



**GSM Association's response to the  
European Commission's call for input on potential  
EU regulation on international roaming**

**22 March 2006**

The GSM Association is the world's premier wireless industry representative body, representing more than 680 second and third generation GSM network operators, regulators, manufacturers and suppliers such as application providers and roaming brokers. Its members have operations in over 214 countries.

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## EXECUTIVE SUMMARY

On 20 February 2006, the European Commission launched a public consultation, requesting comments on three open-ended questions, regarding the shaping of a potential new regulation of international roaming tariffs. The GSM Association (GSMA) is very sceptical about the need for regulation. The cost of voice services overall (domestic and international roaming calls) for consumers has fallen every year between 2001 and 2005 at an average of 5% per annum and this downward trend is accelerating. Data from a sample of key operators in Europe suggests that retail roaming prices declined at around 8% in the last year.

The reduction in retail prices is the direct result of a highly competitive European mobile market. The mobile industry operates within a broader, rapidly developing market for telecommunications. As a result of increased competition from new entrants, new access solutions for people 'on the move' and a focus on consumer needs (evidenced by rapid innovation and high levels of investment), the industry is delivering sustained value to consumers, across the full package of consumer services, including international roaming.

The GSMA notes that the public consultation neither asks for, nor provides, any evidence of why or whether there should be regulation of international roaming, both fundamental questions that must be answered prior to the Commission taking action. From previous announcements and subsequent informal discussions with the Commission, it is unclear whether the Commission will provide a second phase to the public consultation, at the start of which the details of its proposals can be shared with industry. The GSMA asks that the Commission respect both its own and the legally applicable processes involved with any such proposal for new regulation and avoids putting at risk the competitiveness, innovation and consumer benefits of the mobile telecommunications industry. It is the opinion of the GSMA that such a risk is acute if the Commission submits hastily constructed legislation.

### **The Commission should respect its own and the legally applicable processes**

The GSMA calls on the Commission to respect the guidelines that it itself has drawn up to ensure due process is followed. Adherence to these guidelines will help guard against the adoption of inappropriate or damaging regulation and will avoid a rushed

process, that is likely to have unintended and unforeseen consequences. Accordingly, the Commission is requested to:

- (i) ensure that there is a process of full and meaningful consultation with the mobile telecommunications industry on a specific proposal. In accordance with the Commission's own guidelines, industry should be given at least 8 weeks to respond once the Commission's proposal is known
- (ii) complete a full impact assessment of the possible consequences of the adoption of any such regulation, prior to proceeding further. The Commission should attempt to use the most reliable and relevant data and ensure that the modelling of this complex market is undertaken accurately
- (iii) complete a thorough assessment of the impact that any new regulation would have on the existing telecommunications regulation. The Commission must also provide clear guidance to industry regarding the regulatory review process. In particular, the relationship of the established 'framework review' and the process being proposed for the development of these new international roaming proposals
- (iv) ensure that the legal basis of any proposed legislation respects the requirements to be properly founded and justifiable. The GSMA considers Article 95 of the EU Treaty, as a proposed basis for legislation, to be inappropriate and unfounded. Further, any proposed legislation must respect the fundamental legal principles of:
  - a. proportionality (being a balanced measure for the issues it seeks to address)
  - b. subsidiarity (ensuring that the role of the National Regulatory Authorities (NRAs) in regulating the telecommunications market is respected), and
  - c. legitimate expectations (ensuring a coherent legislative framework that will not undermine the basis of investment in the EU).

Based on information made available by the Commission, the GSMA does not believe that this will be the case.

## **The Commission should avoid the unintended consequences of hastily prepared legislation**

The GSMA requests that the Commission consider carefully whether the pursuit of short term, political objectives that it may seek to meet by rushing through new legislation would have long term, negative impacts on jobs, competitiveness and investment in the European telecommunications industry.

It is important for the Commission to understand that the European mobile industry is a very large and complex ecosystem, delivering considerable consumer benefits, wealth and employment to the Member States of the EU.

### ***International roaming is not sold as a standalone service***

International roaming forms part of a package of interrelated services to consumers. These packages offer extremely good value for money and the total cost of these services to consumers has been falling for a long and sustained period. Consumers have embraced the services that the mobile industry offers and the value for money these services represent. Despite there being an ever increasing array of competing technological solutions to staying connected 'on the move', mobile penetration continues to rise, in some markets, to over 100%. Price regulating a single aspect of an interrelated package of services is not appropriate and will almost certainly have unforeseen consequences.

