therefore ComReg's view that the parties should bear their own costs for testing of their own systems and for end-to-end testing.
- 74 ComReg therefore concludes that it is not permissible for either party to charge for the testing of facilities and services necessary for the implementation of SSRRS.

## 6.4 Security Audits

- 75 At Item 5 in Figure 1 Vodafone proposes to charge for Security Auditing. Security auditing falls outside the scope of ETSI Standard for the implementation of SSRRS. It is ComReg's view that the implementation of SSRRS could occur in the absence of such audits therefore such audits are not necessary and therefore optional.
- 76 Having reviewed the additional information provided by Vodafone regarding the Security Audit it is not a service or facility offered to Cloud 9 but rather a service or service or facility which Vodafone requires itself.
- 77 Where access to a facility or service is not necessary for SSRRS under the ETSI Standard, it is optional and SSRRS may be implemented in its absence. A party requiring an optional facility or service shall bear the cost. A party offering the optional facility or service may charge a fair and reasonable price.
- 78 If Vodafone wishes to undertake an optional security audit, it shall not charge Cloud 9.

## 6.5 Other charges

- 79 Vodafone proposed to charge Monthly recurring charges to Cloud 9 for items such as 'Incident Management', 'Customer Care' and 'KPI reporting and 'Set up of new ARP on our Finance \ SAP systems'<sup>28</sup>. Vodafone has provided no additional information on these items.
- 80 In the absence of further information it is ComReg's view that if these items are within the ETSI Standard for the implementation of SSRRRS they are necessary for SSRRRS and access to shall be free of charge pursuant to Article 5(1) of (EU) No 531/2012.
- 81 Where access to a facility or service is not necessary for SSRRRS under the ETSI Standard, it is optional and SSRRRS may be implemented in its absence. A party requiring an optional facility or service shall bear the cost. A party offering the optional facility or service may charge a fair and reasonable price.

## 6.6 Cost Recovery

- 82 In its submissions, Vodafone states that it does not intend to charge for the use of facilities and services necessary for SSRRRS. Vodafone states that this is in compliance with its obligations. However, Vodafone contends it may charge for connection to facilities and services necessary for SSRRRS on the basis that it is reasonable for it to recover costs associated with such connection from the ARP.

*"Vodafone reiterates that there is a distinction between use of the standard interfaces and processes (which shall be provided free of charge save for traffic costs) and "connecting" activities associated with the connection of a specific access seeker to these interfaces and processes."*

*"In accordance with our obligations under the Roaming Regulations, Vodafone has provided the standard interfaces and processes for the use of SSRRS free of charge. However in order to connect an access seeker, in this case Cloud 9, to the standard interface and to additional costs that are, in Vodafone's opinion, above and beyond the costs associated with Vodafone's obligation under the Roaming Regulation. It is Vodafone's view that the placing of costs generated by a specific access seeker on that access seeker is fair, reasonable and in line with existing legal and regulatory principles."<sup>29</sup>*

- 83 Vodafone contends that (EU) No 531/2012 must be read in conjunction with existing legal and regulatory principles provided for in the Framework Directive and Specific Directives.
- 84 As noted at paragraph 20 above, Article 1(4) of (EU) No 531/2012 states that the regulations contained therein are a specific measure within the meaning of Article 5(1) of the Framework Directive. Article 5(1) of the Framework Directive provides that the

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<sup>28</sup> Items 6, 7 and 8 in Figure 1.

<sup>29</sup> Paragraph 4 of Vodafone response of 5 September 2014.

Framework Directive and the Specific Directives are without prejudice to any specific measure adopted for the regulation of international roaming on public mobile communications networks within the Community.

