Telefónica

COMMISSION CALL FOR COMMENTS ON THE PROPOSED REGULATION OF INTERNATIONAL ROAMING CHARGES

COMMENTS OF TELEFÓNICA

1. INTRODUCTION

1.1 In this submission, Telefónica sets out its initial comments on the Commission's intention to propose a regulation to the European Parliament and the Council concerning international roaming charges (the "Regulation").

1.2 Telefónica is a global telecommunications group. It is the second largest mobile operator outside China, with a significant presence in 19 different countries, over 99 million mobile customers, and over 220,000 employees worldwide. Since completing its takeover of the O2 group in February of this year, Telefónica has mobile operations in five European member states (Spain, the Czech Republic, the UK, Germany and Ireland).

1.3 Telefónica is committed to driving down the cost of international roaming services to its customers. To this end, it dedicates substantial resources to developing products that allow its subscribers to access mobile telephony services throughout Europe at fair and reasonable prices, and that provide foreign users with access to mobile telephony services in the countries in which Telefónica operates.

1.4 Nevertheless, the Commission has voiced concern over what it believes are the "*unreasonably high prices*" that consumers pay for using their mobile phones abroad. The Commission claims that these prices are "*reducing cross-border use of mobile phones*", thereby creating *"an obstacle to the European market for electronic communications*". The Commission therefore proposes to introduce a Regulation to regulate international roaming charges under Article 95 of the EC Treaty.

Executive Summary

1.5 This paper is structured as follows.

1.6 **Section 2** discusses the legal basis for any Regulation. For the reasons given in that section, Telefónica believes that:

- the proposed Regulation does not comply with the requirements of Article 95 of the EC Treaty;

- it is unlawful and inappropriate for the Commission to attempt to adopt new legislation to regulate international roaming when this already falls within the scope of the existing regulatory framework; and

- the proposed Regulation risks infringing a number of general principles of EU law, including the principles of legitimate expectations, subsidiarity, proportionality and non-discrimination.

1.7 **Section 3** discusses whether the Commission has provided any evidence of a need for price regulation. As explained in that section, Telefónica believes that:

- the Commission has failed to provide any evidence that EU consumers would benefit from price regulation; and

- the Commission has not shown a need for new legislation in order to impose price regulation.

1.8 **Section 4** discusses the practicalities of implementing any price regulation, and the potential effects on competition within and between member states of any such regulation. For the reasons given, Telefónica believes that any regulation risks significantly distorting competition within and between European member states, and harming EU consumers.

1.9 **Section 5** contains Telefónica's concluding remarks.

Preliminary comments

1.10 Telefónica believes that there are significant competitive pressures on roaming services in Europe and that these will increasingly be seen in declining retail prices this coming summer and throughout next year. Telefónica expects these to take the form of declining overall retail roaming prices and innovative pricing options for customers.

1.11 The ability to make and receive calls when overseas is just part of a bundle of mobile services which customers purchase from mobile operators, and the importance of each element of the bundle to a particular customer will depend upon that customer's particular needs and preferences. As a result, a wide variety of pricing packages is offered by operators across Europe. These include Europe-wide flat rates where the same rate is paid regardless of the country visited or network roamed upon (such as O2 UK's 'International Traveller Service' or TME "Worldwide Roaming Tariff"); network-related discounts, where a different rate is paid depending upon whether the network visited (such as O2 Germany's Starmap tariffs), and high user (such as TME premium Worldwide Roaming Tariff) and country-specific discounts.

1.12 For this reason, Telefónica does not believe that regulation of roaming charges is necessary or proportionate. The wide range of tariff options available is of enormous benefit to consumers, enabling them to choose the best tariff for their own particular needs and preferences. Regulatory intervention risks preventing operators from continuing to innovate in the area of pricing, which is critical to sustaining a competitive environment.

1.13 If, notwithstanding the above, the Commission is intent on pursuing an interventionist regulatory agenda, then it is essential that a "regulatory exit path" is built into the legislative mechanism (according to the regulatory framework and based on its principles). Specifically, it should be possible for NRAs to refrain from implementing regulatory measures set out in the Regulation, or subsequently to withdraw such measures, as and when the market has delivered the desired result. This might be achieved by requiring NRAs to conduct a market analysis, and providing that the regulatory obligations will only be triggered in the event that the analysis shows this to be necessary.

