

The Sector Inquiries into Leased Lines and Mobile Roaming:

Findings and follow-up of the competition law investigations in Cases COMP/C1/37.638 and COMP/C1/37.639

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I. Introduction

After the stimulating perspectives offered by Dr Ungerer's speech it is my sad duty to lead you back to the dungeons to inflict a description of the Commission's seemingly tortuous and interminable competition procedures. I will speak about the Commission's sector inquiries under the competition rules into leased lines and roaming pricing. Just to explain these terms very briefly:

- Leased lines concerns the lease of communications links of a guaranteed capacity and/or speed that are the essential building blocks for alternative communications infrastructure, for infrastructure competition, and thereby of key importance for the competitive provision of the services that run over this infrastructure. They are the lifelines for market entry and a key part of the European ticket to E-Europe, or what used to be called the Information Society.
- Mobile roaming occurs when I use my mobile phone on another network than that of which I am a subscriber: for example, if I use my Belgian Proximus mobile phone when visiting the Vodafone network in the UK. Roaming prices are of course of immediate concern not only to businesses but also to the tens of millions of European consumers who have recently returned from their holiday's abroad to find that they have run up unexpectedly high phone bills. The consumer concerns involved makes roaming a topic that has the keen interest of the European Parliament, especially at a time when they are discussing the future regulatory framework. National regulators are also feeling the pressure to address roaming prices. In decoded form that means: if mobile phone operators don't shape up soon they may soon wake up to find themselves price-regulated for the foreseeable future.
- Finally, a sector inquiry is an obscure legal instrument that is now making a comeback, but you will learn more about this in a minute.

Objectives: Very briefly, the objectives of my presentation are:

1. To explain why the sector inquiries were launched;
2. To set out the general trends in our comparative findings; and
3. To inform you about the state of the follow-up to the inquiry.

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The Commission formally opened three sector inquiries in the summer of 1999, by a single Commission Decision of 27 July. This Decision launched sector inquiries into leased lines pricing, into mobile roaming, and local loop unbundling. All three of these sectors had been identified as areas where in spite of formal liberalisation competitive prices and pan-European offers were in fact not emerging. For practical (or should I say logistical) reasons the three inquiries did not start simultaneously but were launched successively.

Overview: Just to give you a short overview on where we are today:

- The comparative phase of the leased lines inquiry was concluded in September last year ago with a public hearing in Brussels, following which we opened a number of ex officio cases. They concern not only the pricing issues that were the original focus of the inquiry, but also non-price aspects such as quality of service.
- The roaming inquiry started with data collection in January 2000 and the Commission Services' report containing a public version of the comparative findings that is included in your conference materials came out in December. It is this report and its follow-up that I will discuss today.
- The inquiry into unbundling the local loop started last Summer, and is ongoing, in parallel with the monitoring of the implementation of the Council Regulation on local loop unbundling.

I will limit my discussion to the preliminary findings and the follow-up of the first two inquiries, that is to the inquiries on leased lines and roaming. First, I will briefly describe the sector inquiry instrument. Or in other words: what is a sector Inquiry?

II. Sector Inquiry – Powers and Purpose

Legal basis: A sector inquiry is an instrument based on Article 12 of Regulation 17, the basic Regulation that gives the Commission the powers to implement the cartel prohibition and the prohibition of abuse of a dominant position found in the Treaty. In a sector inquiry the Commission can conduct a general investigation into an economic sector (and I quote):

'if in any sector of the economy the trend of trade between Member States, price movements, inflexibility of prices or other circumstances suggest that in the economic sector concerned competition is being restricted or distorted within the common market''

For both leased lines and roaming, these conditions were clearly met.

Scope: So much for the legal basis; now for the scope: what are the Commission's powers in a sector inquiry?

Especially as regards the collection of data, these powers are just the same as in any case that is based on Article 81 or 82 directly: the Commission can request information from market parties under threat of fines; and it can request and receive information and assistance from national authorities. The means of information collection available to the Commission, as the German and UK mobile operators have discovered this summer, include inspections, the so-called dawn raids.

