



Commission for
Communications Regulation

Consultation

Market Analysis – The wholesale national market for international roaming on public mobile networks

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All responses to this consultation should be clearly marked:-
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and sent by post, facsimile, e-mail or on-line at www.comreg.ie
(current consultations), to arrive on or before 5.30pm, 3rd
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Please note ComReg will publish all submissions with the
Response to Consultation, subject to the standard confidentiality
procedure.

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1 Executive Summary

- 1.1 ComReg is obliged to conduct a market definition and market analysis process into "the wholesale national market for international roaming on public mobile networks",¹ with a view to determining whether such a market is susceptible to sector-specific regulation because of a lack of effective competition. According to the European Commission, it would appear that certain competitive problems characterise the market across the territory of the European Union.
- 1.2 The European Commission ("the Commission") launched a sectoral inquiry as far back as 2000 into the charges being levied by mobile operators for international roaming services,² and has also taken infringement actions against certain mobile operators under EC competition rules.
- 1.3 While it is arguably possible for ComReg to carry out the market *definition* phase on the basis of information available to it from public sources, it is not possible for it to draw any definitive conclusions as regards market *analysis* in the absence of at least a minimum level of retail information being made available to ComReg from consumers of international roaming services based in other jurisdictions. This information is, to the best of ComReg's understanding, available from other National Regulatory Authorities and from on-the-spot consumer surveys conducted on non-Irish mobile users roaming in Ireland. As a number of Member States have not yet transposed the new regulatory framework, the collection of this range of data will require a reasonable period of time before it can be completed.
- 1.4 ComReg is also of the view that the best way to achieve competitive results in this market, for the benefit of all consumers across the European Union, is to co-ordinate an appropriate market analysis approach and to determine the appropriate remedies, should they be required, at a pan-European level. This would be most effectively achieved, in the view of ComReg, under the auspices of the International Regulators' Group (the "IRG") or the European Regulators' Group (the "ERG"), both of which represent National Regulatory Authorities ("NRAs").
- 1.5 In line with its statutory objective to promote the development of the internal market, ComReg is anxious to ensure that visitors to Ireland from other parts of the EU who roam onto national networks can avail of the best possible value for money in terms of price, choice and quality. In parallel we will be seeking the co-operation of other NRAs to ensure that, where necessary, customers of Irish mobile network operators are protected by overseas NRAs when they roam elsewhere in the EU.
- 1.6 ComReg is consulting on its preliminary conclusions that to fulfil its obligations under regulations 26 and 27 of the Framework Regulations it must co-ordinate the collection of data and the market analysis with other NRAs.

¹ Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC, EC OJ L 114/45 of 8 May 2003.

² See IP/00/111 of 4 February 2000, "Commission launches second phase of telecommunications sector inquiry under the competition rules: mobile roaming".

- 1.7 ComReg would welcome written comments on this paper from all interested parties by Wednesday 3rd December.

2 Introduction

Objectives under the Communications Regulations Act 2002

2.1 Section 12 of the *Communications Regulation Act 2002* outlines the objectives of ComReg in exercising its functions. These are, 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 European Union.

These objectives are identical to those set out in Article 8 of the Framework Directive.

2.2 This review is in line with the objectives set out in the Communications Regulation Act 2002, which also form part of the EU directives and Irish regulations.

Regulatory Framework

2.3 Four sets of Regulations,³ which transpose into Irish law four European Community directives on electronic communications and services,⁴ entered into force in Ireland on 25 July 2003. The final element of the EU electronic communications regulatory package, the *Privacy and Electronic Communications Directive*, must be transposed into Irish law by 31 October 2003. The Minister for Communications, Marine and Natural Resources has consulted on the draft regulations.⁵

³ Namely, the European Communities (Electronic Communications Networks and Services) (Framework) Regulations 2003 (S.I. No. 307 of 2003), ("the *Framework Regulations*"); the European Communities (Electronic Communications) (Authorisation) Regulations, 2003 (S.I. No. 306 of 2003), ("the *Authorisation Regulations*"); the European Communities (Electronic Communications) (Access) Regulations 2003 (S.I. No. 305 of 2003), ("the *Access Regulations*"); the European Communities (European Communications) (Universal Service and Users' Rights) Regulations 2003 (S.I. No. 308 of 2003), ("the *Universal Service Regulations*").

⁴ The new regulatory framework for electronic communications networks and services, comprising of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, ("the *Framework Directive*"), OJ 2002 L 108/33, and four other Directives (collectively referred to as "the *Specific Directives*"), namely: Directive 2002/20/EC of the European Parliament and of the Council on the authorisation of electronic communications networks and services, ("the *Authorisation Directive*"), OJ 2002 L 108/21; Directive 2002/19/EC of the European Parliament and of the Council on access to, and interconnection of, electronic communications networks and services, ("the *Access Directive*"), OJ 2002 L 108/7; Directive 2002/22/EC of the European Parliament and of the Council on universal service and users' rights relating to electronic communications networks and services, ("the *Universal Service Directive*"), OJ 2002 L 108/51; and the Directive 2002/58/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector, ("the *Privacy and Electronic Communications Directive*"), OJ 2002 L 201/37.