1.14 Telefónica notes, in this regard, that the Commission has suggested that the GSMA might 'agree on a common position on issues like international roaming tariffs'. This suggests that the Commission would not consider regulation necessary if prices were set at a level which would be acceptable to the Commission. As the members of the GSMA are competitors in their national markets, competition law makes it difficult for them to agree a common approach to tariff setting. However, it is clearly open to the Commission to specify the level of retail tariffs which it considers 'reasonable'.

2. LEGAL BASIS FOR THE PROPOSED REGULATION

No grounds for using Article 95

2.1 The Commission is proposing to adopt legislation to regulate international roaming tariffs under the procedure established in Article 95 of the

EU Treaty. As a preliminary matter, Telefónica does not believe that this is a legitimate legal basis for the adoption of the proposed Regulation.

2.2 Article 95 allows the Council to adopt legislation in certain circumstances "*for the approximation of the provisions laid down by law, regulation or administrative action in Member States*". The object of such legislation must be "*the establishment and functioning of the internal market*", namely, the elimination of obstacles to the freedom to provide services or the removal of distortions of competition.

2.3 In the present case, these conditions are not satisfied. In particular, the Regulation is not required in order to harmonise laws in different Member States. The law in this area is already harmonised.

2.4 In 2002, the European Parliament and Council adopted a set of the Directives which form the EU regulatory framework for electronic communications (the "Regulatory Framework"). The precise purpose of these Directives was the formation of a comprehensive and *harmonised regulatory framework*. This is made clear by Recital 5 of the Framework Directive, which indicates, that "*all transmissions networks and services should be covered by a single regulatory framework*".

2.5 By attempting to introduce new legislation under Article 95, it appears that the Commission is deliberately attempting to bypass the Regulatory Framework that has been implemented across the EU[1], and which provides the appropriate legal framework for regulating mobile communications markets.

The Regulatory Framework is the appropriate basis for any regulation

2.6 The existing Regulatory Framework is based on the fundamental principle that regulation should be withdrawn from markets which are effectively competitive. Only markets which demonstrate a lack of competition (ie those in which one or more operators are found to have significant market power) should be subject to economic regulation.

2.7 One of the main benefits of the Regulatory Framework is that it thus requires a proper market analysis to be conducted at a national level, before regulation can be imposed. In this way, it ensures that the NRA's decision about whether or not to impose *ex ante* regulation (and if so, the type of regulation

[1] The Commission's 11th Implementation Report indicates that most member states have virtually completed the legislative and regulatory process ensuring implementation, and the remainder have made substantial progress (page 9, section 3)

required) reflects national market conditions. This is appropriate because most markets for electronic communications services are still national markets, and the markets in different member states have evolved very differently over the years.

2.8 In fact, the Regulatory Framework specifically requires NRAs to conduct an analysis of roaming markets. One of the markets listed in the Commission Recommendation on Relevant Markets, and which NRAs are therefore required to examine, is precisely "*the wholesale national market for international roaming on public mobile networks*" (Market 17).

2.9 To date, FICORA has completed an analysis of Market 17, and concluded that the market is competitive. Other NRAs, such as ARCEP in France and OPTA in the Netherlands, have begun their consultation processes, but have not yet taken any final decision on whether *ex ante* regulation is required.

2.10 It follows that there can be no justification for the Commission's apparent decision to introduce new legislation, to run in parallel with the Regulatory Framework. Indeed, it is premature and precipitant for the Commission to propose such an approach. As explained above, the existing Regulatory Framework allows for the potential regulation of international roaming, and it cannot be concluded that the Regulatory Framework is incapable of achieving the desired result. The Commission is attempting to prejudge the outcome of NRAs' analyses of roaming markets under the principles set out in the Regulatory Framework.

2.11 The proposal is particularly unjustified in light of the fact that the Commission is currently in the process of reviewing the existing framework. This review process will enable the European institutions to amend the Regulatory Framework if necessary.

Regulation infringes general principles of EU law

2.12 In addition to the above, Telefónica believes that the adoption of a Regulation pursuant to Article 95 of the Treaty, would infringe a number of general principles of EU law.

<u>Legitimate expectations and legal certainty</u>

2.13 The EU can only modify the Regulatory Framework in accordance with the well-established principle of legitimate expectations.

