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Review of the functioning of the Roaming Regulation and of its possible extension
to SMS and data roaming services

Comments by Vodafone
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Executive summary

- Last year, the Roaming Regulation was presented as an 'exceptional measure', yet today we already find the Commission proposing to extend the voice regulation beyond 2010, to intervene in new and immature markets like data roaming and to apply the same 'one size fits all' approach to call termination services which are already being regulated by national regulators.
- The Commission should pause and think carefully before these 'exceptional measures' become the norm. They weaken the EU Regulatory Framework which most policymakers claim to support. It is too early to decide whether to continue voice regulation less than 12 months after it was implemented. The European Court is expected to decide next year whether the Regulation is lawful.
- In the meantime, we cannot think of any other market in the European Union which is delivering such rapid price reductions (as we see in the mobile sector today) and yet still faces the threat of retail price regulation.

Voice roaming

- Vodafone's Passport tariff remains more popular and better value than the regulated Eurotariff. In the first quarter of 2008, Passport customers paid at least [X] - less than Eurotariff customers
- Passport customers see their prices fall every time their domestic mobile call charges fall. The price per minute paid by Passport customers has fallen by almost 20% in the period between September 2007 and March 2008
- The Roaming Regulation has imposed significant opportunity costs on the industry and its customers. Resources that would otherwise have brought new competitive offers to market have instead been needed to comply with the Regulation. Vodafone has had to defer or cancel at least three major roaming product launches as a result.
- Vodafone will apply a 'first minute then per second' charging approach to the Eurotariff from 1 October 2008. This is the approach already used for most

domestic tariffs, both fixed and mobile, and is widely accepted by customers and regulators alike

Data roaming

- Flat rate data tariffs (€x per day or €y per month) are the simplest way to provide transparency. Vodafone launched daily and monthly flat rate tariffs back in July 2007 and today over [8<] of our customers use them.
- Following their launch, the cost of roaming in Europe for Vodafone customers had fallen by 21% by March 2008. Monthly flat rate users have then seen a further reduction of upto 45% in June. Vodafone customers who have instead remained on traditional 'per MegaByte' tariffs will see reductions of as much as 90% from 1 July.
- Vodafone is determined to put an end to bill shocks for the few customers who are unaware of the usage or cost. From July, all customers will pay the same price whichever network they roam on, and all data charges will be capped at new, lower, levels which are detailed in our submission.
- The Commission has no basis for asserting that data roaming tariffs or SMS roaming tariffs are 'too high'. It does not even attempt to demonstrate that the market is failing or that a competitive market would do 'better'. This growing tendency to conclude that a particular set of prices are 'too high', without attempting to determine whether competition is effective or may be expected to be in future, is contrary to the fundamental basis of the EU Regulatory Framework and the Treaty upon which it relies.
- The Commission cannot devise retail or wholesale price caps for data roaming which would not harm the competition and growth we see today. Linear per MegaByte tariffs would make some data services unaffordable and others uneconomic. The voice experience shows that imposing the same regulated tariff structure for all operators – whether linear or not - will kill the very innovation which is currently propelling the market forward and benefiting European customers today.

Introduction

Vodafone implemented the Roaming Regulation in September 2007. Our primary concern prior to the adoption of the Regulation had been to ensure that the benefits of competition, choice and innovation which our customers were already enjoying were not stifled. The EU Regulatory Framework – which the Roaming Regulation attempts unlawfully to bypass – was supposed to safeguard such benefits.

The extension of pan-European price controls will further undermine the EU Regulatory Framework which policymakers claim to support

This review comes at a time when the Commission has launched an avalanche of proposals to extend or otherwise change the regulatory landscape for telecoms in Europe¹. Whilst each should be considered on its merits, it is also important to consider the cumulative impact of ever more regulatory intervention by Brussels upon confidence in the European mobile industry and the telecommunications sector more widely².

Last year, the Roaming Regulation was presented as an 'exceptional measure', yet today we already find the Commission proposing to extend the voice regulation beyond 2010, to intervene in new and immature markets like data roaming and to extend the same 'one size fits all' approach to call termination services which have been effectively regulated by national regulators for decades in some cases. There is a real danger that such 'exceptions' now become the norm. This means that the Regulatory Framework – which many European policymakers claim to support and which commands wide support from investors and industry alike – is increasingly in danger of being set to one side.

Vodafone continues to believe that this cannot and should not be done, and that the Roaming Regulation is unlawful in attempting to do so. The challenge to the Roaming Regulation initiated by several UK mobile operators was referred to the European Court of Justice by the UK High Court in December last year. The

¹ In addition to this, see Commission proposals on the regulatory treatment of termination rates (http://ec.europa.eu/information_society/policy/ecomm/library/public_consult/termination_rates/index_en.htm), as well as broader proposals in the context of the current Review to give the Commission veto powers over other remedies.

² We also refer readers to the GSMA submission, and to their paper entitled 'Demystifying the mobile industry'.

outcome of the European Court's deliberations – which are likely in the course of 2009 - will determine whether the Regulation can continue at all and, even if it can, what form such regulation might take in future. One of Vodafone's grounds is that the Commission was wrong to propose a single retail price cap for services which are supplied under different market conditions in 27 different Member States. The Commission risks wasting legislative time if it proposes measures this year which prove to be incapable of adoption. Annex 1, prepared by Vodafone's lawyers, sets out Vodafone's continuing legal concerns.

It is too early to come to firm conclusions by the end 2008..

This review is being undertaken less than 12 months after the implementation of the Regulation. It is too early to be able to draw firm conclusions about its impact of the need for future legislation. Many Europeans have not even travelled abroad since the Regulation was adopted.

We know that the Commission is obliged to report to the Parliament and Council by the end of this year, but the Commission should use all of the time and evidence available to it. The Commission is not prevented from gathering further evidence during 2008 and 2009 and is not obliged to make firm legislative proposals this year. If it concluded that further regulation was needed, it could make proposals towards the end of 2009 in time for adoption before the expiry of the current Regulation in June 2010.

Vodafone Passport is still more popular than the Eurotariff amongst Vodafone roamers...

At this stage, nothing we have seen since last year changes our conviction that competition, not regulation, produces tariffs and services which best meet the needs of our customers. The real test is the choices customers make for themselves. Since September 2007, over 17.5 million by March 2008 – have chosen our unregulated Passport tariff over the regulated Eurotariff³. In the first

³ We note that Commission data published in October 2007 showed that only about 3 million users - 1% of customers - had positively chosen the Eurotariff over the competitive alternatives when required to make an active choice. This confirms our view that competition produces more attractive offers for customers, provided it is allowed to do so, see <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1445&format=HTML&aged=0&language=EN&guiLanguage=en><http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/1445&format=HTML&aged=0&language=EN&guiLanguage=en>

quarter of 2008, our Passport roamers paid on average at least [X] - less than Eurotariff customers for roaming. It was cheaper to both make and receive calls. Unsurprisingly, those Passport customers roam more often and talk more as a result. They also see their prices fall every time domestic mobile call charges change and have enjoyed reductions in connection fees in some markets – with the result that Passport price per minute fell by 19% in the period September 2007 to March 2008

Vodafone's Eurotariff moves to per second billing in all EU markets from October...