⁵ ComReg Document No. 03/99 outlines ComReg's response to the draft regulations.

- 2.4 The new communications regulatory framework requires that ComReg define relevant markets appropriate to national circumstances, in particular relevant geographic markets within its territory, in accordance with the market definition procedure outlined in the *Framework Regulations*.⁶ In addition, ComReg is required to conduct an analysis of the relevant markets to decide whether or not they are effectively competitive.⁷ Where it concludes that the relevant market is not effectively competitive (*i.e.*, where there are one or more undertakings with significant market power (“SMP”)), the *Framework Regulations* provide that it must identify the undertakings with SMP on that market and impose on such undertakings such specific regulatory obligations as it considers appropriate.⁸ Alternatively, where it concludes that the relevant market is effectively competitive, the *Framework Regulations* oblige ComReg not to impose any new regulatory obligations on any undertaking in that relevant market, and withdraw any such obligations it may have imposed at an earlier stage⁹.
- 2.5 In carrying out market definition and market analysis, ComReg must take the utmost account of the *Relevant Market Recommendation* and the Commission's *Guidelines on Market Analysis and Significant Market Power* (“*The SMP Guidelines*”).
- 2.6 The Framework Directive requires a NRA, taking utmost account of the Recommendation, to define relevant markets appropriate to national circumstances. Where appropriate, there might be a need for a NRA to define markets that differ from those listed in the Recommendation.¹⁰ NRAs are therefore permitted to examine all relevant markets for the purpose of market analysis, whether or not they are listed in the Recommendation.

Consultation

- 2.7 All comments to this consultation are welcome. However, it would make the task of analysing responses easier if comments were referenced to the relevant question numbers from this document.
- 2.8 The consultation period will run from Wednesday 22nd October to Wednesday 3rd December during which ComReg welcomes written comments on any of the issues raised in this paper.
- 2.9 As required by Regulation 20 of the Framework Regulations, the draft SMP notification will be made accessible to the European Commission and the national regulatory authorities in other member states of the European Community prior to taking a final decision.

⁶ Regulation 26.

⁷ Regulation 27.

⁸ Regulation 27(4).

⁹ Regulation 27(3).

¹⁰ As Recognised by recital 19 of the Recommendation

3 Market Definition

- 3.1 The purpose of the market definition procedure is to identify in a systematic way the competitive constraints that providers of mobile international roaming services encounter, thereby also facilitating the subsequent market analysis procedure. According to the European Court of Justice,¹¹ a relevant product market comprises all products or services that are sufficiently interchangeable or substitutable, not only in terms of the objective characteristics of those products, their prices or their intended use, but also in terms of the conditions of competition and/or the structure of supply and demand for the products in question.
- 3.2 A relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products and/or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different to those areas.
- 3.3 The definition of the relevant market concentrates on identifying constraints on the price setting behaviour of operators. These constraints comprise demand substitution and supply substitution. For the purpose of defining the relevant market ComReg will take into account a range of measures in assessing demand and supply substitution, including the SSNIP test where practicable.¹² The market definition exercise is concerned with the likely competitive response of a body of customers, which is not necessarily the majority of customers.¹³
- 3.4 The Commission recommends, in its *Relevant Markets Recommendation*, that NRAs should analyse the relevant “national market for international roaming on public mobile networks”.¹⁴
- 3.5 ComReg has received detailed responses from the mobile operators in Ireland, however to finalise the market definition and analysis process it is necessary to collate data from other jurisdictions. ComReg hopes to co-ordinate this at an IRG / ERG level.

¹¹ See, for example, Case 322/81, *Michelin v. Commission* [1983] ECR 3461, as well as the Commission Notice on the definition of relevant markets for the purposes of Community competition law (“the Commission Notice on Market Definition”), OJ 1997 C 372/3, and the SMP Guidelines.

¹² See the Commission Notice on Market Definition, the SMP Guidelines and ComReg’s Market Data Information Notice for additional guidance. Applying the SSNIP test, one tries to ascertain whether customers purchasing a particular product or service would switch to readily available substitutes or to suppliers located elsewhere if a hypothetical monopoly supplier were to impose a small (in the range of 5% to 10%) but significant, non-transitory price increase above the competitive level, thereby rendering such a rise in prices as being unprofitable.

¹³ See, for example, Case 85/76, *Hoffman-La Roche & Co. A. G. v. Commission*, [1979] ECR 461, as well as Case 66/ 86, *Ahmed Saeed Flugreisen v. Zentrale zur Bekämpfung unlauteren Wettbewerbs*, [1989] ECR 803.