- 85 Specific measures adopted by the European Commission for the regulation of international roaming on public mobile communications networks within the Community include Regulation (EC) No 717/2007 of the European Parliament and of the Council ('**(EC) No 717/2007**')<sup>30</sup>, (EU) No 531/2012 and (EU) No 1203/2012.
- 86 The European Commission's rationale for implementing specific roaming regulations is discussed at Recitals 4 and 12 of (EC) No 717/2007. The specific roaming regulations complement and support the provisions of the Framework Directive and the Specific Directives by adopting, on the basis of a different conceptual approach, that regulation as a specific ex ante regulatory measure taking into account the unique characteristics of the roaming markets in order to correct the inadequacy of the Framework Directive and the Specific Directives. The European Commission stated in Recitals 4 that the the Framework Directive and the Specific Directives had not provided NRAs with sufficient tools to take effective and decisive action with regard to the pricing of Community-wide roaming services and thus failed to ensure the smooth functioning of the internal market for those services. The European Commission concluded that (EC) No 717/2007 was an appropriate means of correcting that situation. The European Commission's position on implementing specific roaming regulations was supported by Court of Justice (Grand Chamber) of 8 June 2010<sup>31</sup>.
- 87 Consequently, the European Commission has implemented specific roaming regulations such as (EU) No 531/2012. While these specific roaming regulations complement and support the provisions of the Framework Directive and the Specific Directives, the provision within these specific roaming regulations, including (EU) No 531/2012 and (EU) No 1203/2012, should be viewed as distinct unless directly cross referenced.
- 88 It is Comreg's view that the charging for wholesale elements of roaming services such as the implementation of SSRRS or Wholesale Roaming Resale Access are fully provided for in specific roaming regulations including (EU) No 531/2012. Principles and regulations provided for in the the Framework Directive and the Specific Directives cannot be applied as Vodafone contends.

## 6.7 Wholesale Charges for Regulated Roaming Services

- 89 Wholesale Charges for Regulated Roaming Services are set out at Articles 7, 9 and 12 of (EC) 531/2012. The Wholesale Charges for Regulated Roaming Services are maximum charges for Voice, SMS and Data applicable retrospectively on a 12 monthly basis to the average wholesale charge levied on the customer's roaming provider for a

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<sup>30</sup> Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC (OJ L 171/32, 29.6.2007).

<sup>31</sup> C-58/08, Vodafone Ltd and Others v. Secretary of State for Business, Enterprise and Regulatory Reform, Judgment of the Court of Justice (Grand Chamber) of 8 June 2010, E.C.R. 1-4999.

regulated roaming services. This maximum charge is not applied to each and every charge but to a 12 month average. Wholesale Charges for Regulated Roaming Services averaged over 12 months shall be compliant if the charges are at or below the level set out at Articles 7, 9 and 12 of (EC) 531/2012.

- 90 Article 3(4) of (EC) 531/2012 provides that these charges relate to the Wholesale roaming access referred to Article 3(3). Pursuant to the definition at Article 2(2)(o) of (EC) 531/2012, Wholesale roaming access includes both Direct Wholesale Roaming access and Wholesale Roaming Resale Access<sup>32</sup>. Consequently the Wholesale Charges for Regulated Roaming Services provided for at Articles 7, 9 and 12 is applicable to both Direct Wholesale Roaming Access and Wholesale Roaming Resale Access. Article 3(3) provides that Wholesale roaming access shall cover access to “[...] *all network elements and associated facilities, relevant services, software and information systems, necessary for the provision of regulated roaming services to customers.*”
- 91 Under (EC) 531/2012, the maximum 12 monthly average Wholesale Charges for Regulated Roaming Services apply to both Direct Wholesale Roaming Access and Wholesale Roaming Resale Access.
- 92 To summarise ComReg has concluded that for the Vodafone implementation of SSRRRS considered in this dispute:
- (a) Where access to a facility or service is necessary for SSRRRS, Vodafone shall not charge, pursuant to Article 5(1) of (EC) 531/2012.
  - (b) Where access to a facility or service is not necessary for SSRRRS under the ETSI Standard, it is optional. A party requiring an optional facility or service shall bear the cost. A party offering an optional facility or service may charge fair and reasonable prices.
  - (c) Where access to network elements, associated facilities, relevant services, software and information systems, is necessary for the provision Wholesale Roaming Resale Access, pursuant to Article 3(4) of (EC) 531/2012, Vodafone may only charge in accordance with Articles 7, 9 and 12 of (EC) 531/2012.
  - (d) Where a component is not necessary for the provision Wholesale Roaming Resale Access, Vodafone may charge fair and reasonable prices pursuant to Articles 3(4) of (EC) 531/2012.