### ***Investment is at risk***

Operators continue to invest heavily in the introduction of a wide range of international roaming related services, such as SMS, MMS, data roaming, and flat-rate roaming packages. This is not a result of overt government intervention but rather of an open and competitive market, where customers can choose from a wide variety of services, provided by a wide variety of suppliers. Investment in innovation is a key competitive differentiator in the mobile market and international roaming is no exception. By proposing an uncoordinated intervention in one specific part of the market, the Commission puts at risk this investment and, with it, Europe's global leadership in mobile services.

### ***Market complexity***

The complexity of the mobile ecosystem involved in international roaming demands a thorough impact analysis. Any analysis needs to consult all the stakeholders, including the operators and NRAs.

**The Commission has yet to provide sufficient information to enable the GSMA to reply to its call for input in an informed and complete manner. Specific comments will only be possible after the Commission's actual proposal is formally released. Accordingly, the GSM Association reserves the right for further comment.**

#### **Key Points**

- The EU telecoms industry is highly competitive, the cost of voice services (which include international roaming) has consistently fallen and the industry is delivering sustained value to consumers.
- The GSMA is very sceptical about the need for regulation and the Commission has not provided any evidence of why it considers intervention necessary.
- The Commission should respect its own and the legally applicable processes in completing a proper consultation and impact analysis and only propose legislation that respects the rule of law.
- The Commission should avoid the unintended consequences of hastily prepared legislation, putting investment at risk. It is fundamental that the Commissions understand that international roaming is not a stand alone service but part of a complex mobile ecosystem.

## **INTRODUCTION**

This response to the Commission sets out, in section 1, some of the significant consumer benefits that the mobile telecommunications industry has delivered and continues to develop. International roaming is an integral part of the services offered to customers in a highly competitive market. In a constantly evolving market, defined by innovation, new entrants and new service and tariff offerings, it is important that regulation does not undermine the incentive for investment or lead to unintended consequences. Such a result could affect not only the telecommunications markets but may have knock-on effects in other areas as well.

Section 2, sets out the GSMA's concerns regarding the Commission's process and its apparent disregard for its own good practice guidelines. The GSMA is further concerned that the Commission may propose legislation that runs counter to the fundamental legal principles of the EU, such as proportionality, subsidiarity and legal certainty, and is adopted on an inappropriate and unfounded basis, giving rise to further uncertainty in the market.

## **1. CONSUMER BENEFITS OF THE MOBILE ECOSYSTEM**

### **1.1 Mobile industry delivering benefits**

The European mobile industry is delivering great benefits to consumers and the wider economy. Mobile operators bring a vast choice of high quality services to 459 million users across Europe and, in addition, serve millions of customers where other networks are not available. According to the 11<sup>th</sup> Implementation Report<sup>1</sup> of the European Commission "...Average EU penetration of mobile services reached 92.8% in October 2005...There are now 79 2G network operators in the EU, together with 214 service providers, up from 166 in 2004... 3G voice and content services are now rolling out..."

If Europe is to sustain this growth and make rapid progress over the next five years to achieve the objectives of i2010, it must rely on one of its primary strengths – an

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<sup>1</sup> Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on European Electronic Communications Regulations and Markets 2005 (11<sup>th</sup> Report), SEC(2006)193.

open, competitive and advanced mobile sector which fosters the development of a wide variety of suppliers. In such circumstances customers can choose from a wide and increasing range of high quality services at attractive prices. Continued competition and advances in the sector are illustrated by the mobile operators' commitments to major investment cycles for 3G as well as other technologies and innovations in both the domestic call and international roaming environment, which contain both risks and opportunities.

## **1.2 New operators, new services**

Mobile markets remain healthily competitive. In each market, an increasing number of operators and service providers<sup>2</sup> are competing for customers on price, quality and range of services. This results in strong competition amongst operators, which continues to drive down the price of the package of services offered to consumers.

The benefits and innovative services being delivered to consumers are a result of this competition. Consumers now have available a broad range of services covering:

- communications (business and personal, voice calls, video telephony messaging (SMS and other forms) and Internet access)
- business applications (personal information management and connectivity to data), and
- entertainment (downloaded content and applications such as music, games and TV).