2.14 The Commission has repeatedly told industry that electronic communications markets will not be regulated, other than in accordance with the current Regulatory Framework. Indeed, operators had no reason to doubt this, as the Regulatory Framework specifically provided for the potential regulation of roaming services. The Commission has also indicated on a number of occasions that it was the purpose of the Regulatory Framework to provide increased legal certainty.

2.15 It follows that the adoption of an *ad hoc* Regulation outside the scope of the Regulatory Framework breaches the principle of legitimate expectations and undermines legal certainty. In this way, it undermines the very basis upon which mobile operators have invested in the industry. It is important to note, in this regard, that investments in telecommunications markets have a particularly long horizon (of 10-15 years). This makes long term stability of the legal and regulatory framework particularly important to investors in mobile networks.

Subsidiarity

2.16 Article 5.2 of the EU Treaty provides that the Community may take action only if the objectives of the proposed action cannot be achieved by Member States.

2.17 As explained above, there is no evidence that international roaming prices cannot be regulated by Member States. The Regulatory Framework provides NRAs with the tools to adopt such regulation if necessary.

Proportionality

2.18 The principle of proportionality requires that measures adopted by the Community must be appropriate and necessary to achieve its objectives. When there is a choice between several measures, the Commission must choose the least restrictive. Furthermore, the disadvantages caused by the measure must not be disproportionate to the goals pursued.

2.19 The Commission does not appear to have undertaken any assessment of whether the proposed legislation to regulate roaming is proportionate. In the absence of any evidence of consumer harm in unregulated markets, the competitive damage caused by any Regulation seems highly likely to be disproportionate.

Right to property and freedom to trade

2.20 As a general principle, prices should not be regulated in competitive markets. The current proposal to restrict undertakings' commercial behaviour in competitive markets, amounts to an unjustified infringement of their right to property and freedom to trade.

Non–discrimination

2.21 The non-discrimination principle requires that undertakings in different circumstances be treated differently. Roaming services are provided on national mobile markets and, as has been noted, the conditions of competition in different EU markets are significantly different. It follows that any legislation to regulate international roaming must take account of these relevant differences.

Development of European communications networks

2.22 Finally, in accordance with Article 3(o) and Article 154 of the EU Treaty, the Community must ensure the development and creation of European communications networks and infrastructure. A measure whose main objective is to regulate roaming tariffs could hamper investments in the European infrastructure and, in this way impede the achievement of the above principles.

3. NO EVIDENCE OF A NEED FOR PRICE REGULATION

3.1 Before considering any type of regulatory intervention in a market, the Commission must show that regulation is reasonably justified, taking into account the particular problem to be solved. The Commission has manifestly failed to provide any such justification. First, it has failed to provide any evidence that the current structure of roaming pricing harms consumers or the internal market. Secondly, it has provided no evidence of a need for new legislation in this area.

3.2 Telefónica would welcome any statement from the Commission clearly explaining the precise nature of the harm thought to be caused by the current level of international roaming charges, and providing evidence for this allegation. Telefónica is particularly keen fully to understand the underlying concern and proposed remedy in light of the substantial cost and administrative burdens that would be likely to result from price regulation in these markets. These burdens are likely to be felt, not only by mobile operators (in the form of compliance costs) but also by NRAs, which will presumably be responsible for monitoring compliance and enforcing any Regulation.

There is no evidence of consumer detriment

3.3 The Commission has voiced a general concern over what it believes to be "*unreasonably high prices*" for international roaming services.

3.4 At this stage, it is not even clear whether the Commission is contemplating wholesale regulation, retail regulation, or both. In either case, however, the Commission has provided no evidence that regulation would benefit EU consumers.

Retail roaming services

3.5 Retail roaming charges are those which mobile operators collect from their own customers when those customers make and receive calls overseas.

3.6 As has been described, retail roaming is part of the bundle of services which mobile operators provide to their customers. Customers do not buy the ability to make and receive calls overseas in isolation, but along with a handset, the ability to make and receive calls at home, and a variety of other mobile services. Accordingly, it is the price of this whole 'bundle' of services which customers will take into consideration when making their purchase.

3.7 The relative importance of different price elements within the bundle will depend upon the customer's particular usage pattern. For example, cheap domestic call charges may be more important for customers who rarely travel than cheap roaming charges. Customers who travel frequently, on the other hand, may prefer to pay higher domestic call charges in return for cheaper rates when roaming.