There are some important differences as well. First, unlike in individual Art 81 and 82 cases the Commission in a sector inquiry systematically collects information from companies that are not suspected of involvement in an infringement – not even as complainant. Second, unlike in Article 81

or 82 cases that already target a specific company or group of companies the Commission in a sector inquiry in principle does not take decisions finding individual infringements. Instead the Commission is likely to use a sector inquiry to establish prima facie evidence as a basis for opening formal proceedings in individual cases that can lead to a decision finding an infringement.

Outcome: However, it is important to emphasise that there is no standard outcome to a sector inquiry. It is an instrument that has not been widely used in the past: a sector inquiry into beer distribution was started in 1965 and closed with the adoption of a block exemption for beer supply in 1984. A subsequent investigation concerning margarine prices started in 1970 concluded a number of years later when dominant producers modified their behaviour. So there is no standard outcome – and I will not be giving away any surprises by already confirming to you now that the result will not be a block exemption.

The sector inquiry procedure was rediscovered in 1999 – I believe by none other than Dr Ungerer himself – following EU-wide ex officio inquiries in the telecommunications area concerning fixed-mobile interconnection and into international accounting rates. The instrument has now been revived, and I believe that the fact this instrument is retained in the proposals for the new Regulation 17 is a clear indication that sector inquiries may well be used more frequently in future. It may also be an even more useful instrument when following modernisation the possibilities for a co-ordinated follow-up by national competition authorities will increase.

Another innovation that I should mention is that we co-ordinated the leased lines and roaming inquiries with the EFTA surveillance authority – ensuring that the inquiry covered the entire European Economic Area.

III. Case COMP/C1/37.638 – Sector inquiry/Leased Lines

The Commission launched an EU-wide sector inquiry into leased line pricing based on allegations that very high leased line prices existed across the EU, notably for international broadband capacity. International corporations in particular complained that leased line prices in the EU were significantly higher than those in the US. It was troubling that these rates remained high and rigid even more than a year after full liberalisation on 1 January 1998. Moreover the fact that this was happening in spite of the construction of competing infrastructures by new entrants obviously raised the question whether abusive or collusive behaviour was involved.

III.1. First Phase

As the first phase of the sector inquiry, the Commission collected and analysed comparative market data for all Member States, focusing on prices. In September last year, the Commission presented the initial findings of the inquiry at a public hearing here in Brussels. The conclusions drawn from the Commission's investigation and the submissions at the hearing can be summarised as follows:

Preliminary findings: A number of possible abusive pricing practices involving the provision of national and international leased lines were identified. These included:

- excessive pricing
- price squeezing
- abusive discounting practices
- absence of information and transparency on pricing and discounting schemes.

Moreover, market entrants complained that to them non-price aspects of leased line provision were as important as are pricing issues. They highlighted in particular:

- long delays in leased lines provisioning that appeared targeted at sabotaging emerging customer relationships
- facilitated by the lack of published terms and conditions with enforceable penalties for non-performance
- and the absence of enforceable service level agreements in some Member States
- as well as abusive use of competitors' confidential customer information (used to target discriminatory offers at emerging customers of new entrants).

III.2. Second Phase

Based on these findings, the second phase of the inquiries started when in November 2000, the Commission opened five own initiative cases. These concerned the provision of international leased lines in five Member States where the prices for international half-circuits appeared *prima facie* excessive compared to average prices for international leased lines between other major commercial centres in the EU. The countries involved are Belgium, Greece, Italy, Portugal and Spain.

Moreover, in reaction to the non-price issues raised by the market parties the Commission extended its investigation into discounting practices, service level agreements and quality of service in those five countries. The own initiative cases are being carried out in close contact with the national competition authorities and the national telecommunications regulators in the relevant Member States.

Preliminary conclusions: Meanwhile, although the exact situation evidently differs from country to country and without prejudice to the outcome of any particular own initiative procedure, the following general conclusions can be drawn:

- Prices for international and long distance national leased lines now appear to be falling, but national short distance leased lines are remaining a source of concern;
- There is a lack of effective enforcement of the sector-specific obligations by a number of national regulatory authorities (NRAs);
- Finally, in order to promote more effective action by authorities at national level, the Commission will have to provide guidance on market definitions.