The introduction of initiatives such as mobile number portability has also fostered increased consumer choice. During 2005, mobile number portability doubled and, overall, 25.1 million numbers have been retained while customers changed supplier.

## **1.3 Innovation and availability**

The industry is developing innovative services to win and keep their customers, which is maintaining the high level of investment relative to revenues<sup>3</sup>. Total operator

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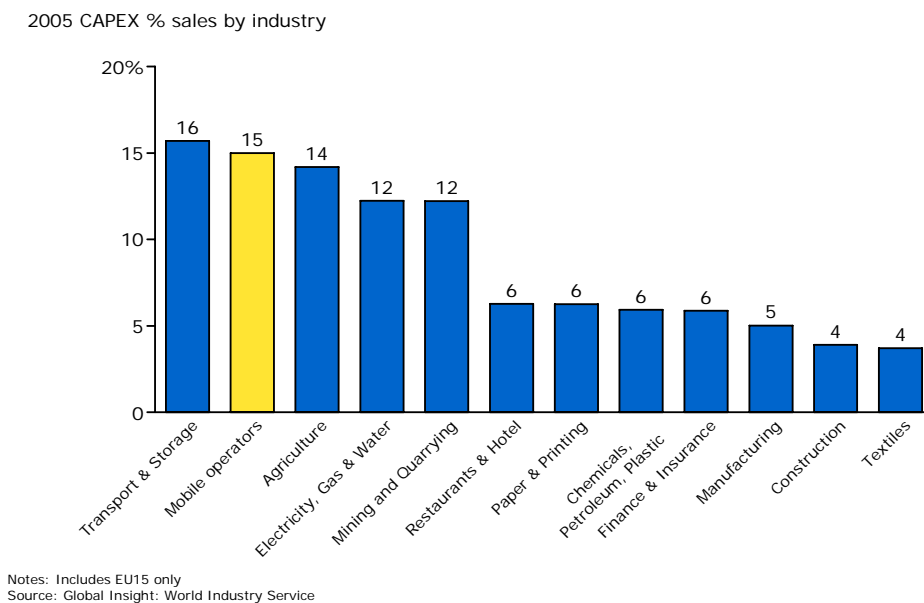
<sup>2</sup> There were 48 new 2G service providers in Europe from 2004 to 2005 alone, increasing the total number of providers from 166 in 2004 to 214 in 2005. 135 of these service providers are MVNOs.

<sup>3</sup> The Commission's 11<sup>th</sup> Implementation Report: states that "...The investment-to-revenue ratio...for the mobile sector...is higher, pointing to strong future competition for new high-value added services..." "...Competition is driving players to invest in new technologies to deliver innovative services based on convergence between broadband networks, audiovisual media and electronic devices, with consumers benefiting from higher data speeds and improved quality..."



capital expenditure was estimated at €45 billion in 2005, an increase of 6% from 2004. Average mobile operator capital expenditure is 15% of total revenues – amongst the highest across all industries (see *Illustration 1*).

***Illustration 1:*** Mobile industry capital spending compared to other industries



Operators have invested heavily in the roll out of 3G networks and services and are already offering commercial 3G services across Europe. Although still a new service, 3G is proving to be a success with consumers with a current total of 25 million 3G subscribers.

Improved technologies will foster this development. HSDPA technology with a current speed of 1.8 Megabit/sec has already been launched in many markets.

Technology innovation is also expanding the range of substitutes<sup>4</sup> and communication options open to Europeans travelling outside their home country. Today's travellers can choose from mobile calls, fixed line calls, text messages, instant messages, email, MMS and other options.

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<sup>4</sup> For traditional voice, a rapidly growing substitute is VoIP; for messaging (SMS, MMS, etc) substitutes include e-mail and instant messaging using WiFi networks.