The ERG, some MEPs and others have raised concerns about the way in which the Eurotariff is charged for. All telecoms operators, both fixed and mobile, generally levy a fixed charge for the first minute of any call and then bill in single second or 30 or 60 second 'units' thereafter. In competitive markets, it is right and proper that customers should have choices about different tariffs, including choices about unitization.

No guidance was provided in the Roaming Regulation itself and Vodafone did not change its unitization practices when the Regulation was implemented. We have now concluded that the best approach is to apply the '60+1' unitization to the Eurotariff in all Member States. This is the approach we adopt for the majority of our domestic tariffs and with which customers are therefore already very familiar. This will apply in all EU markets from 1 October 2008.

Simple tariffs are the best form of transparency for both voice and data....

Vodafone continues to believe that simple tariffs, not complicated measures such as SMS notifications, are the best form of transparency⁴. That belief lay at the heart of our decision to launch the Passport voice tariff in 2005. It was at the heart of our decision to launch a range of simple flat rate data roaming tariffs in July 2007.

The majority of our roaming customers – over [X] at the end of June 2008 - now use these flat rate tariffs rather than paying on a per MegaByte basis. We have

⁴ We do not have any evidence to suggest that the push SMS obligations have produced significant customer benefits, despite the significant resource costs of implementation. It appears that the majority of customers simply ignore them. Vodafone provided evidence to the European Parliament's hearing in November 2007, reporting that fewer than 1% of SMS recipients in Europe called the freephone hotlines and fewer than 1% opted out of receiving SMS. We do not update data, but would not expect these figures to have changed significantly.

since reduced the flat rate fees and expanded the usage limits so that customers can now roam for as little as 40 cents per MB⁵. The cost of roaming in Europe for our users had fallen by an average of 21% by March 2008. Our monthly flat rate users have seen a further 45% cut in the headline tariff in June and Vodafone customers who have instead remained on traditional 'per MegaByte' tariffs will see reductions of as much as 90% from 1 July.

Vodafone is determined to stop 'bill shock'

As part of a broader industry initiative to address regulatory concerns, Vodafone audited all its existing data roaming tariffs. We found that some of these were now inappropriate because the speed of networks and volume of data downloaded has grown enormously with the move from GPRS to much faster 3G networks and the development of more sophisticated, lower cost data devices. We also saw high fees if customers roamed inadvertently on non-Vodafone networks. These resulted in 'bill shock' for a small minority of customers. This in turn means adverse publicity for Vodafone and customers who often refuse to pay.

We are determined to put an end to bill shock.

From 1 July, Vodafone will have ensured that all data (and voice) roaming tariffs apply irrespective of the European network on which the customer is roaming. Customers will pay the same tariff even if they move from a Vodafone network to an alternative network without noticing.

No Vodafone customer in Europe who is not already protected by being on a simple flat rate will pay more than €7.50 per MB for PC access or Blackberry under any circumstances. The vast majority of customers not otherwise already on lower flat rate tariffs will still pay much less than this €7.50 cap - in some countries more than 50% less⁶. Similar caps will apply to mobile internet use via handheld devices, although the risk of bill shock is lower here⁷.

⁵ See

http://www.vodafone.com/start/media_relations/news/group_press_releases/2007/vodafone_launches0.html
and

http://www.vodafone.com/start/media_relations/news/group_press_releases/2007/vodafone_builds_on.html

⁶ For example, Vodafone Germany will apply a cap of €3.80 per MB, UK €4.20 per MB, Spain €5 per MB.

Implementation will be July 1 in all Vodafone markets except Spain and Italy.

⁷ For which the cap will be €10/MB or less, according to Vodafone market, with the same implementation schedule as above.

To reinforce these measures, we will also apply caps to total expenditure to ensure that no customer will face unexpectedly high charges in any given month.

We have also been working for the past year on other, more complex, plans to provide customers with real time information about the amount of data they are using and the costs they are incurring, on both PCs and mobile handsets. These require fundamental IT platform development and work with other vendors of devices. We plan to start implementing these from 2009.

Vodafone's data prices fell by over 20% in the year to March 2008, will have fallen further since then, and will continue to fall

Only some of the actions we describe above will be reflected in the forthcoming ERG data on pricing trends for the period to March 2008 which we expect to be published in July. These will instead be captured in the next set of data for the period to September 2008 – another reason for the Commission not to rush to conclusions. In the meantime, Vodafone's most recent submission to the ERG data collection exercise shows that the average cost of data roaming for our customers fell by 21% in the period June 2007 to March 2008. Vodafone's retail SMS prices fell by 22% during the same period.

Answers to questions in the consultation document:

General experience

1. To what extent do you consider that the Regulation has achieved its objectives in relation to the core elements of the regulation?

(i) the reduction of retail prices to acceptable levels

(ii) transparency of retail prices

(iii) reduction of wholesale prices

(iv) supervision and enforcement of compliance, including dispute resolution

The Regulation appears to have been implemented effectively by most operators and to have achieved many of the objectives attributed to it by the Commission⁸. We would therefore expect the latest ERG data to confirm that voice prices have fallen significantly, although we also believe that they would have done so in the absence of the Regulation (as industry data showed for the period prior to the Regulation⁹).

An important objective not identified by the question but relevant to this review is whether the Regulation allowed competition and choice to develop. This is vital if the Regulation is to be transitory¹⁰. The evidence here is mixed. On the one hand, customers have been able to continue to benefit from competitive tariffs such as Vodafone Passport, as described in our introduction. On the other, it does appear that the very significant industry resources consumed in implementing the Regulation and anticipating this review (especially in relation to the proposal to extend regulation to SMS and data roaming) have been diverted from other activities for much of the past year. These represent real and substantial opportunity costs for customers, costs which should be recognized when contemplating any extension of the scope of the regulation.

⁸ Vodafone maintains that the Roaming Regulation is unlawful and that one grounds for this is that the Regulation has consumer protection and the reduction of prices per se as its primary objective, not the elimination of barriers to trade in the internal market. Despite the preamble, the description of the 'core elements' of the Regulation confirms that this remains the Commission view. As such, Vodafone contends that the Regulation cannot be based on Article 95 (or any other Article) since its real objectives cannot be supported by it.

⁹ See GSMA submission to EC, July 2008, for details

¹⁰ Which recital 39 of the Regulation states it is intended to be

In Vodafone's case, three major initiatives have been deferred directly as a result of the Roaming Regulation. These were:

- [X]
- [X]
- [X]

Vodafone is unlikely to be the only operator facing these trade offs and this may be one reason why other operators appear to have adopted the Eurotariff rates for their services without yet developing other, more differentiated, offers. We suspect that some existing plans to respond to the competitive challenge presented by Vodafone's Passport may have been deferred last year whilst operators awaited the outcome of the regulatory debate (or spent their time engaged in it) and then implemented the Regulation. Plans to launch innovative products like Passport across multiple EU markets take time – 6 months or more – to research, develop and implement. We are beginning to see renewed evidence of these activities by some competitors in some markets, but we would expect more this coming summer. In the meantime, the Regulation has inevitably provided regulatory 'focal points' which has the effect of crowding out other innovations and initiatives. This is precisely the risk of regulation of this kind.