## 6.8 Other Considerations

- 93 In this section ComReg explores other relevant considerations ahead of setting out our Draft determination as to whether Vodafone’s proposals for charges for access to facilities and services for SSRRRS are permissible under (EU) No 531/2012.

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<sup>32</sup> Wholesale Roaming Access constitutes the Direct Wholesale Roaming Access offered to Vodafone by Visited Networks and Wholesale Roaming Resale Access offered to Cloud 9 by Vodafone.

- 94 Article 5(1) of (EU) No 531/2012 sets out that Domestic MNOs shall meet all reasonable requests for access to facilities and related support services relevant for SSRRRS. The access to facilities and related support services relevant for SSRRRS requested by Cloud 9 is within the ESTI Standard for the implementation of SSRRRS. It is ComReg's view that Cloud 9's access request is reasonable in these circumstances.
- 95 As discussed in Section 4.6 above, ComReg is obliged to handle disputes that fall within Regulation 31 of the Framework Regulations. Having received a Dispute from Cloud 9 on 30 July 2014 and having considered the submission pursuant to the Dispute Procedures, it was concluded that it was appropriate for ComReg to take the matter as a Dispute under Regulation 31 of the Framework Regulations, Consequently the Dispute was accepted on 1 August 2014.
- 96 When making a determination under Regulation 31 of the Framework Regulations, Regulation 31(6) provides that ComReg must have regard to Section 12 of the Communications Regulation Acts.
- 97 Section 12 of the Communications Regulation Acts sets out ComReg's objectives<sup>33</sup> in performance of its functions. Section 12(1)(a) sets out ComReg's objectives in respect of Electronic Communications networks, services and associated facilities.

*"12. (1) The objectives of the Commission in exercising its functions shall be as follows—*

*(a) in relation to the provision of electronic communications networks, electronic communications services and associated facilities—*

*(i) to promote competition,*

*(ii) to contribute to the development of the internal market, and*

*(iii) to promote the interests of users within the Community,"*

- 98 In relation to the objectives at Section 12(1)(a), Section 12(2) requires that ComReg take all reasonable measures to achieving that objective. The relevant<sup>34</sup> measures are as follows:

Section 12(2)(a)(i) the promotion of competition by ensuring that users, including disabled users derive the maximum benefit in terms of choice, price and quality.

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<sup>33</sup> Some of ComReg's objectives provided for at Section 12 of the Communications Regulation Acts relate to the Postal Sector, the management of Radio Spectrum or the National Numbering Scheme and are not relevant to this dispute. In the interest of clarity, objectives which are not directly applicable to either Electronic Communications networks, services and associated facilities or to the subject and/or scope of this dispute are not cited and are not considered.

<sup>34</sup> See Footnote 33

- Section 12(2)(a)(ii) the promotion of competition by ensuring that there is no distortion or restriction of competition in the electronic communications sector.
- Section 12(2)(b)(i) contributing to the internal market by removing remaining obstacles to the provision of electronic communications networks, electronic communications services and associated facilities at Community level.
- Section 12(2)(b)(ii) contributing to the internal market by encouraging the establishment and development of trans-European networks and the interoperability of transnational services and end-to-end connectivity.
- Section 12(2)(c)(v) the promotion of the interests of users within the Community by encouraging access to the internet at reasonable cost to users.
- 99 It is ComReg's view that by determining a dispute and ensuring compliance with (EU) 531/2012 ComReg is meeting the objectives set out in the list of Sections above. For reference the subject matter and scope of (EU) 531/2012 is set out at Articles 1(1) and 1(2) as follows:

“

*Article 1****Subject matter and scope***

- (1) *This Regulation introduces a common approach to ensuring that users of public mobile communications networks, when travelling within the Union, do not pay excessive prices for Union-wide roaming services in comparison with competitive national prices, when making calls and receiving calls, when sending and receiving SMS messages and when using packet switched data communication services, thereby contributing to the smooth functioning of the internal market while achieving a high level of consumer protection, fostering competition and transparency in the market and offering both incentives for innovation and consumer choice.*

*It lays down rules to enable the separate sale of regulated roaming services from domestic mobile communications services and sets out the conditions for wholesale access to public mobile communications networks for the purpose of providing regulated roaming services. It also lays down transitory rules on the charges that may be levied by roaming providers for the provision of regulated roaming services for voice calls and SMS messages originating and terminating voice calls and SMS messages originating and terminating within the Union and for packet switched data communication services used by roaming customers while roaming on a mobile communications network within the Union. It applies both to charges levied by network operators at wholesale level and to charges levied by roaming providers at retail level.*



- (2) *The separate sale of regulated roaming services from domestic mobile communications services is a necessary intermediate step to increase competition so as to lower roaming tariffs for customers in order to achieve an internal market for mobile communication services and ultimately for there to be no differentiation between national and roaming tariffs.”*

100 Regulation 31(6) of the Framework Regulation also requires that ComReg have regard to Regulation 16 of the Framework Regulations when making a determination under Regulation 31.

101 Regulation 16 of the Framework Regulations sets out additional objectives for ComReg. These are without prejudice to the objectives at Section 12 of the Communications Regulation Acts. The text of the relevant<sup>35</sup> sections of Regulation 16 is as follows:

Regulation 16(1)(c) in so far as contributing to the development of the internal market is concerned, co-operate with BEREC in a transparent manner to ensure the development of consistent regulatory practice and the consistent application of European Union law in the field of electronic communications.

Regulation 16(1)(d) in so far as promotion of the interests of users within the European Union is concerned, to promote the ability of end-users to access and distribute information or use applications and services of their choice.

102 It is ComReg's view that by determining a dispute and ensuring compliance with (EU) 531/2012 ComReg is meeting the objectives set out in the list above based on the subject matter and scope set out at Article 1 of (EU) 531/2012).

103 Regulation 16(2) of the Framework Regulations provides that In pursuit of its objectives under paragraph 16(1) of the Framework Regulations and under Section 12 of the Communications Regulation Acts, the ComReg shall apply objective, transparent, non-discriminatory and proportionate regulatory principles by ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks and services. It is ComReg's view that (EU) 531/2012 is applicable to all Domestic MNOs therefore, there is no discrimination the treatment of undertakings providing access to facilities and services for SSRRRS in similar circumstances.

## 6.9 Preliminary Conclusions

104 Access includes connection as set out in the Access Directive and directly cross referenced in (EU) 531/2012.

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<sup>35</sup> Some of ComReg's objectives provided for at Regulation 16 of the Framework are not relevant to this dispute. In the interest of clarity, objectives which are not directly applicable to the subject and/or scope of this dispute are not cited and are not considered.

105 The facilities and services necessary for the implementation of SSRRRS are provided for in the ETSI Standard for the implementation of SSRRRS for the implementation of SSRRRS.