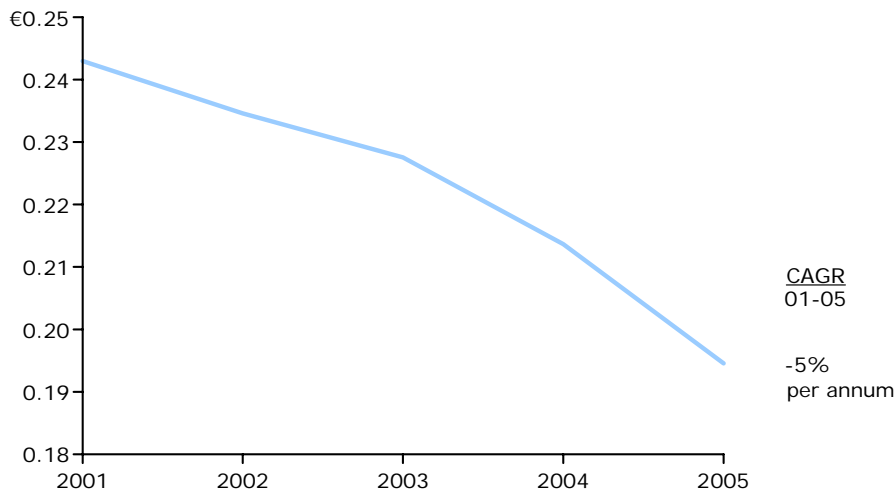
## 1.4 Prices and tariff innovation

As consumer markets approach 100% penetration, operators' core voice and messaging business are maturing. Operators now compete on value and quality in their core services, and by having the most compelling innovative services in newer areas<sup>5</sup>.

This dynamic competition has been driving down the price of calls across Europe over the last five years. Operators' voice revenues per minute for all calls (international roaming and domestic), have been declining at an average rate of 5% per annum over the last four years across Europe and this decline is accelerating (see *Illustration 2*). In addition, data from a sample of key operators suggests that retail roaming prices declined at around 8% in the last year.

*Illustration 2: Average voice (domestic & international roaming) revenues per minute - Europe*

Average retail voice revenue per minute in Q3



Note: EU 15 minus Luxembourg  
Source: Merrill Lynch, Dec 2005

International roaming cannot be seen in isolation as it forms part of a package of interrelated services to consumers. These packages offer extremely good value for money and, as indicated above, overall, prices have declined consistently over the past five years. Consumers have embraced the services that the mobile industry offers and the value for money these services represent. Despite there being an ever

<sup>5</sup> The Commission's 11<sup>th</sup> Implementation Report: states that "...Operators are beginning to offer portfolios of services, with different combinations of low-cost voice (including mobile), internet access and audiovisual content to attract and retain customers"..."

increasing array of competing technological solutions to staying connected 'on the move', mobile penetration continues to rise, in some markets, to over 100%. Price regulating a single aspect of an interrelated package of services is not appropriate and will almost certainly have unforeseen consequences.

A review of retail roaming prices across the EU reveals clear differences in individual operators' roaming charges, within specific countries. Customers in different countries see a range of prices, which is evidence of a competitive environment.

### **Improved price / service innovation**

There has been an ongoing drive amongst operators to introduce improved customer roaming offerings – focusing on simplicity, transparency and value. Most operators have launched single-rate, zone-based roaming tariffs to simplify their offer to consumers, emphasising the continued attractiveness of this approach.

- Today all operators in the UK, Spain, Portugal and Italy now offer single rate, zone-based pricing; as well as some operators in Belgium, Denmark, Finland, Germany, Greece and the Netherlands
  - For example, Amena launched a flat-rate roaming tariff for customers in Europe in July 2005 and Optimus launched a flat-rate roaming tariff to over 50 countries in May 2005
- Vodafone launched 'Vodafone passport' in June 2005, where customers roaming on the Vodafone network pay a one-off connection fee and domestic rates for the rest of the call. This offers both improved transparency and value
- T-Mobile has introduced minutes bundles whereby a certain number of minutes can be purchased (e.g. 20 or 30 minutes) at very competitive prices
- Orange has introduced, in a number of EU countries, minute bundles that allow customers to benefit from competitive discounts on standard roaming rates
- O2 and T-Mobile both offer a subscription-based service in the UK (£2.99 or £2.50 per month) which reduces the cost of international call charges

- TME also offers a subscription-based service (10€/month) which reduces per minute call charges for roaming services
- Since December 2005, Telecom Italia/TIM launched the offer “TIM Globe”, which provides 0,66€ cent/min for originated traffic.

A thorough review of operator marketing initiatives demonstrates the emphasis that operators have placed on creating attractive new roaming related propositions. Given that the cost of voice services has been falling consistently over the last few years and the increasing frequency of tariff reductions and innovations introduced by operators over the last few months, the GSMA is very sceptical of the need for regulation.