Question 2: to what extent has the Regulation provided unintended consequences for mobile customers, whether in terms of the availability of quality of retail roaming services and/or the amount of information provided to end users..

See 1 above. We think the Regulation has imposed significant opportunity costs in terms of deferred product and service launches over the past year. We identified three major products and would expect competitors to be able to identify many others.

Question 3: How have tariffs for making and receiving voice roaming calls on the basis of tariffs other than the Eurotariff evolved...

Since 2005, Vodafone has been making major investments in our Passport tariff and we have continued to invest heavily in this product since the implementation of the Regulation. We added almost 6 million new Passport customers in the year

to March 2008 and, as outlined in the introduction, they continue to pay significantly less per minute on average than the Eurotariff customers and have seen their average prices falling by almost 20% in the 6 months to March 2008.

All Vodafone subsidiaries reassess their Passport offer to ensure that they remained attractive and competitive and, since the Regulation, our Dutch and Greek businesses have reduced the per call fixed fee significantly as a result of this (contributing to the 20% reduction referred to above).

It is of course also important to note that the 'home tariff abroad' concept underpinning Vodafone Passport means that roaming voice costs fall as domestic voice tariffs fall. Vodafone's domestic voice prices decreased by almost 17% in the year to March 2008 and many of our roaming customers, as Passport customers, will have seen these reductions translate directly into lower per minute roaming charges.

Question 4: What has been the impact of the Regulation on mobile operators, in terms of revenues, volumes, profits, innovation etc?

Vodafone recently reported that the cumulative impact of price reductions which Vodafone itself had initiated prior to the Regulation, combined with the Regulation itself, meant that Vodafone's EU roaming revenues (both voice and data) fell by 8% on an organic basis in the year to March 2008, notwithstanding a 13.3% increase in voice roaming minutes over the same period¹¹.

We addressed the impact of the Regulation on innovation in our response to question 1 above.

Question 5: Since the adoption of the Regulation have there been any instances of the termination or threat of termination of wholesale roaming agreements or the refusal to negotiate new ones?

Although some smaller operators raised this concern last year, Vodafone never considered this a likely risk in a competitive wholesale market and we are not aware of any cases of termination either prior or subsequent to the Regulation.

Question 6 and 7: Inadvertent roaming

¹¹ Vodafone Preliminary Results to March 2008, at [p://www.vodafone.com/etc/medialib/attachments/preliminary_results.Par.50962.File.dat/Prelim_Mar_08_FINAL.pdf](http://www.vodafone.com/etc/medialib/attachments/preliminary_results.Par.50962.File.dat/Prelim_Mar_08_FINAL.pdf)

What measures could be taken to avoid the adverse effects of inadvertent roaming, whether by means of voluntary co-operation between operators or by means of regulatory or legislative action?

Vodafone recognizes this concern, although it affects only a very small proportion of customers – fewer than 1%¹² - in Europe. In all cases, customers already:

- will know when they switch from their home to a visited network whilst making or receiving a call because the call will drop
- have handsets or other devices which inform them of the network they are using
- will receive a push SMS whenever their handset first finds a visited foreign network (assuming that they have not opted out).
- can bar roaming, if they wish to avoid inadvertent charges and ensure that they are always using their home network

It is important to note that inadvertent 'non-roaming' 'is equally likely to benefit customers who move across borders. That is, a similar number of customers moving across the border will continue to be connected to their 'home' network even when physically located on the other side of the border. They will continue to make calls at domestic prices whilst they are abroad. The negative consequences of inadvertent roaming are therefore to some extent compensated by the positive benefits of such 'non-roaming'.

These issues nonetheless remain for a very small group of customers because the technical challenges in resolving these 'spillover' problems are very formidable. It is clearly not possible to engineer mobile networks so that radio signals stop at national boundaries. Some degree of overspill is therefore inevitable unless we are remove mobile coverage from these regions altogether.

It might be thought possible for mobile operators to agree commercial terms so that roaming on certain base stations in border regions was subject to different wholesale charging arrangements (perhaps allowing for an 'domestic calling zone' which extended some kilometers into adjacent countries). But this would

¹² Vodafone calculates those living within 1km of a national border to represent 0.5-1% of all mobile users.

first require sharing very sensitive network information and co-ordination with roaming partners who may also own competitors within the home operators market, and would then require all operators to develop wholesale and retail billing systems which enabled them to differentially rate calls made and received at these base stations only. Vodafone believes that the implementation costs of such approaches are wholly disproportionate to the detriment suffered, particularly given the straightforward steps which customers can and do readily take to avoid these known concerns.

As noted above in response to question 1, Vodafone had planned to launch a service, [REDACTED]

Question 8 and 9: Outermost Regions

Vodafone does not provide roaming services in the outermost regions and so is unable to answer these questions

Question 10 and 11: Impact on Smaller Operators

Vodafone is not aware of any public information on the financial impact of the Roaming Regulation on smaller operators. We have entered into revised or new wholesale agreements – for both voice and data roaming – with many smaller operators in the past year and are not aware of any difficulties beyond normal commercial negotiations prior to the conclusion of mutually acceptable terms.

Question 12: Traffic steering. To what extent is the use of traffic steering accompanied by a lower retail price for the roaming customer? How effective is traffic steering in practice?

Vodafone employs traffic steering techniques to ensure that, in the year to March 2008, over [REDACTED] of voice traffic was directed to Vodafone subsidiary or affiliate networks.

Vodafone and some other operators have in the past sought to use retail price differentials between preferred and non-preferred networks to encourage customers themselves to manually steer traffic onto the preferred networks – for example, with Vodafone Eurocall, launched in 2001 and with Vodafone Passport in 2005. This allowed us to obtain better discounts in the wholesale market where we had to buy from other operators and ensured that our customers could

use services such as 'virtual home environment' (e.g. shortcode ('121') dialing to access voicemail when roaming) which could be configured only on preferred Vodafone networks.

As the Commission is already well aware, network or SIM-based traffic steering techniques were less technically effective in the past, and Vodafone retained much lower levels of traffic within the Vodafone footprint than we do today. Some of Vodafone's competitors chose not to offer retail price differentials at all, but instead offered 'all network' tariffs on the basis that customers would pay the same tariff irrespective of the network they were roaming on. Some customers preferred the discounts arising from Vodafone's strategy, others preferred not having to think about which network they were roaming on.

Traffic steering technologies have improved enormously in the past 5 years. Today, Vodafone is able to steer the vast majority of its traffic without requiring any manual intervention by customers, and we have been able to negotiate lower wholesale tariffs from other network operators for the small volumes of traffic which continue to be supported by non-preferred networks in Europe. The consequence of this is that retail price differentials between preferred and non-preferred networks are increasingly unnecessary and unimportant in the roaming market and have eliminated them for our Passport tariffs in all EU markets over the past 18 months. The benefits of traffic steering are now passed through in the form of lower overall tariffs rather than in the form of discounts for roaming on some networks and not others.