3.8 If the national mobile market in a particular member state is competitive overall, then the overall 'bundle' price can be expected to be competitive, and to reflect consumer preferences. In these circumstances, price regulation will not benefit consumers.

3.9 If, on the other hand, the mobile markets in particular member states are not competitive, then there is already a legal and regulatory framework to address this. This is discussed further below.

3.10 In practice, the retail mobile markets in most member states are, in fact, competitive.

Wholesale roaming services

3.11 Wholesale roaming charges are those which mobile operators make to foreign mobile network operators, in return for allowing the foreign operator's customers to use their network. Thus, for example, when a Telefónica customer travels to France, the French network will charge Telefónica for calls made by the Telefónica customer on its network.

3.12 Unlike retail roaming, wholesale roaming represents a separate economic market. Again, however, if the relevant market is competitive then price regulation is unnecessary and will not benefit customers.

3.13 If, on the other hand, the market is not competitive, then the Regulatory Framework and competition law provide member states and the Commission with the tools to address this, as discussed below.

3.14 In practice, wholesale roaming markets are now competitive. As the Commission is aware, the competitive dynamic of the market for wholesale international roaming has changed significantly over recent years, largely as a result of technological developments which improve operators' ability to direct their roaming traffic. This has resulted in an acceleration of the development of new services and facilities and wholesale price reductions, through bi-laterally negotiated discounts. Indeed Commissioner Reding appeared to admit this in her speech, stating that "*competitive pressures may have brought down charges at the wholesale level*". Furthermore, although the Commission has alleged that the UK and German wholesale roaming markets were not competitive in the past (in Cases 38.097 and 38.098), no such allegation has been made in relation to the period after the end of 2003.

3.15 These price reductions have enabled operators to pass on cost savings to their retail customers, through cheaper and simpler tariff schemes (such as Telefónica's European and world roaming tariffs), and will continue to do so. As has been noted, Telefónica believes that significant reductions in retail roaming prices will be seen this summer and throughout next year. Telefónica expects not only that overall retail roaming prices will decline, but also that operators will offer increasing numbers of innovative pricing options for customers.

There is no evidence of a need for new legislation

3.16 As described above, there is no evidence that regulation of international roaming charges will benefit consumers. Even if this were the case, however, the Commission has provided no evidence that new legislation is necessary in order to address any alleged consumer detriment.

3.17 As described above, if regulatory intervention were necessary in this market, a remedy could be imposed under the existing Regulatory Framework. The existing framework is specifically designed to allow different practical instruments and approaches to be used as appropriate in order to deal with the particular competitive problems observed in a market. Specifically, Telefónica identifies the following regulatory instruments that could be used in the event that regulatory intervention was necessary in this market:

- *Regulation of the wholesale national market for international roaming*. This market is already identified as a market susceptible to be regulated on an *ex ante* basis. Accordingly, it can be regulated if NRAs conclude that it is not effectively competitive. To date, the Finnish NRA (Ficora) has completed its market analysis. Ficora has concluded that there are no SMP operators on this market, and that regulation of this market is therefore unnecessary.

- *Retail mobile services regulation*. Telefónica does not believe that retail price regulation is desirable. If there is evidence that the market on which retail roaming is provided is not competitive, however, then it is within the power of NRAs to regulate this market under the Regulatory Framework. In practice, the NRA would have to identify the appropriate market, undertake a market analysis, and impose an appropriate remedy on any undertaking with SMP.

- *Transnational roaming mobile services market*. The EU Framework Directive specifically allows the Commission (if necessary) to adopt a decision identifying transnational markets[2].

- *Competition policy-based intervention in the market*. The Commission, and national competition authorities, can also use their powers under Articles 81 and 82 of the EC Treaty (and equivalent national competition law) to intervene in markets where there is evidence of anti-competitive behaviour.

3.18 Clearly, the Commission should use its existing legal powers to address any alleged competitive distortion, before considering the introduction of new legislation. Only in cases where a problem cannot be solved using the existing legislative framework should a new type of regulatory intervention be

[2] See Art. 15.4 of the Framework Directive.

considered. Telefónica considers that none of the available options have properly been considered as methods for regulating roaming prices.