It should be noted that the Commission has yet to provide any substantial evidence of its alleged concern regarding international roaming prices. Commissioner Reding provided an anecdotal comment that prices had not fallen during the three months that the Commissioner's selective sample web site of roaming prices had been in operation. However, there have been no figures produced to date and it would be hard to claim that the review of a three month period for only a limited number of offerings could form the basis of any realistic market trend.

### **A competitive wholesale market**

As recognised by Commissioner Reding in her speech of 8 February 2006, competitive pressure has brought down charges at the roaming wholesale level.

If new regulation is considered in the retail roaming market, its design cannot be isolated from a review of the existing provisions for wholesale regulation. As such a review is underway as part of the Commission's review of the EU Regulatory Framework for Electronic Communications and Services (2006 Review), any decision regarding retail regulation is premature.

The Commission has identified wholesale roaming as a separate market and it has been included as 'Market 17' in the list of relevant markets. Market 17 is currently under review by NRAs and the ERG and is subject to investigation by the European Commission (DG Competition) in a number of countries.

Mobile operators compete to attract the custom of foreign networks and foreign roamers to their networks, so there is no reason to believe that the

markets would be found to be anything other than competitive. In the provision of wholesale roaming to foreign visitors, negotiations typically take place with up to 200 other mobile networks at EU and global level. In any one country, there are usually at least three networks with whom Inter-Operator Tariffs (IOTs) are negotiated and networks also compete for inbound roaming traffic by signing discount agreements. The introduction of “traffic steering” has enhanced competitive pressures on IOTs and the available tools have become increasingly sophisticated. Previously, traffic steering was conducted by programming of preferred partners on SIM cards whilst today dynamic updates allow for almost daily redirection of traffic.

The Finnish regulator has completed an analysis of its national wholesale roaming market and found it to be competitive and not requiring regulatory intervention. The French and Italian regulators have also acknowledged that there is no individual or joint Significant Market Power (SMP) in these markets. It is likely that there will be similar findings in the other Member States, which are expected throughout 2006.

### **1.5 Unintended consequences**

The European mobile market is a complex ecosystem, containing many hundreds of companies operating in many different countries, both inside and outside the European Union. Where necessary, services are subject to remedies imposed by national regulators, who take into account the different competitive pressures in each country, applying local knowledge and market understanding to their analysis and decisions. Roaming services form an interconnected part of a far larger range of services and any regulation of a single part of the market may have wider, unintended impacts. For example, on the overall package of mobile services, innovation and investment.

In order to avoid any unintended consequences, the GSMA believes that there needs to be proper consultation to ensure that the impact of any proposed legislative action is properly analysed and fully understood by all stakeholders, before legislative action is taken. Given that the economics of the roaming market are complex and that any proposed regulation will have a substantial impact on both operators and other stakeholders (and without prejudice to its view that any such regulation is neither necessary nor justified), the GSMA believes that it is particularly important that the Commission conducts a thorough consultation and impact analysis.

## Summary

- The EU mobile industry delivers significant consumer benefits and leads the world in value for money
- The mobile industry is defined by new services, new entrants and innovation
- Prices in the mobile sector, including international roaming, are declining and competition is increasing
- There are high levels of capital expenditure, being amongst the highest across all industries
- International roaming cannot be treated or regulated as a stand alone service as it is an integral part of any mobile telecoms package
- International roaming is a competitive environment with evidence of active competition resulting in lower prices and service innovation
- The Commission cannot single out one area for regulation without a full understanding of the overall industry or there are likely to be unintended consequences

## **2. LEGAL AND PROCESS CONCERNS REGARDING THE COMMISSION'S PROPOSAL**

In the GSMA's opinion the current proposed legislation is:

- (i) in violation of the Commission's own stated process
- (ii) in violation of the existing regulatory framework governing telecoms in the EU, and
- (iii) in violation of the EU Treaty.

These issues are discussed in more detail below.

### **2.1 Violation of the Commission's consultation principles**

On 8 February 2006 Commissioner Reding stated that: "...I have asked my services to start working on an EU regulation on international roaming charges...". The Commissioner's speech was followed by the launch of a public consultation on 20 February 2006. The consultation called for comments on three open-ended questions regarding the shaping of a Regulation but no proposed text.

The GSMA considers that the proposed process violates the Commission's consultation principles and the requirement for an impact assessment, as set out in greater detail below.