We expect this trend to continue as the roaming market continues to mature and, as noted in our introduction, now decided to adopt the same approach for our data roaming tariffs (where we had also previously distinguished between Vodafone and non-Vodafone networks in our retail pricing).

Customers can of course, continue to manually select other networks, including non-preferred networks, if they wish.

Question 14: Impact on domestic prices

Have you identified any significant effects on domestic prices or changes in an operator's tariff structure for domestic voice calls or other mobile services introduced after or shortly before the entry into force of the Regulation?

Vodafone did not to suggest that the measures proposed in the Regulation would be likely to result in an increase in other prices, although this does not mean that other prices were not affected. Vodafone's European operating companies experienced a 17% reduction in the domestic voice outbound price per minute in the year to March 2008.

It is extremely difficult to causally link changes in one tariff to those of another in the mobile market. We have already highlighted in our response to question 1 the very real opportunity costs of regulatory compliance. A simplistic view of a 'waterbed' ignores the complexities of mobile markets, but the fact that the consequences of regulation are extremely difficult to discern should induce caution not disregard. In the past year, Vodafone has published the first serious empirical research by academics on the relationship between regulated reductions in mobile termination rates and other mobile prices. They show that the 'waterbed' clearly does exist¹³. Their analysis required examination of thousands of observations and changes of prices over an extended time series. This is not available to us at this stage for the Roaming Regulation.

Question 15 and 16: Impact on international roaming arrangements with operators in third countries

What if any has been the impact of the Regulation on reciprocal roaming arrangements between EU/EEA operators and their counterparts in other third countries?

Vodafone has continued to negotiate roaming arrangements with non-EU/EEA operators on a reciprocal basis as before. In many cases rates with non-EU operators remain higher than those applied by the Roaming Regulation within the EU or than those which applied within the EU prior to the Regulation. Vodafone believes that this is often because the competitive alternatives in the wholesale market are more restricted in many non-EU markets with which it seeks to negotiate than within the EU.

¹³ See Valletti and Genakos, Vodafone Public Policy Paper No. 7, at http://www.vodafone.com/start/misc/public_policy.html

Question 17: Actual vs billed minutes

Please provide details of changes from per second to per minute billing for voice roaming services which have occurred since or shortly before the entry into force of the Regulation. Were customers informed of those changes in advance? Have practices for new customers changed? What are the common billing practices for domestic and roaming calls?

Vodafone made a deliberate decision that all Vodafone companies would retain their existing unitization practices (i.e. the charging units applied to calls) when implementing the Eurotariff. This ensured that customers saw no change in the way in which calls were billed and that the changes to existing price levels which had been intended by the Regulation were, in practice, made in full.

Vodafone's existing unitization practices have generally followed existing industry practice of charging in 30 or 60 second billing increments after the first minute (known as '60 plus 30' or '60 plus 60') for roaming calls at both the wholesale and the retail level. The exact structure differs by market and is one feature of competition between the operators.

The retail pricing structures adopted by the telecoms industry in Europe also differ between national markets and between operators or tariffs within the same market. In many markets customers have choices between lower tariffs with 30 or 60 second units or higher tariffs charged on a per second basis or in 10 second units. National regulators have generally welcomed these choices, because they give customers more choice about both the structure and the level of prices they pay. As a result, customers enjoy a wide variety of pricing options in Europe today.

Nonetheless, we have consulted extensively with regulators and customers and have decided that all Vodafone companies will move to '60 plus 1' unitisation for the Eurotariff by 1st October 2008¹⁴. This change will ensure that the vast majority of our customers then have the same unitisation when roaming as for their domestic services¹⁵. We believe that '60 plus 1' is generally recognised as being an approach which reflects the underlying costs of providing the service and commands general acceptance and understanding amongst our customers

¹⁴ Except in Vodafone Greece, where '30 plus 1' is already applied and Spain, where a 'set up plus 1' structure must be applied.

¹⁵ This is always the case for Passport customers

(and national regulators). We do not therefore see the need for further legislative action in this area.

Retail pricing obligations

Question 19: Do you think it necessary to maintain the provisions of the Regulation dealing with retail prices for roaming services – in particular the mandatory Eurotariff – beyond the current expiry date of the Regulation in June 2010? If yes, why; and if not, why not?

Vodafone has always considered retail price regulation unnecessary (as well as being at odds with the principles of the EU Regulatory Framework and being unlawful as a result) and the continued success and popularity of competitive tariffs such as Vodafone Passport since the implementation of the Roaming Regulation only reinforces this view.

If policymakers do not accept this view, they should at least recognize that it is too early to properly assess the impact of the Regulation and too early to consider whether to extend it only a few months after the Regulation has actually been implemented. New tariffs and initiatives developed since last year will not be fully visible to policymakers until this summer.

Question 20: What evidence is there of competition between providers of intra-Community mobile voice roaming services in the provision of such services other than by means of the Eurotariff?

In our reply to question 3 we described how we have refined and continued to promote our Passport tariffs and how, in doing so, existing and new Vodafone customers have enjoyed simpler and lower cost for roaming than are available either from the regulated Eurotariff or from competitors.

In our reply to question 1 we also noted that the resources which might otherwise have been applied to competing in the roaming market have been largely preoccupied with compliance over the past 12-18 months. It is too early to draw firm conclusions about competition under the Roaming Regulation from the data available today.

Question 21: In the event that the Regulation were left to expire on 30 June 2010, do you expect that providers of intra-Community mobile roaming services would maintain their Eurotariff or other retail offerings below the price ceilings applicable under the Regulation? What is the basis of your opinion in this regard?

Competition in the European mobile industry has ensured that the prices of the vast majority of mobile services, including international roaming, have fallen consistently over the past decade and that they continue to fall today. Vodafone Passport per minute prices in Europe have fallen by almost 20% *since* the Roaming Regulation was introduced. We therefore find it very difficult to envisage circumstances in which any operator could unilaterally increase the price of international roaming in Europe.

Question 22: Should wholesale regulation be maintained and, if so, for how long? If not, why not? What is your estimate of the share of total wholesale roaming capacity that it captive?

Vodafone has consistently said that wholesale roaming markets in Europe are already effectively competitive. Vodafone's EU wholesale prices continued to fall in almost all markets between Q4 2007 and Q1 2008 and we see no place for wholesale regulation as a result.

If such regulation is to be maintained, it would be greatly improved if wholesale prices were to be set by individual National Regulatory Authorities rather than as a single, inflexible one size fits all caps. The reasons for this – the significant variations in the costs of wholesale provision between Member States – were extensively debated last year.

As the question itself implies, the internalization of traffic within groups such as Vodafone also makes wholesale regulation increasingly irrelevant for many roamers. We have said in response to question 12 that over [X] of our voice traffic is retained on the Vodafone network, but have no reliable estimate of the market as a whole. The main motivation behind the current provisions appears to be the 'protection' of small non-aligned national operators in Europe. Vodafone does not believe that this is a legitimate objective under Article 95, nor one that the regulation of wholesale roaming would in any event be capable of delivering.