3.19 Telefónica notes, in this regard, that it would be nonsensical to suggest that any price differences between services offered at national and international level may represent a threat to the functioning of the EU internal market, and therefore require the introduction of legislation under Article 95 of the Treaty. Such an approach would lead to extensive and permanent overregulation of numerous markets, contrary to the Commission's stated objective of rolling back regulation. For example, in the analogous fixed telephony markets, the Commission has taken no action to eliminate the disparity between fixed line domestic tariffs and fixed line international call tariffs. It is not clear why the disparity between these prices is thought to have no effect upon the establishment and functioning of the internal market, whereas the difference between national mobile call charges and international roaming charges is thought to have such an effect.

4. THE POTENTIAL EFFECTS OF ANY PROPOSED REGULATION

4.1 In light of the uncertainty of the Commission's proposal, Telefónica finds it very difficult to provide focussed and substantive comments on the potential effects of any proposed Regulation.

4.2 Despite this lack of information, in this section Telefónica discusses each of the regulatory measures which it imagines that the Commission *might* be considering, and the potential impact on EU consumers of these measures.

Regulation of retail international roaming charges

4.3 In her speech to the ERG in Paris on 8 February 2006 Commissioner Reding stated that "*The new Regulation will not prescribe a specific "ideal" price for international roaming, but would require that international roaming charges are not higher than national roaming charges.*"

4.4 It is not clear whether the Commissioner was referring here to potential retail price regulation as very few operators offer national roaming. However, Telefónica considers below the impact of various alternative methods of retail price regulation.

Effect of retail price regulation

4.5 If the Commission is envisaging the regulation of retail charges, then Telefónica can only assume that it intends for retail international roaming charges to be set at a rate which is no higher than national mobile call charges (i.e. calls made from a mobile subscriber's own country). The effect of this is considered below.

<u>First, it may result in an increase in domestic call charges</u>

4.6 As Telefónica has already stressed, mobile services are sold in a bundle. In these circumstances, efficient pricing requires that each service in the bundle should bear its own variable costs, while fixed costs should be distributed among the different services. Different parts of the bundle will make a different contribution to the recovery of fixed costs, depending upon the value placed on those services by customers.

4.7 It follows that if operators are required not to discriminate between roaming and domestic services, then operators will be forced to raise the prices of their domestic services. This is because the share of an operator's fixed costs currently borne by roaming services will have to be distributed among the other services.

4.8 This situation will not benefit consumers. In fact, it means that regulation will lead to inefficient pricing. The new pricing structure might increase consumption of roaming services. However, any positive impact on consumer welfare would be more than offset by the reduction in the consumption of the rest of the services in the bundle.

Secondly, it will reduce competition and innovation on domestic mobile markets, leading to higher prices and less choice for consumers

4.9 An obligation to equalise retail international roaming charges and national mobile call charges will have a chilling effect upon competition in national mobile markets. Mobile operators will have a disincentive to reduce national mobile call charges if any such reduction will also result in a reduction in retail international roaming call charges. They will also be constrained in their ability to introduce new and innovative pricing packages.

4.10 Consumers currently benefit from high levels of competition in mobile markets throughout the EU. Indeed, competition is rapidly developing in mobile markets which are subject to increasing pressure from fixed-mobile convergence products. Fixed-mobile convergence increasingly enables the market to deliver different services over various technological platforms with varying degrees of substitution between them. Telefónica fully expects that in the short term, fixed mobile convergence will result in a proliferation of potential alternative services to mobile international roaming, putting increasing amounts of pressure on roaming prices (eg nomadic VoIP services provided over broadband connections anywhere).

4.11 The Commission should not legislate in a way which undermines this competitive and innovative environment.

Thirdly, domestic calls are not an appropriate benchmark

4.12 It is unclear whether the Commission is considering linking the price of roaming services to domestic national calls (ie the price of a call made in the subscriber's own country to a destination in the same country) or domestic international calls (ie the price of a call made from the subscriber's own country to an overseas destination).

4.13 The vast majority of calls made by roamers are international calls (back to their home country). The cost of domestic national calls would therefore, clearly, form an inappropriate benchmark. There can be no justification for a requirement that international calls made while roaming should be cheaper than international calls made from home.