The Commission outlines its requirements for consultation procedures in:

- (i) "Communication from the Commission towards a reinforced culture of consultation and dialogue — General principles and minimum standards for consultation of interested parties by the Commission"<sup>6</sup> (the "Communication on Consultations"), and
- (ii) "Impact Assessment Guidelines"<sup>7</sup>.

These documents represent the Commission's own recognition of the importance of and need for public accountability in the exercise of its legislative powers. As the

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<sup>6</sup> 11 December 2002, COM(2002) 704 final.

<sup>7</sup> 15 June 2005, SEC(2005) 791.

Commission states "*It goes without saying that, when the Commission decides to apply principles and guidelines, its departments have to act accordingly.*"<sup>8</sup>

The Commission recognizes that a pre-legislative consultation constitutes one of the Commission's duties when proposing legislation<sup>9</sup>. The Commission has also committed to respect certain minimum standards during such process, as follows. However, the Commission has violated these standards in the current process as set out below.

- Clear content. The consultation does not comply with the requirement that "*[a]ll communications relating to consultation should be clear and concise, and should include all necessary information to facilitate responses.*" However, the Commission's call for comments is limited to a few general questions, which give no indication as to the substance of the measures being contemplated. For example, it is unclear whether the Commission is seeking a Regulation for retail tariffs, wholesale tariffs, or both.
- Time limits for participation. For proposals of this complexity, consultation periods should be at least 8 weeks, providing "*sufficient time for planning and responses to invitations and written contributions*". This consultation is only planned for approximately four weeks despite the importance for stakeholders to understand, and in a sufficiently informed manner to comment on, the various options and necessity for, and consequences of any proposed legislative action. No particular reason of urgency appears to compel a departure from the normal consultation timeframe.
- Publication. According to the Communication on Consultations, the Commission should ensure adequate awareness-raising publicity and adapt its communication channels to meet the needs of all target audiences. Simply posting the consultation on DG Information Society's website is not considered adequate. The Commission did not even issue a press release announcing the beginning of the consultation process.

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<sup>8</sup> See Page 10 of "Communication on Consultations".

<sup>9</sup> "*Consultation mechanisms form part of the activities of all European Institutions throughout the whole legislative process [...]. In fact, wide consultation is one of the Commission's duties according to the Treaties and helps to ensure that proposals put to the legislature are sound. This is fully in line with the European Union's legal framework, which states that "the Commission should [...] consult widely before proposing legislation and, wherever appropriate, publish consultation documents" (Protocol (N° 7) on the application of the principles of subsidiarity and proportionality, annexed to the Amsterdam Treaty)*" (emphasis added) (Communication on Consultations).



The contrast is stark with the Commission's previous regulatory actions where it always widely and successfully consulted with stakeholders before proposing the adoption of new measures. Most recently, in respect of the adoption of the New Regulatory Framework, the Commission launched a public consultation on detailed proposals followed by a 2 days public hearing. The Commission published a 60 page document and allowed over 14 weeks for comment. In addition, the Commission issued a summary of the different responses to the consultation, also followed by another public hearing.

The GSMA fully supports the Commission's own guidelines and initiatives to ensure adequate transparency and proper consultation. However, the Commission's departure from these principles has precluded the industry from contributing to the debate in a sufficiently informed manner, undermining the very purpose of consultation.

**Therefore the GSMA requests that the Commission publicly confirm a second consultation, in line with their own guidelines, based on actual proposals.**

## **2.2 Commission's duty to conduct an impact assessment**

For major policy initiatives, the Commission must conduct an "impact assessment"<sup>(4)</sup>. Such an assessment requires the following analytical steps:

- (i) identification of the problem
- (ii) definition of the objectives
- (iii) development of main policy options
- (iv) analysis of their impacts
- (v) comparison of the options
- (vi) outline of policy monitoring and evaluation.

In view of the extremely limited time available before a regulation on roaming is expected to be proposed, it would appear that the Commission will not conduct an adequate impact assessment on the regulation of roaming and will instead proceed with the adoption of the draft regulation on roaming in isolation.