As we explained in submissions to the Commission last year, it is not clear to Vodafone that the consolidation and scale in the US mobile sector which the Commission appears to be seeking to replicate in Europe would have occurred as

quickly or at all if the US authorities had regulated roaming charges in the manner currently undertaken by the Roaming Regulation.

Question 23: What would be the effect if the retail pricing provisions of the Regulation were to expire while the wholesale price obligations were maintained?

Vodafone believes the current retail pricing provisions to be unlawful. In any event the retail pricing provisions should be removed for the reasons provided in our response to question 21.

Vodafone would continue to provide competitive, easy to understand voice roaming services to its customers, as we have been doing whilst the retail pricing provision of the Regulation have applied.

Question 24 and 25: In the event that you consider that the duration of the Regulation should be extended beyond 30 June 2010..

No, for the reasons provided above.

If policymakers do not accept this view, Vodafone urges them not to come to firm conclusions on whether the Regulation should be maintained and, if so, in what form until there is better evidence of the impact of the Regulation on the market and upon competition. This will not be available until early 2009, but would still allow time for the Regulation to be extended if felt necessary.

We accept that, if the Regulation were to be extended, it would clear be disproportionate for declines in the price cap to exceed the general trends in mobile prices and costs over the relevant period. These have been falling at around 15% p.a. across Europe as a whole.

Question 26: Transparency provisions

Taking into account the interests of mobile users and operators..should the obligations regarding transparency be maintained in place...

Vodafone has not seen any convincing evidence to suggest that the existing 'push SMS' transparency provisions deliver material or sufficient benefits to justify the industry costs associated with delivering hundreds of millions of SMS every year.

Question 28: Data roaming

It appears that there are still very significant differences between data roaming prices and those applying at a national level. Respondents are invited to explain how such significant differences can be justified.

Vodafone does not accept that there is some predetermined differential between domestic and roaming prices to which it should adhere, or above which the prices of either set of services might be considered 'too high'. The Commission has no basis for concluding that a particular price is 'too high' in the absence of a finding of dominance and abuse on the part of mobile operators, neither of which the Commission attempts here.

We have only seen significant volumes of data roaming traffic within the last 12 months, during which time, as we note in our introduction, volumes have doubled and prices have fallen by over 20%.

If a comparison exercise is to be undertaken, it is important to compare tariffs properly. The requirements of customers when roaming are different from those at home. The most obvious difference between tariffs is that most customers roam only infrequently, whereas they will generally require domestic data tariffs which can be used at any time. A daily roaming tariff, applicable for only 24 hours or for a few days in a month, is intended to be and would not be accepted if offered as a domestic tariff. The relevant comparison with domestic tariffs might be Vodafone's monthly roaming tariff, but most of Vodafone's monthly domestic data tariffs involve much higher usage caps (over 1GB) since domestic usage levels are typically much higher over the period of the month than roaming usage levels in the same month.

Today, a typical domestic price for a postpay 200MB/monthly data bundle in a Vodafone EU operating company might be €20-25/month (inc VAT) (eg. €25 for Spanish postpay customers, €19.95 for German postpay customers, €20 for Italian postpay (for 500MB)), €25 for Greek postpay customers (for 5 GB)). This compares to Vodafone's monthly roaming bundle of €60 (ex VAT) for 150 MB.

Question 29: To what extent is regulation of data roaming charges necessary to tackle the problem of high charges? To what extent does competition exist for such retail and/or wholesale charges and to what extent can traffic steering be utilized for data services to the benefit of customers?

Vodafone does not agree that data roaming charges are 'high' today. Nor do we agree that a Regulation under Article 95 is capable of addressing such a 'problem' (for the reasons provided in our submissions to the ECJ). The Commission provides no evidence to support the assertion that charges are 'high', nor any threshold against which this claim is made. It does not say what a competitive price would look like.

We have described the downward trend in data roaming prices and the measures we have taken to eliminate 'bill shock' in our introduction. Use of data roaming services has more than doubled in the year to March 2008 – suggesting that price does not represent a barrier to adoption in Europe. The market for data services – both domestic and roaming - remains comparatively immature and Vodafone expects prices to continue to fall in the coming years as mobile data and mobile internet transitions from being a narrow business segment towards a mass consumer service. This is the same competitive dynamic which has driven 10-15% annual reductions voice pricing in the European mobile market over the past decade, and which is driving substantially greater annual reductions in the data roaming market at present. Vodafone is not aware of any other market in the European Union which is delivering such rapid price reductions and yet still faces the threat of retail price controls.

Data roaming traffic cannot, in practice, be steered independently of voice traffic at present by Vodafone and so our internalization performance is similar to that reported for voice traffic in our response to question 22. This is because the configuration of SIM cards to steer traffic between networks is undertaken for the entire SIM card base, irrespective of whether the SIM is embedded in a device used for data or for voice roaming¹⁶. Vodafone's traffic steering decisions are therefore undertaken after an assessment of the overall benefits of one network over another, having regard for both voice and data costs (and other non-price considerations such as coverage). The same competitive considerations therefore apply to wholesale data services as to wholesale voice services – we describe the consequences of this competition in our answer to question 31.

Question 30: To what extent to potential substitute services impose competitive constraints on data roaming services? To what extent might future market or technical developments tackle the problem? Are regulatory solutions other than price regulation possible? If so, please explain?

¹⁶ Many are of course used for both.

Vodafone believes that wifi access from hotspots at airports and hotels represents an important and widely available substitute to the data roaming services that it provides using 3G data cards for PCs. Vodafone's daily tariff – at €12 per day – was and is intended to be directly competitive with typically daily subscriptions for wifi access, such as are generally available at hotels and other locations¹⁷. These services are already much cheaper than narrowband or broadband dial-up facilities from hotels.

Vodafone considers that the pricing of its data roaming service is competitive against wifi and fixed line substitutes and that the superior coverage of its 3G data networks makes access via the Vodafone service a compelling proposition for many customers.

Although access via internet cafes or public internet terminals at airports and other fixed locations may also provide substitutes for PC-based access, Vodafone does not currently foresee many substitutes for portable on-the-move handset-based data roaming services.

Question 31: Can the problem of high charges for data roaming be tackled by wholesale regulation alone? If wholesale regulation is to be considered, how should it be constructed?

Vodafone's wholesale roaming charges within the EU have fallen by more than 45% in the period between June 2007 and March 2008. Since this has been achieved on the basis of a reciprocal offer of €0.50/MB launched in July of last year, we would expect other operators to have achieved similar reductions.

In light of this, we see no basis for the Commission to propose wholesale regulation.

The Commission is right to recognize that the structure of wholesale (and retail) data roaming charges is complex. Linear tariffs will not maximize utility or demand across a wide variety of different services with different demand characteristics – some services will be too expensive and/or other services will be too cheap. Linear pricing, although simple, would be enormously inefficient in the mobile data environment – even supposing that the Commission were able to determine some objective basis by which to establish appropriate caps.