4.14 Telefónica believes that it would also be inappropriate, however, to link roaming prices to the price of domestic international calls. This is because the costs of providing roaming services are substantially higher than the costs of providing domestic international mobile calls. Smaller operators without a pan European footprint are likely to be disproportionately affected by the mismatch between revenue and costs as they are less able to internalise their roaming traffic within their group. They may therefore be foreclosed from providing roaming services at all. This would result in a reduction of competition and consumer choice.

Implementation of retail price regulation

4.15 For the reasons set out above, Telefónica believes that retail price regulation would not benefit consumers. If, notwithstanding these concerns, the Commission decides to proceed with the imposition of retail price controls, however, the Commission must take account of the following.

Limits on pricing flexibility must be kept to a minimum

4.16 Telefónica believes that commercial undertakings usually have a better understanding of the markets in which they operate than regulators. Indeed, even monopoly regulation has tilted in favour of granting the regulated firm some degree of freedom, usually applying price regulation only to a basket of services. In the particular case of roaming, mobile operators must be given the opportunity to differentiate and adapt the structure of their roaming prices in response to the characteristics of demand and supply. Failure to permit this would limit operators' ability to offer pricing packages which best suit their customers' preferences. It would also prevent operators from offering retail prices which reflect the conditions of competition in the wholesale market (for instance, by offering cheaper retail prices for roaming on networks with the lowest IOTs). This will prevent end-users' choices from reflecting the wholesale cost of the service they are using.

Price regulation should not apply to retail charges for roaming outside the EU

4.17 If retail price regulation is to be combined with wholesale price regulation, then any retail price cap clearly must not apply to retail charges for roaming outside the EU (in countries where wholesale roaming costs cannot be regulated). If it were, then this could make it impossible for some operators to offer roaming in such countries.

Regulation of wholesale international roaming charges

4.18 Wholesale roaming charges are already subject to competitive pressure, as a result of the increased use of traffic-reorientation techniques, which give operators more control over the network their subscribers use when roaming. This competitive environment is leading to a progressive reduction of wholesale roaming charges. In competitive mobile markets, these cost savings are passed on to customers in the form of lower retail prices.

4.19 Notwithstanding the above, the Commission appears to be considering potential methods of wholesale price regulation. The potential methods of price control appear to be the following:

- comparison with other wholesale charges, which could include:
  - wholesale international roaming charges to be set at the same level as charges for wholesale national roaming;
  - wholesale international roaming charges to be set at the same level as charges for wholesale access to MVNOs;
- wholesale international roaming charges to be cost oriented.

4.20 Each of these alternatives is considered below.

Effect of wholesale price regulation

Wholesale international roaming charges to be set at the same level as charges for wholesale national roaming

4.21 Commissioner Reding's speech suggests that she is proposing that wholesale international roaming charges should be set at a level which is no higher than wholesale national roaming charges.

4.22 There are very few mobile operators in the EU which have national roaming agreements. Accordingly, if these agreements are to be used as a benchmark then this would mean *either* that only those operators with national roaming agreements would be regulated; *or* that the price of national roaming in those countries where it exists would have to be published.

4.23 Telefónica assumes that the Commissioner cannot be considering either of these alternatives.

4.24 First, it would clearly be inappropriate and nonsensical for the very small number of mobile operators with national roaming agreements to be the only ones which are subject to price regulation for wholesale international roaming (and would be likely to result in the termination of that small number of national roaming agreements which do exist, with catastrophic impact on the level of infrastructure competition in some EU markets). No reasonable market analysis could possibly provide justification for such an approach.

4.25 Secondly, it would also be inappropriate for the Commission to publish the prices charged for wholesale national roaming. This information is highly commercially confidential and its publication would be severely damaging to the businesses of those operators which rely on national roaming agreements. Publication of national roaming prices will thus distort competition on domestic mobile markets.

4.26 Thirdly, the prices of the two services are not comparable. National roaming services are often offered as a result of regulatory intervention to support market entry, without reference to the retail market at all. Also, MNOs which offer national roaming will often receive substantial volume commitments which dwarf those deliverable by any single foreign operator in the context of an international roaming agreement.

<u>Wholesale international roaming charges to be set at the same level as charges for wholesale access to MVNOs</u>

4.27 Alternatively, the Commission may be considering using wholesale prices to Mobile Virtual Network Operators and independent service providers as a benchmark for wholesale roaming charges.