106 Regarding the Vodafone implementation of SSRRRS:

- (a) Where access to a facility or service is necessary for SSRRRS under the ETSI Standard, Vodafone shall not charge, pursuant to Article 5(1) of (EC) 531/2012.
- (b) Where access to a facility or service is not necessary for SSRRRS under the ETSI Standard, it is optional. A party requiring an optional facility or service shall bear the cost. A party offering an optional facility or service may charge fair and reasonable prices.
- (c) Where access to network elements, associated facilities, relevant services, software and information systems, is necessary for the provision Wholesale Roaming Resale Access, pursuant to Article 3(4) of (EC) 531/2012, Vodafone may only charge in accordance with Articles 7, 9 and 12 of (EC) 531/2012.
- (d) Where a component is not necessary for the provision Wholesale Roaming Resale Access, Vodafone may charge fair and reasonable prices pursuant to Articles 3(4) of (EC) 531/2012.

107 Each party is individually responsible for their own compliance with obligations under (EC) 531/2012 and Regulation 23(3) of the Universal Service Regulations. With regard to testing of access to facilities and services necessary for the implementation of SSRRRS, Neither party shall charge for the testing of access to facilities and services necessary for the implementation of SSRRRS.

# Annex: 1 Draft Determination

## **Draft Determination to resolve the dispute between Cloud 9 Mobile Communications Limited and Vodafone Ireland Limited concerning proposed charges for access to facilities and services necessary for the separate sale of regulated roaming services**

### **1. STATUTORY POWERS GIVING RISE TO THIS DETERMINATION**

- 1.1. This Determination is made by the Commission for Communications Regulation ('ComReg') and relates to a dispute under Regulation 5 of the Communications (Mobile Telephone Roaming) Regulations 2013<sup>36</sup> ('the Mobile Roaming Regulations') and Regulation 31 of the European Communities (Electronic Communications Networks and Services) (Framework) Regulations, 2011<sup>37</sup> ('the Framework Regulations') in connection with existing obligations under Regulation (EU) No 531/2012 of the European Parliament and of the Council<sup>38</sup> ('(EU) No 531/2012')
- 1.2. This Determination is made:
- (i) Pursuant to Regulation 31 of the Framework Regulations;
  - (ii) Having had regard to sections 10 and 12 of the Communications Regulation Acts 2002 to 2011<sup>39</sup> ('the Communications Regulation Acts') and Regulation 16 of the Framework Regulations;
  - (iii) Having taken account of submissions received from the parties

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<sup>36</sup> Communications (Mobile Telephone Roaming) Regulations 2013 (S.I. No. 228 of 2013).

<sup>37</sup> European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011)

<sup>38</sup> Official Journal of the European Communities, Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 (2012/531/EC, OJ L 172, 30.6.2012, p.11).

<sup>39</sup> Communications Regulation Act 2002 (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act 2007 (No. 22 of 2007), the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (No. 2 of 2010) and the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011).

## 2. DEFINITIONS

2.1. In this Determination, unless the context otherwise suggests:

**‘(EU) 531/2012’** means the Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 (2012/531/EC, OJ L 172, 30.6.2012, p.11).

**‘access’** shall have the same meaning as under Article 2 of the Access Directive.

**‘Authorisation Regulations’** means the European Communities (Electronic Communications Networks and Services) (Authorisation) Regulations 2011 (S.I. No. 335 of 2011).

**‘Authorised Undertaking’** shall have the same meaning as under Regulation 2 of the Authorisation Regulations;

**‘BEREC’** means the Body of European Regulators for Electronic Communications, as established pursuant to Regulation (EC) No. 1211/2009 of the European Parliament and of the Council of 25 November 2009;

**‘Cloud 9’** means Cloud 9 Mobile Communications Limited, an Authorised Undertaking.

**‘Communications Regulation Acts’** means the Communications Regulation Act 2002 (No. 20 of 2002), as amended by the Communications Regulation (Amendment) Act 2007 (No. 22 of 2007), the Communications Regulation (Premium Rate Services and Electronic Communications Infrastructure) Act 2010 (No. 2 of 2010) and the Communications Regulation (Postal Services) Act 2011 (No. 21 of 2011)

**‘ComReg’** means the Commission for Communications Regulation.

**‘Direct Wholesale Roaming Access’** means the making available of facilities and/or services by a mobile network operator to another undertaking, under defined conditions, for the purpose of that other undertaking providing regulated roaming services to roaming customers.