¹⁷ See Vodafone press release, in which this point is explicitly made, see http://www.vodafone.com/start/media_relations/news/group_press_releases/2007/vodafone_launches0.html

However, non-linear pricing – if imposed on the industry as a whole and even if imposed only at the wholesale level¹⁸ – also risks restricting competition and innovation in a market which remains immature and fluid. We explained in response to question 1 that this may have occurred to some degree as a result of the Roaming Regulation for voice pricing, but the potential loss of innovation and flexibility is even greater in the more complex case of data.

Question 32: What additional costs, apart from the wholesale charges, are incurred by operators when providing data roaming services?

Data roaming services necessitate the following additional activities, in addition to those incurred in the provision of domestic data services:

- wholesale contractual negotiations
- data exchange between operators (TAP files)
- fraud management and usage tracking
- traffic steering and associated vendor support
- provision and planning of signaling network capacity
- wholesale billing system updates
- trouble ticketing

Question 33: Would transparency obligations on mobile operators be enough to tackle the problem of high charges? What sort of transparency mechanism can work effectively to stop the 'bill shock'?

Vodafone accepts that the mobile industry needs to take further measures to improve the transparency of data roaming tariffs. We explained in our introduction that we have done so, and underlined our determination to stop 'bill shock'.

If regulation were eventually to be required in this area, Vodafone would advocate a requirement that every operator offer a 'safeguard' flat rate daily roaming tariff, which all customers could select at no additional cost. Such tariffs would be simply described '€ for X MB over 24 hours', allowing direct comparison of (and facilitating competition between) operators.

¹⁸ The Commission's current proposals to reduce mobile termination rates (which Vodafone contests) are founded, in part, upon the claim that wholesale prices are 'distorting' retail pricing. The same argument would apply if the Commission were to fossilize wholesale pricing in the data market.

Question 34: If retail regulation is to be considered, how should this be designed and what parameters should be used?

As we said in our answers to questions 31 and 33 above, Vodafone sees no basis for retail regulation in a market which scarcely existed a year ago, where evidence of competition is strong and where the risks to innovation are high.

The Commission has:

- no legal basis for retail regulation (which is explicitly excluded in these circumstances by the EU Regulatory Framework)
- no economic basis for determining the levels of any retail price caps in this market
- no basis for imposing a restrictive structure for a wide variety of different services (PC browsing, Blackberry email access, content downloads) which address many different needs and different customers.

Vodafone believes that the Commission's 'one size fits all' approach to retail price regulation in the voice Roaming Regulation was unlawful, unwarranted, and damaging to innovation and choice. Such an approach would be even less justified and less appropriate in the case of data roaming.

Question 35: SMS

Do you think that wholesale charges for the provision of SMS services for roaming customers are subject to competitive pressures?

It is not technically possible to steer SMS traffic independently of voice traffic, with the result that – as with data traffic - SMS wholesale pricing has formed an element of the overall bargaining between the home and visited network when inter-operator arrangements come to be reviewed. The wholesale market for roaming services has been reviewed by many national regulators and found to be competitive.

Question 36: Wholesale SMS prices appear to be higher than many retail domestic SMS prices. Are wholesale charges at current levels justified in light of the costs to the host operator for the provision of wholesale SMS roaming charges?

Vodafone does not accept that wholesale SMS roaming prices must be 'justified' by reference to the prices charged for other services (which are not substitutes), or to some arbitrary notion of 'costs'.

As Vodafone has explained to the Commission in the past in relation to retail services and as we explain in response to question 35 above in relation to SMS wholesale services, most mobile services are not provided on a stand alone basis. Costs are shared between services, each of which earn different margins, in response to competitive conditions. In these circumstances, simplistic 'cost plus' assumptions of the kind implied by the question are misplaced.

In any event, as noted in our response to the question 28, the Commission must be careful to consider comparable tariffs. Domestic SMS bundles represent a level of pre-commitment to spend which is not a feature of wholesale SMS roaming arrangements between operators. Wholesale roaming arrangements are typically concluded at prices below the comparable (i.e. out of bundle) domestic SMS charges¹⁹ - although we do not believe this provides evidence one way or another as to whether such services should be regulated.

Question 37: Do you believe that wholesale SMS roaming charges should be regulated?

Vodafone does not believe that wholesale SMS roaming charges should be regulated. The Commission has presented no evidence to suggest that they should be and respondents who 'believe' charges should be regulated should be required to present objective evidence, particularly in the absence of any finding of market or competitive failure.

Question 38: If wholesale regulation is necessary, will operators pass on the benefits of lower wholesale charges to consumers or could this only be achieved by retail regulation?

¹⁹ For example, typical SMS wholesale rates across Vodafone EU subsidiaries range from 12 -20 cents/SMS whilst out of bundle domestic SMS prices for the same companies range from 10 -25 cents (ex VAT)

Vodafone does not accept that wholesale regulation is necessary, however retail regulation is widely recognized as being even more intrusive and should only be considered as a measure of last resort in cases of entrenched monopoly.

Vodafone's SMS retail roaming prices fell by 22% in the period June 2007 to March 2008 and are, we believe, competitive and attractive to customers. Vodafone's SMS roaming prices currently exceed the Commissioner's 'target' of 12 cents, but no justification has been presented to support this target.

Question 39: If you believe retail regulation is necessary then what should be the level and parameters of any retail charge limit?

Vodafone does not accept that retail regulation of SMS is necessary

Annex 1: Vodafone's Legal Concerns about the Roaming Regulation

Throughout the legislative process that preceded the adoption of the Roaming Regulation in June 2007, Vodafone argued that:

- i. the chosen legal basis for the regulation, Article 95 of the EC Treaty, was incorrect and therefore the Roaming Regulation was unlawful.
- ii. the centralised imposition of a crude single pan-European price control (across 27 national markets and at both wholesale and retail level) and the bypassing of the NRAs and the safeguards included in the existing EU Regulatory Framework (i.e. rigorous competition law and economics based market analysis, objective thresholds for intervention, the Article 7 review process, full appeal on the merits against SMP designation and remedies) infringed both the principles of proportionality and subsidiarity.

These fundamental legal concerns about the Roaming Regulation were largely ignored during the legislative process. Vodafone, therefore, felt bound to challenge the validity of the Roaming Regulation through the courts. Vodafone issued proceedings through the UK High Court challenging the legality of the UK implementing regulations and the Regulation itself. Following a hearing before the High Court in December, the following questions on the validity of the Regulation were referred to the European Court of Justice under Article 234:

- Whether the Roaming Regulation lacks a proper legal basis since it was wrongly adopted under Article 95 of the EC Treaty; and/or
- Whether the imposition of retail price control by the Roaming Regulation infringes the principles of proportionality and/or subsidiarity.

The challenge is now before the European Court of Justice and written observations have been submitted by the parties. A decision is likely during the course of 2009. Vodafone still maintains that the Roaming Regulation is unlawful on these grounds, but also believes that the proportionality of a single pan-European wholesale price cap is disproportionate when applied to 27 different national markets.

On 16 October 2006, Sir Francis Jacobs QC provided Vodafone with a written opinion which sets out the reasons why Article 95 does not provide a legal basis for the Roaming Regulation and why the Roaming Regulation infringes the principles of proportionality and subsidiarity.²⁰ That Written Opinion was provided to the Community Institutions during the legislative process for the Roaming Regulation.