4.28 If so, this causes the same difficulties discussed above in relation to national roaming, as many mobile operators do not have agreements with ISPs or MVNOs.

4.29 On the one hand, it would clearly be inappropriate for the Commission to regulate only those operators which do have such agreements. Not only would this be arbitrary, but it would also damage national competition as it would be likely to result in the termination of MVNO and ISP agreements.

4.30 On the other hand, in markets where NRAs have not determined the level of wholesale access charges, it would distort competition if the Commission were to publish a 'benchmark' access price for wholesale international roaming, based on the commercially negotiated prices charged to MVNOs and ISPs by those operators with such agreements. Any benchmark would result in transparency of prices charged by operators for wholesale airtime and, in this way, damage competition on national mobile markets. In particular, it would decrease the bargaining power of MVNOs and independent service providers in negotiations with operators. The benchmark would also be close to setting an ideal price for wholesale roaming, and Commissioner Reding claims in her speech that this is not the Commission's intention.

4.31 Finally, any linkage between wholesale roaming charges and access prices to MVNOs or ISPs, will distort competition in the domestic market, as it will create a strong disincentive for operators to reduce their wholesale access charges.

Wholesale international roaming charges to be cost oriented

4.32 Finally, the Commission may be considering a requirement that wholesale international roaming charges should be cost oriented.

4.33 An obligation to charge cost oriented prices is the most severe regulatory obligation that can be imposed on an undertaking. In accordance with the principle of proportionality (which requires remedies to be the least onerous available, and costs to be proportionate to the objective sought), this should only be imposed as a last resort. Wherever possible, other price control measures should prevail.

4.34 In any event, regulation based on cost orientation should only be considered after a proper market analysis, taking into account the suitability and proportionality of such price control, in the light of the alleged competition failures identified.

4.35 It is not clear how the Commission might seek to impose cost-oriented prices through the proposed Regulation. All of the alternatives appear to raise many difficulties:

- On the one hand, the proposed Regulation might seek to specify the precise level at which wholesale roaming charges should be set, based on cost orientation principles. Telefónica assumes this is not the Commission's intention, as Commissioner Reding states in her speech that the Commission does not intend to impose an ideal price. In any event, however, this approach does not seem realistic. In order to calculate an appropriate cost oriented price cap, the Commission would be required to undertake a lengthy assessment of the costs of operators across the EU and a detailed cost allocation exercise. It would be impossible to undertake such an exercise within the time frame that the Commission has set for the implementation of the proposed Regulation.

- Alternatively, the proposed Regulation might simply require wholesale international roaming charges to be cost oriented and leave it to the NRAs of member states to enforce this requirement. The problem with this approach, however, is that NRAs will have different levels of experience and expertise in setting cost-oriented prices, and are likely to take different views as to the appropriate level of such a price. They may also take vastly different amounts of time to conclude their analysis (as has been shown by the market analysis process under the Regulatory Framework). These differences risk creating serious distortions of competition across the EU as, unlike other services, wholesale roaming is sold only to undertakings in *other* member states. It follows that consumers in the country with the quickest regulator, which sets the lowest wholesale roaming prices will, perversely, lose out. Operators in such a country will be net losers, as they will have to pay high wholesale roaming charges to foreign operators, whilst charging lower prices when foreign operators' customers use their network. This would have a consequent impact on margins and could lead to pressure to raise domestic prices.

Implementation of wholesale price regulation

4.36 For the reasons set out above, Telefónica believes that any method of wholesale price regulation risks seriously distorting competition within and between EU member states. If, notwithstanding these concerns, the Commission decides to proceed with the imposition of a form of price regulation, however, then the Commission must take account of the following.

Any price regulation must leave room for pricing flexibility

4.37 If prices are to be regulated then any price cap must enable operators to offer different roaming prices to different operators in response to competition, and to account for the fact that different operators might have different attitudes towards retail pricing. Operators must not be required to offer the same price, on a non-discriminatory basis, to all other operators.

4.38 If operators' discretion over wholesale pricing is removed then competition in the wholesale roaming market would be eliminated entirely (as there would be no reason for operators to continue to invest in traffic directing technology). This would be a retrograde step because, as described above, competition in this market has developed rapidly over recent years. It would also leave little or no prospect of future regulatory withdrawal.