A thorough impact assessment can only be based on the actual detail of the proposed regulation and must cover all material impacts. The following are examples of what such an analysis must cover:

- **Impacts on consumers** – in delivering international roaming and all other services, for example the potential impact of adverse price changes forced on non roaming services by the restructuring of operators' costs and margins
- **Impacts on the strategic, international competitiveness of a critical EU industry** - by its very nature, the international roaming market is global and, hence, the impact of changes to its regulation within the EU could have impacts beyond the Union's boundaries. For example, the Commission's proposed changes in roaming regulation could place European operators at a major disadvantage to non EU operators and distort the balance of competition in non EU markets
- **Impacts that vary between different operators**, for example depending on whether an operator is a net receiver or originator of international roaming calls. Before any decisions are made, the Commission must fully understand the overall EU roaming market and appreciate the very different nature of the roaming market in different Member States. Any proposed intervention must be designed to not unreasonably favour one group of operators, at the expense of another, if the intervention is not to risk materially changing the competitive structure of the EU's mobile markets
- **Impacts in the wider telecommunications industry** – as has already been stated, the competitive positioning of mobile cannot be viewed in isolation from the wider telecommunications industry. For example, international mobile roaming regulation may have knock-on impacts on other mobile retail prices which, in turn, could impact non-mobile operators. If Commissioner Reding's speech of 8<sup>th</sup> February was taken literally, international mobile roaming rates could, for example, create a major distortion to the wider telecommunications market.

**The GSMA calls on the Commission to confirm that it will undertake a thorough impact assessment of any proposal to regulate, in full consultation with the wider telecommunications industry, at the earliest possible opportunity.**

## **2.3 Need for alignment with the existing NRF**

The adoption of ad hoc regulation on international roaming cuts across existing regulation and, without proper analysis of its impact, risks legal confusion.

The field of electronic communications is regulated pursuant to the NRF. This provides a holistic regulatory framework that is the basis upon which participants have invested in the industry

In addition, telecommunications operators derive a number of rights from the NRF. These essentially consist of (i) the principle of proportionality, (ii) the principle of subsidiarity, and (iii) the expectations legitimately raised by the NRF in relation to operators. The role of NRAs must not be undermined. These issues are reviewed below.

### **2.3.1 The NRF already provides a holistic and harmonized regulatory framework.**

In 2002, the EU adopted a set of Directives, aimed at determining a comprehensive and harmonized regulatory framework for the provision of electronic communication services. The NRF specifically provides that, in this respect, "*all transmission networks and services should be covered by a single regulatory framework*"<sup>10</sup>.

At the time of the adoption of the 2002 package, the Community legislator also provided for a review process of the existing framework in 2006, whereby the NRF could be assessed and amended. This review process is currently underway. Adopting new legislation outside of this process fundamentally undermines the entire NRF.

### **2.3.2 Need to respect fundamental principles of regulation**

The adoption of such any new international roaming regulation, outside of the NRF, violates the following general principles:

#### **The principle of proportionality**

The adoption of an *ad hoc* regulation on roaming is disproportionate. There is an existing framework in place, which allows the adoption by NRAs of

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<sup>10</sup> Recital 5 of the Framework Directive

remedies applying to international roaming. The Commission confirmed in its Communication (COM (2006) 28 final) that the existing framework is a success and that the market analysis enables the imposition of better regulation in the EU ("*The system of market reviews has ensured that regulation is based on a thorough economic analysis and is strictly limited to markets in which there is persistent market failure. This has resulted in better regulation.*").

Furthermore, in the context of the current framework, the Commission has repeatedly indicated that pursuant to the proportionality principle, no regulation should be imposed where no body is found to have Significant Market Power. Even if the principle of proportionality was satisfied as to the need to adopt a regulation, the Commission would still have to establish that the content of the regulation is limited to what is strictly necessary in view of the objectives pursued. In the absence of any information as to the content of the regulation, it is, at this stage, not possible to assess whether this requirement is fulfilled.

In addition, while the GSMA does not recognize there should be any regulation, if the Community were to adopt any legislation it should be on the basis of a directive rather than a regulation. This has been expressly recognized in the declaration annexed to the Single European Act which provides that: "Declaration on Article [95] of the EEC Treaty - In its proposals pursuant to Article [95] (1) the Commission shall give precedence to the use of the instrument of a directive if harmonization involves the amendment of legislative provisions in one or more Member States".