Vodafone will set out these arguments briefly here because the Consultation Document shows that the Commission still has a fundamental misunderstanding of the purpose of Article 95, which will render any proposal to extend the Roaming Regulation, either in time or scope, unlawful.

The Roaming Regulation has No Valid Legal Basis

Article 95 can only be used for the purposes of approximating divergent national laws, regulation or administrative action. This is clear from the wording of Article 95 itself and the case law of the European Court of Justice.²¹ No such divergent measures have ever been identified by the Commission in relation to roaming. In fact the Member States could not have adopted, or been about to adopt, divergent national measures in respect of roaming charges prior to the adoption of the Roaming Regulation, because the EU Regulatory Framework "occupies the field" and prohibits regulation other than in compliance with the Framework.²² Divergent national measures neither existed nor were "likely".

Even if divergent national legal or regulatory measures could be identified, Article 95 can only be used if the true objective of the harmonising measure is to eliminate barriers to trade or distortions of competition. The Consultation Document does refer to the "smooth functioning of the Internal Market", but section 2.4 makes it clear that the identified "obstacle" to the internal market is not any legislative or regulatory measures imposed by one or more Member States but the level of roaming prices available in the market:

²⁰ At the time Vodafone sought the advice of Sir Francis Jacobs QC, the Roaming Regulation was in the form of a draft proposal having not yet been enacted. Whilst the proposed Regulation which is the subject of the Written Opinion differs in some respects from the version of the Roaming Regulation which was subsequently adopted, those differences do not affect the substance of the advice given by Sir Francis Jacobs QC as regards the lawfulness of the Roaming Regulation.

²¹ Article 95 states "The 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." See also Case C-300/89 *Commission v Council* ("Titanium Dioxide") [1991] ECR I-2867 at paragraph 15

²² See Article 2(3) of Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services

*"There have been a number of recent moves by operators to reduce charges for data roaming services at retail and wholesale levels **but these are still perceived to be high and an obstacle to the single market**" (Emphasis added)*

The ECJ has stated categorically that Article 95 does not grant the Community Legislature a general power of market regulation:

"To construe that article as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above²³ but would also be incompatible with the principle embodied in Article [5] of the EC Treaty...that the powers of the Community are limited to those specifically conferred on it."²⁴

It is clear from the face of the Roaming Regulation and the Consultation Document that the true objective of the Roaming Regulation is not removing legislative obstacles to the internal market, but that the reduction of roaming prices is an objective in itself in the belief that this is necessary for consumer protection. Even if the level of roaming prices were perceived to be a barrier to people travelling (which Vodafone does not consider is the case) this is not something that can be directly regulated under Article 95 unless there is a divergence in national laws that can be identified that caused that barrier. This is not the case.

It is also clear that the Roaming Regulation neither amends nor contributes to the implementation of the existing Regulatory Framework, but is a radical departure from that harmonised framework that must satisfy the above requirements of Article 95 in its own right. This is clear on the face of the Regulation which states at Article 10:

"The following paragraph shall be added to Article 1 of Directive 2002/21/EC (Framework Directive):

'5. This Directive and the Specific Directives shall be without prejudice to any specific measure adopted for the regulation of international roaming on public mobile telephone networks within the Community'

²³ Articles 3, 14 and 95 EC

²⁴ *Tobacco Advertising I*, para 83

This provision places the Regulatory Framework below the Roaming Regulation in the legislative hierarchy, such that the Roaming Regulation does not need to comply with any of the underlying principles of the Framework or the safeguards which the Framework creates for participants in electronic communications markets. This provision and the adoption of the rest of the Roaming Regulation effectively remove the regulation of roaming services from the scope of the Regulatory Framework.

The Regulatory Framework establishes principles that ex ante regulation should only be imposed where there is not effective competition and where the provisions of competition law are not sufficient to ensure effective competition. Effective competition was defined as the absence of Significant Market Power ("SMP", which was aligned with the competition law concept of dominance), but the key point is that there was an objective threshold for justifying regulatory intervention, which was objective, understood by market participants, NRAs and the Commission, and against which regulatory decisions could be tested. The Roaming Regulation has no such threshold beyond the assertion that roaming prices were too high.

The Framework also established a coherent institutional framework where market analysis and construction of appropriate remedies was assigned to NRAs because they are closer to the market (most telecommunications markets are national) than the Community institutions and have the relevant expertise for analysing markets and constructing remedies such as price controls. Several checks and balances were then put into the system, in the form of guidance from the European Commission on market definition and assessment of SMP, the Article 7 review process by the Commission and other NRAs, and a right to a full appeal on the merits to national courts with the appropriate expertise.

This Framework recognised that most telecommunications markets, including those for wholesale roaming services and for mobile access and origination (whether wholesale or retail) are national. Thus, where remedies were necessary because of a lack of effective competition, they could be tailored to local market and economic conditions. This is especially true with regard to price controls because the 27 national markets were, and still are, very different.

The Roaming Regulation ignores all these principles and bypasses all these safeguards. The pan-European price control on both wholesale and retail roaming services which the Roaming Regulation imposed, ignores differences in national market and economic conditions and inevitably results in a crude "one size fits all" solution.

This centralised, uniform, pan-European price control could not have been imposed under the existing Regulatory Framework because NRAs would have been obliged to consider local market conditions and consumer preferences and so must be considered as a stand alone piece of legislation. As such it cannot be regarded as a mere amendment of the existing Regulatory Framework and it must therefore meet the requirements of Article 95, which it clearly does not.

For all the above reasons the extension of the Roaming Regulation in time and scope is and will remain outside the scope of the powers granted by Article 95.

Proportionality

Vodafone maintains that the provisions of the Roaming Regulation imposing pan-European price control of retail and wholesale roaming services are also disproportionate for the following reasons.

Firstly, for the same reasons explained above it was unnecessary and inappropriate for the Community legislature to circumvent the NRAs and the checks and balances contained in the existing Regulatory Framework by formulating and imposing wholesale and retail price controls directly. The consequent imposition of crude, uniform, pan-European price control of both retail and wholesale roaming services across 27 different national markets applies in an inappropriate and unfair manner. It took no account of different economic conditions in different member states – both in relation to costs and consumer preferences – and it afforded market participants no opportunity to challenge the nature or level of the remedy imposed, other than through the Article 234 preliminary ruling procedure.

Secondly, even if it was considered necessary to impose wholesale regulation, it was unnecessary and inappropriate to impose retail price control in addition to wholesale price control. The Regulatory Framework contains a fundamental principle that retail price regulation should be avoided if at all possible because it is the most restrictive form of regulation and so the most likely to adversely affect competition – it should only be imposed as a last resort if there is a clear lack of effective competition and wholesale regulation can be shown to be ineffective.

The Commission has never provided any evidence why this basic presumption should be ignored in this case. The Commission is also suggesting in Section 5.1 of its Consultation Document that the imposition of the Eurotariff has restricted competition because most Eurotariffs have been clustered around the level of the price cap. This is hardly surprising, especially because the Commission has

imposed not only a one-off ceiling but also a structured glidepath for the Eurotariff over 3 years.