**‘ETSI’** means the European Telecommunications Standards Institute.

**‘ETSI Standard for the implementation of SSRRRS’** means Standard technical interfaces, protocols and processes for SSRRRS including but not limited to implementation, provisioning and billing (produced maintained and updated from time to time by ETSI) which are publicly available through the cooperation platform maintained by ETSI<sup>40</sup>

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<sup>40</sup> [http://docbox.etsi.org/Reference/Cooperation\\_Platform\\_Separate\\_Sale\\_of\\_Roaming\\_Services/](http://docbox.etsi.org/Reference/Cooperation_Platform_Separate_Sale_of_Roaming_Services/)

**‘Access Directive’** means Directive 2002/19/EC of the European Parliament and of the Council of 7 March, 2002 as amended, on access to, and interconnection of, electronic communications networks and associated facilities.<sup>41</sup>

**‘Framework Regulations’** means the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2011 (S.I. No. 333 of 2011)

**‘Mobile Roaming Regulations’** means the Communications (Mobile Telephone Roaming) Regulations 2013 (S.I. No. 228 of 2013).

**‘SSRRRS’** means the separate sale of regulated roaming services as provided for in (EU) 531/2012.

**‘Vodafone’** means Vodafone Ireland Limited, an Authorised Undertaking.

**‘Wholesale Roaming Access’** means Direct Wholesale Roaming Access or Wholesale Roaming Resale Access

**‘Wholesale Roaming Resale Access’** means the making available of facilities and/or services by a mobile network operator to another undertaking, under defined conditions, for the purpose of that other undertaking providing regulated roaming services to roaming customer.

**‘Wholesale Charges for Regulated Roaming Services’** means the wholesale charges provided for at Articles 7, 9 and 12 of (EC) 531/2012.

- 2.2. Terms used but not otherwise defined in this Determination shall have the meaning attributed to them (EC) 531/2012.

### 3. SCOPE AND APPLICATION

- 3.1. This Determination applies to Cloud 9 Mobile Communications Limited (‘Cloud 9’) and Vodafone Ireland Limited (‘Vodafone’) (together ‘the Parties’) and is binding upon the parties. The Parties shall comply with this Determination in all respects.
- 3.2. This Determination relates to (EC) 531/2012.
- 3.3. The scope of the dispute was published on the ComReg website on 8 August 2014 as follows:

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<sup>41</sup> Official Journal of the European Communities, Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (2002/19/EC, OJ L 108, 24.4.2002, p. 7) as amended by Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities and 2002/20/EC on the authorisation of electronic communications networks and services (2009/140/EC, OJ L 337, 18.12.2009, p. 37).

Whether it is permissible for Vodafone to impose the following on Cloud 9 for facilities and support services for the separate sale of regulated roaming services ('SSRRRS'):

- (i) One-off connection and set-up charges.
- (ii) Monthly/Recurring charges.
- (iii) Wholesale charges for the making of regulated roaming calls.

## 4. DETERMINATION

4.1. In accordance with Regulation 31 of the Framework Regulations, 2003 as amended; the Communications Regulation Act; the Mobile Roaming Regulations and (EU) No 531/2012; and for the purpose of this Determination in the dispute between Cloud 9 and Vodafone, ComReg hereby determines that:

- (i) Access includes connection as set out in the Access Directive and directly cross referenced in (EU) 531/2012.
- (ii) The facilities and services necessary for the implementation of SSRRRS are provided for in the ETSI Standard for the implementation of SSRRRS for the implementation of SSRRRS.
- (iii) Regarding the Vodafone implementation of SSRRRS:
  - (a) Where access to a facility or service is necessary for SSRRRS under the ETSI Standard, access shall be free of charge, pursuant to Article 5(1) of (EC) 531/2012.
  - (b) Where access to a facility or service is not necessary for SSRRRS under the ETSI Standard, it is optional. A party requiring an optional facility or service shall bear the cost. A party offering an optional facility or service may charge fair and reasonable prices.
  - (c) Where access to network elements, associated facilities, relevant services, software and information systems, is necessary for the provision Wholesale Roaming Resale Access, pursuant to Article 3(4) of (EC) 531/2012, Vodafone may only charge in accordance with Articles 7, 9 and 12 of (EC) 531/2012.
  - (d) Where a component is not necessary for the provision Wholesale Roaming Resale Access, Vodafone may charge fair and reasonable prices pursuant to Articles 3(4) of (EC) 531/2012.
- (iv) With regard to testing of access to facilities and services necessary for the implementation of SSRRRS, neither party shall charge for the testing of access to facilities and services necessary for the implementation of SSRRRS.

4.2. In relation to the specific items proposed by Vodafone in the agreement offered to Cloud 9:

- (i) 4.1(iii)(a) of this determination applies to the following:
  - (a) 'Tibco Reverse Proxy - ARP specific'

- (b) 'Configuration - Comms - Firewalls \ VPN'
  - (c) 'Signalling and connectivity with Online Charging System (ARP OCS)'
  - (d) 'End to End Testing of ARP call routing \ provisioning'
- (ii) 4.1(iv) of this determination applies to the following:
- (a) End to End Testing of ARP call routing \ provisioning'
  - (b) Any testing of access to facilities and services necessary for the implementation of SSRRRS .
- (iii) 4.1(iii)(a) and 4.1(iii) (b) of this determination applies to the following as appropriate:
- (a) 'Security audits to ensure that ARP systems comply with Vodafone Security policies'
  - (b) 'Set up of new ARP on our Finance \ SAP systems'
  - (c) 'Recurrent charges to cover O&M and Incident Management e.g. for calls made to Customer Care by ARP customers or from ARP to 2nd/3rd level line support for roaming issues'
  - (d) 'Charges for reporting and KPI requirements - Increased monitoring and reporting specific to individual ARPs'

## 5. MAINTENANCE OF OBLIGATIONS

- 5.1. Unless expressly stated otherwise in this Determination, all obligations and requirements contained in Decision Notices, Decision Instruments and Directions made by ComReg applying to the parties and in force immediately prior to the Effective Date of this Determination, are continued in force by this Determination and the parties shall comply with same.
- 5.2. If any section, clause or provision or portion thereof contained in this Determination is found to be invalid or prohibited by the Constitution, by any other law or judged by a court to be unlawful, void or unenforceable, that section, clause or provision or portion thereof shall, to the extent required, be severed from this Determination and rendered ineffective as far as possible without modifying the remaining section(s), clause(s) or provision(s) or portion thereof of this Determination, and shall not in any way affect the validity or enforcement of this Determination.
- 5.3. For the avoidance of doubt, to the extent there is any conflict between a ComReg Decision Instrument or ComReg document (or any other document) dated prior to the Effective Date and the Parties obligations now set out herein, this Determination shall prevail, unless otherwise indicated by ComReg.

## **6. STATUTORY POWERS NOT AFFECTED**

- 6.1. Nothing in this Determination shall operate to limit ComReg in the exercise and performance of its statutory powers or duties under any primary or secondary legislation (in force prior to or after the Effective Date of this Determination).

## **7. EFFECTIVE DATE**

- 7.1. The Effective Date of this Determination shall be the date of its publication and notification to the Parties and it shall remain in force until further notice by ComReg.

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**KEVIN O'BRIEN**

**CHAIRPERSON AND COMMISSIONER**

**THE COMMISSION FOR COMMUNICATIONS REGULATION**

**THE [ ... ] DAY OF [ ... ] 201[...]**