### **The principle of subsidiarity**

The principle of subsidiarity provides that EU institutions may take action only if the objectives of the proposed action cannot be sufficiently achieved by Member States. The division of powers in the NRF recognizes that NRAs should assess the need for new regulatory obligations, on the basis of an analysis of their national market. The adoption of a regulation at the EU level for regulating roaming services therefore violates the principle of subsidiarity and prejudices the outcome of the market reviews to be undertaken by the NRAs.

The principle of subsidiarity also requires that a directive should be given preference over a regulation.

### **The principle of legitimate expectations and legal certainty**

The principle of legitimate expectations should be relied upon to limit regulatory changes when authorities have given specific assurances as to their likely future conduct. Any additional regulatory intervention, outside the scope of this broader review (and other than on the basis of the NRF itself), violates this principle.

DG Information Society itself explicitly recognized in January 2006 that "a flexible yet stable regulatory regime gives operators the confidence they need to plan their investments for a reasonably consistent and predictable EU single market".

### **2.3.3 The Commission should not undermine the role of the NRAs**

Any proposed regulation and its impact assessment must also take into consideration the role of NRAs. NRAs must maintain the required flexibility to regulate electronic communications in the NRF and prejudices the outcome of market reviews to be undertaken by NRAs (market 17). Because a roaming regulation departs from such principles, the impact assessment should, amongst others, cover the issues of:

- (i) the implications of departing from the flexibility afforded to NRAs
- (ii) the tension between the objective of enabling operators to compete (by securing sufficient revenues) and the objective of low roaming tariffs
- (iii) assessment of the impact on operators of such a regulation, and
- (iv) comparing the options available for the regulation of roaming charges.

### **2.4 Article 95 is not an appropriate basis for legislation**

Commissioner Reding's speech of 8<sup>th</sup> February outlined that the proposed legislation will be a Regulation adopted on the basis of Article 95 of the EU Treaty. The GSMA believes that Article 95 is an illegal basis for the Commission to take action in this field, as set out below.

#### **Article 95 is limited to harmonization of existing rules**

Article 95 grants the Community the right to harmonize Member State rules. The second sentence of Article 95(1) provides, more particularly, that "[t]he Council shall [...] adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market" (emphasis added). The wording of Article 95 therefore presupposes the existence of Member State rules established by law or administrative action.

The case law confirms that the existence, or likely existence, of disparate laws in Member States constitutes a condition for acting on the basis of Article 95.<sup>11</sup> However, currently there are no national laws or regulations on international roaming services and, therefore, nothing to be harmonized. It should also be noted that no such national laws could be adopted due to the defining framework of the NRF.

#### **The EU Commission cannot be a price regulator**

In any event, even if Article 95 could apply, as it was reminded in connection with the adoption of the cross-border payment regulation, the European Union has no competence to regulate prices. It is for this reason that the cross-border payment regulation did not require cross-border payment fees to fall to the level of the national fees but only imposed a measure of "equalization" aimed at eliminating the cross-border effect. In the case of international roaming, if a regulation could be adopted (which is not the case), such regulation could not require operators to lower their roaming tariffs.

#### **The Commission is required to show an internal market purpose**

Notwithstanding the above, Article 95 can only be used for the purposes of achieving the internal market. Thus, the Commission is required to demonstrate that any proposed legislation has as its main objective the elimination of obstacles to the freedom to provide services or the removal of distortions of competition created by national laws. The Commission has not done this.

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<sup>11</sup> See, inter alia, Case C-376/98, Germany v EP & EU Council, Judgment of 5.10.2000, §93, ECR [2000] I-8419, Case C-434/02, Arnold André GmbH & Co. KG v Landrat des Kreises Herford, Decision of 14.12.2004, §41-43, ECR [2004] I-11825.

## Summary

- The Commission is requested to publicly confirm a second consultation based on actual proposals, in line with their own guidelines on minimum standards for consultation of interested parties
- As the EU Commission itself recognises, it must carry out a full and thorough impact assessment of any proposal to regulate, in full consultation with the wider telecommunications industry
- As the Commission has previously stated, regulation in the field of telecoms should only be carried out within the scope of the existing regulatory framework or else it threatens to undermine investment and investor confidence in the market. Accordingly, the Commission should only act within that framework
- The EU Commission must respect the legal principles of proportionality, legal certainty and subsidiarity, all of which appear to be breach by the current plans
- The legal basis proposed by the Commission for legislation, as understood, is inappropriate and against the rules of the EU Treaty.

/END