Regulated prices must not be required to be offered to un-regulated operators

4.39 The Commission must not require regulated wholesale roaming prices to be offered to non-EU operators who are outside the scope of the Regulation. If they do so, this will cause a net flow of funds out of the EU, and damage EU consumers

4.40 Specifically, it would enable consumers in third countries to benefit from the low regulated wholesale roaming charges levied by EU operators, without any reciprocal benefit for EU operators (and therefore, indirectly, consumers). EU operators would continue to have to pay the higher, unregulated wholesale roaming rates charged by operators outside the EU.

4.41 In these circumstances, the proposed Regulation would act as an impediment to EU operators' attempts to drive down the wholesale roaming charges of third country operators through competitive negotiation. If third country operators know that they will benefit from a regulated price within the EU regardless of the price they themselves charge, then the incentive to lower their own price is substantially reduced.

5. CONCLUSION

5.1 For the reasons described in this paper, Telefónica believes that the proposed introduction of a Regulation under Article 95 is not only unnecessary, but that it fundamentally undermines confidence in the legal framework, and risks severely damaging competition and EU consumers. In the light of these concerns, Telefónica believes that it is extremely important that the Commission conducts a proper impact assessment and consults thoroughly on the detail of the proposal before it is proposed to the European Parliament and Council. Inappropriate regulation could have devastating effects on European mobile markets.

5.2 Some key points should be emphasised, by way of conclusion.

The implications of the Commission's proposed use of Article 95

5.3 As Telefónica has described in this submission, the Commission is not justified in departing from the existing legal framework (set out in the Regulatory Framework and competition law), and this attempt to do so fundamentally undermines the principle of legal certainty. The proposed use of Article 95 before the use of the current framework has been fully explored calls into question the future of that framework and the confidence that operators can place on its use.

5.4 As has been explained, Telefónica also believes that Article 95 cannot, in any event, provide an appropriate legal basis for regulating roaming services. This means that the proposed legislation is very likely to be challenged in the European courts. This will lead to a prolonged period of legal uncertainty, which will undermine investment in the industry generally, and in particular in new markets such as mobile broadcasting (due to uncertainty over the commercial risk involved).

5.5 The application of Article 95 in this sudden and arbitrary way will also undermine legal certainty in other unrelated markets, both in and beyond telecommunications. It will clearly raise concerns about the Commission's propensity to propose new regulation at will, without justification or proper consultation. The crudeness of the Article 95 approach and the uncertainty surrounding its application by the Commission will significantly raise the commercial risks associated with investing in European businesses.

Need for a proper impact assessment

5.6 Before imposing any Regulation, it is clearly imperative that the Commission should precisely identify the alleged problem and fully investigate the impact of the proposed remedy. However, it is difficult to see how the Commission can conduct a proper impact assessment before it has properly consulted on the proposal. The Commission has provided stakeholders with almost no guidance as to the form of any proposed Regulation. This makes it difficult or impossible to provide informed comments on its potential impact.

5.7 As described in this submission, Telefónica cannot foresee a means by which the Commission can practically regulate retail or wholesale international roaming charges without distorting competition to the detriment of EU consumers. Inappropriate regulation may have major potential adverse effects on the operation of mobile markets across Europe, undermining investments and investor confidence, and stifling innovation. This is particularly inappropriate at a time when the mobile industry is making substantial new investment in mobile broadband technology, services and products. Intervention which replaces market forces (especially that which controls retail prices) represents a return to the unpredictable and interventionist era which existed before the introduction of the Regulatory Framework.

Retrograde step

5.9 Finally, and perhaps most importantly, the proposed Regulation represents a worrying step back from the important principles which underpin the Regulatory Framework. The Framework promotes an economics based approach to regulation and is designed to encourage competition. Commissioner Reding stated in her speech that, "*One of my policies is that of creating an open and competitive single market for information society and media services in the EU*." Telefónica agrees that the Commission should promote open and competitive markets. Price regulation of roaming services, however, would fundamentally undermine this competition-based approach. The current level of international roaming charges is determined by the competitive process, which enables prices to reflect numerous complex criteria including costs, coverage, demand, reputation, and value. Regulation of roaming prices would be a retrograde step towards a command and control approach to economic regulation, and would ride roughshod over the competitive forces of an open market.