¹⁴ This market corresponds to that referred to in Annex I (2) of the *Framework Directive*.

4 Market Analysis

4.1 Having first identified a relevant market relating to the national market for international roaming, ComReg is required to conduct an analysis of the effective competitiveness of that market by reference to whether any given undertaking or undertakings are deemed to hold SMP in that market. Recital 27 of the *Framework Directive* states that a relevant market will not be effectively competitive “*where there are one or more undertakings with significant market power*”. Regulation 25(1) of the *Framework Regulations* states that:

“A reference in these Regulations ... to an undertaking with significant market power is to an ... undertaking (whether individually or jointly with others) enjoys a position which is equivalent to dominance of that market, that is to say a position of economic strength affording it the power to behave to an appreciable extent, independently of competitors, customers, and, ultimately, consumers”.

4.2 In accordance with EC jurisprudence, and taking utmost account of the *SMP Guidelines*, ComReg’s investigation will first focus on whether any individual mobile operator in Ireland holds a position of SMP with respect to international roaming in Ireland.

4.3 In addition, and in the alternative to an investigation of single SMP, ComReg will investigate whether two or more undertakings can be found to be in a joint dominant position within the meaning of the *Framework Regulations*¹⁵ if, even in the absence of structural or other links between them, they operate in a market the structure of which is considered to be conducive to coordinated effects.

4.4 A thorough market analysis of international roaming services arguably also requires additional data from an end-user’s perspective. The responses to a consumer survey and customer questionnaires should provide a large component of this requested data. The consumer survey and additional questionnaires could seek to collect, among other matters, the following market data:

- the characteristics of end-users, *e.g.*, corporate, medium user, low user, *etc*;
- the frequency with which these end-users roam;
- their knowledge of inbound and outbound call tariffs while roaming;
- their relative price sensitivity (as a result of the “*called party pays*” principle with respect to international roaming services);
- their use of alternative means of communication in response to a price increase, *e.g.*, plastic roaming, call-back, fixed calls, *etc*;

¹⁵ Regulation 25(2)

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- their awareness of manual override facilities and preferred roaming services; and
- whether these end-users exert any countervailing bargaining power.

4.5 An assessment of whether effective competition exists in the provision of international roaming services will also need to take into account the introduction of a variety of recent commercial developments, the effects of which might be to exert countervailing bargaining power on the part of consumers or to introduce greater competitiveness among MNOs. Some of those developments include:

- any departures from the GSM Association's standard STIRA and IOT agreements;
- any relaxation of the non-discrimination obligations to which certain MNOs are subject, which might generate greater tariff flexibility;
- the recent convention of competing “roaming alliances”
- the emergence of GPRS roaming exchange (“GRX”) services which are based on a model of roaming which is different from the 2G roaming model;
- any pan-European roaming packages which create greater consumer choice, including 'preferred roaming' relationships; and
- the availability and level of use in practice of manual or automatic override facilities for the selection of the roaming operator.

4.6 ComReg has received detailed responses from the mobile operators in Ireland, however to carry out a robust market analysis it is necessary to collate data from other jurisdictions. ComReg hopes to co-ordinate this at an IRG / ERG level.

5 Conclusion

- 5.1 In order to carry out a robust analysis of the relevant market for international roaming services with a view to determining whether SMP exists on any such relevant market, ComReg believes that co-operation with other NRAs and / or the completion of on-the-spot consumer surveys conducted on those non-Irish mobile users roaming in Ireland is required. ComReg hopes co-operation with other NRAs can be achieved at an IRG / ERG level so that all consumers across the European Union could benefit from the co-ordinated effort.

Q. 1. Do you agree with ComReg's conclusion that it is preferable to complete the market definition and analysis by co-ordinating its data collection and analysis task with other NRAs. Please elaborate your response.

6 Submitting Comments

- 6.1 All comments are welcome; however it would make the task of analysing responses easier if comments were referenced to the relevant question numbers from this document.
- 6.2 The consultation period will run from 22nd October to 3rd December 2003 during which the ComReg welcomes written comments on any of the issues raised in this paper.
- 6.3 ComReg appreciates that many of the issues raised in this paper may require respondents to provide confidential information if their comments are to be meaningful. Respondents are requested to clearly identify confidential material and if possible to include it in a separate annex to the response. Such information will be treated as strictly confidential.
- 6.4 Having analysed and considered the comments received, ComReg will review the wholesale national market for international roaming market review and publish a report on the consultation which will inter alia summarise the responses to the consultation.
- 6.5 In order to promote further openness and transparency ComReg will publish the names of all respondents and make available for inspection responses to the consultation at its Offices.

Appendix A – Consultation Questions

Q. 1. Do you agree with ComReg’s conclusion that it is preferable to complete the market definition and analysis by co-ordinating its data collection and analysis task with other NRAs. Please elaborate your response. 9