The second impact of imposing a particular retail tariff on operators, along with strict requirements for marketing that tariff, is that other plans of the operators to offer new innovative tariffs had to be shelved because of the diversion of resources to ensure compliance with the Roaming Regulation.

Operators have continued to offer competing market-based tariffs, such as Vodafone's Passport which has continued to grow in popularity and decline in price, but it is clear that the imposition of the Eurotariff restricts competition. It is for this reason that a self-imposed price cap agreed by the operators would be a per se infringement of Article 81, even if the initial effect of it was to reduce prices.

Subsidiarity

Vodafone submits that the Community legislature also infringed the principle of subsidiarity by excluding the NRAs from any role in the formulation and imposition of price controls in respect of wholesale roaming services and just one element (i.e. roaming services) of national retail mobile markets and thereby arrogated to itself the complex task of formulating price controls for 27 national wholesale roaming and retail mobile markets. The Regulatory Framework assigned this role to the NRAs because they are best placed to perform the necessary analysis of national markets and have the appropriate expertise to construct any necessary price controls at appropriate levels. The Roaming Regulation centralised this role when this was clearly inappropriate, which has resulted in a crude, uniform, pan-European price control.

The Consultation Document Further Undermines the Legality of the Roaming Regulation and any Amendment

The Consultation Documents suggests that it would be appropriate to extend the Roaming Regulation, both in time and scope. This is not legally possible since the Roaming Regulation has no valid legal base in the first place. What is more, the apparent Commission position set out in the Consultation Document further undermines the legality of the Roaming Regulation in several ways.

- i. As stated above, it becomes even clearer from the Consultation Document that removing legal or regulatory obstacles to the internal market is not an objective of the Regulation. To the extent that the internal market is posited as an objective, it is the level of roaming prices that is cited as the obstacle (see Section

2.4 cited above). Vodafone does not agree that roaming prices are, or were, an obstacle to trade. What is more, there is clearly no national regulation of roaming prices to harmonise – Article 95 is therefore being used for the direct pan-European regulation of prices for which there is no such power in Article 95 (or elsewhere in the EC Treaty).

ii. In Section 5.1 the Commission expresses disappointment that Operators have not set Eurotariffs significantly below the imposed regulatory ceiling. As stated above, if true, this demonstrates very well the dangers of retail price regulation and why it is not appropriate, because the setting of a regulatory imposed price inevitably creates a focal point for pricing. The initial conclusion of a lack of competition in the setting of Eurotariffs is therefore not surprising. The justification for continued regulation cannot be based on a myopic analysis of competition in the provision of a regulated tariff alone— there is no market for Eurotariffs, it is a market for mobile services of which international roaming is but one service. The fact that the Commission forced approximately 400 million customers to move onto the Eurotariff, which in some cases increased the prices they paid, cannot justify regulation if there is competition in market-based offers, otherwise regulation becomes self-perpetuating.

iii. The apparent desire of the Commission to extend the duration of the Roaming Regulation and to impose further cuts beyond the 3 annual cuts already imposed in the Roaming Regulation and the extension of the pan-European price control model to other services such as SMS roaming and data roaming, demonstrates that the true objective of the Regulation is micro-regulation of markets, rather than removal of barriers to the internal market. This can no longer be viewed (if it ever could) as an exceptional intervention to deal with a perception of “excessive” or “high” prices, it is the creation of a new enduring regime of direct price regulation when the EC Treaty grants no such power – such a power would be contrary to the fundamental “principle of an open market economy with free competition” set out in Article 4 of the EC Treaty. The only power in the Treaty for the Community to regulate prices directly is under the Common Agricultural Policy (Article 36 of the EC Treaty).

iv. This extension of the Roaming Regulation further undermines the coherence and credibility of the existing Regulatory Framework because it shows an apparent willingness of the Community to dispense with the analytical rigour and procedural safeguards set out in the Regulatory Framework when they might inhibit the achievement of particular political objectives.

v. In Section 5.2 the Commission states that further wholesale roaming price declines are justified on the basis that “*the projected reduction in mobile termination rates imposed by NRAs might be more pronounced than assumed in mid-2007*”. Vodafone understands that the ERG expects regulated MTRs to fall at a broadly similar rate in the next 3 years as they have fallen in the previous 3 years, as efficiently incurred costs continue to reduce²⁵. Vodafone does not consider that the Commission and NRAs can legally impose MTR price regulation at below efficiently incurred cost. Vodafone will respond in more detail on this point to the current consultation on the Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates²⁶. However, Vodafone is concerned that the Commission is apparently prejudging the result of that consultation in order to justify further cuts in voice roaming rates. This is clearly bad regulatory practice but it also shows a clear misunderstanding of mobile networks and wholesale roaming. Even if the Commission considers that it is appropriate that the mobile subscriber should pay for all the fixed and common costs of the mobile access network, rather than sharing the cost with callers to the network, that just means that the cost is moved from MTRs to access or origination charges paid by the mobile subscriber, it does not disappear. Therefore, if mobile termination rates do decline faster than expected because of the Commission’s proposed re-allocation of cost to the mobile subscriber, that just means that the cost shifts to the origination side. There should be no impact on calculation of the wholesale roaming price, which involves both termination and origination.

vi. The Regulatory Framework also states in Recital 27 of the Framework Directive that any analysis of whether a market is effectively competitive and whether regulation is necessary, should include considering whether the market is “prospectively competitive” in order to ensure that newly emerging markets are not subject to “inappropriate obligations” and their development stymied. Both SMS roaming and data roaming services are still growing fast and the market for data roaming, in particular, is still very immature. In such markets where tariffs, technology and usage patterns are all evolving quickly, price regulation simply cannot be justified and any attempt to regulate such a market would once again undermine the integrity of the Regulatory Framework.

Conclusion

²⁵ See http://www.erg.eu.int/doc/whatsnew/erg_08_32_25th_plen_vilnius_%20press_080603.pdf

²⁶

See http://ec.europa.eu/information_society/policy/ecomm/doc/library/public_consult/termination_rates/termination.pdf

Vodafone maintains that the Roaming Regulation is illegal and so any proposal to extend the regulation, in either time or scope, will also be unlawful. The extension of the "Roaming Regulation Model" of centralised, uniform pan-European price regulation will also further undermine the credibility and coherence of the existing Regulatory Framework as well as being contrary to the principle of an open market economy with free competition.

This matter is still the subject of a legal challenge before the European Court of Justice and no formal proposal to extend the regulation in time should be made until the legality of the initial regulation is determined. Vodafone is aware that Article 11 of the Roaming Regulation obliges the Commission to report to the Council and Parliament on the functioning of the Roaming Regulation by the end of 2008. However the Roaming Regulation does not expire until June 2010 and so an extension does not need to be in place until the first half of 2010, by which time the European Court of Justice will have issued its decision. Any decision on whether such an extension is necessary should be left until then.

Vodafone Group Legal Department
30 June 2008