1. National short distance leased lines new focus of concern: The Commission initially focused on international leased line prices both because they are inherently of Community interest and because such international leased lines are not covered by the cost orientation obligations of the Leased Lines Directive. However, although this remains to be confirmed in some individual cases, it appears that prices for such international leased lines are now subject to increasing competitive pressure, and are generally falling.

Meanwhile, contacts with the national authorities and informal complaints from market parties suggest that instead short distance leased lines have now become a more serious concern. Short distance leased lines or terminating circuits are part of international and long-distance national leased infrastructure, and they are a form of local access where competitive pressure is still absent. This means that although competition now appears to be emerging on long distance and international leased lines, the incumbent operators in effect retain a monopoly in the terminating segment – the final leg to the customer. This makes new entrants dependent on the incumbents for establishing point to point connection offers to their consumers – and precisely in this crucial segment of the market price and non-price obstruction appear to be widespread.

This was surprising because – perhaps naively – it had been assumed that the timely provision of such national leased lines at cost-oriented rates could not be seriously problematic because they are subject to detailed sector-specific regulation based on the Leased Lines Directive.

2. Lack of pro-activity of the national regulatory authorities (NRAs): Perhaps the most important conclusion is that the existing sector specific regulation does not appear to have been implemented fully or consistently at national level, in particular as regards cost-orientation obligations. A number of national regulatory authorities are hampered by their lack of reliable cost information, or even by the lack of legal instruments to collect this information. As a consequence, the regulators concerned end up approving incumbents' leased line tariffs that are not in fact cost-oriented. This approval by the regulator then in turn often blocks national competition authorities from intervening against these prices.

In theory there are at least two possible legal remedies to address this problem:

- Not only antitrust action by the Commission against incumbents who charge excessive tariffs.
- But also infringement actions by the Commission against the Member States where NRAs approve anti-competitive tariffs, and where NRAs are inadequately equipped to assess the cost orientation of leased lines tariffs;

Both measures are under consideration.

3. Market definitions: So far, Court judgements and Commission decisions have provided market definitions for “transmission capacity” markets and markets for the “supply of international and national infrastructure”, without defining separate leased line markets. In the absence of antitrust case law concerning leased lines' provision in particular, precise market definitions are lacking. Notably, the question is whether

- there are separate leased line markets for the provision of international and national leased lines;
- such markets could be further segmented based on capacity and/or speed;
- and the geographic scope of those markets.

In order to facilitate coherent action by national competition authorities and regulators in this field, it would obviously be useful if the Commission could set the necessary precedents. At the same time, given its limited resources, the Commission will have to be selective with the number of cases it pursues further. How will such cases be selected?

Follow-up cases: The Commission will verify whether:

- significant price reductions have occurred;
- competition is increasing in terms of new entry and other market dynamics;
- service level agreements (SLA) and other conditions fostering competition are being implemented;
- the NRA/NCA will address the problems in an effective manner.

If a market where leased lines prices are currently under investigation does not meet these tests, it qualifies for further Commission action.

In addition, new cases may have to be opened if and when well-documented complaints are received. In spite of much informal wailing and moaning, no formal complainant has so far come forward, ostensibly because new entrants are dependent on the incumbents and afraid of harming their commercial relationships with them. Recent press statements by members of the European

Competitive Telecoms Association (ECTA) suggest that this may be about to change. We will see. This is all I wanted to say as regards the sector inquiry under the competition rules, but I want to add something on regulation.

Leased Lines Directive and New Regulatory Framework: It appears self-evident that in parallel to any competition law cases a more rigorous application and monitoring of the application of the sector-specific rules is necessary. That is to say: although the antitrust and sector specific regulatory standards are converging, until more effective competition emerges their parallel application remains necessary. The two are complementary.

The Leased Lines Directive of 1992 imposes cost orientation for SMP operators, and all incumbents have been notified as SMP operators. The ONP Leased Lines Directive itself will be repealed and will not be replaced with a separate Directive under the new regulatory framework. However, there is a general consensus that the existing rules on mandatory leased line provision should only to be withdrawn when competition is found to be effective in the relevant national markets.

For this reason, under Article 27 of the proposed European Parliament and Council Directive on the Rights of Users and Obligations of Providers of Communications Services the current provisions on leased lines continue in force. This is subject to a sunset clause that allows these provisions to lapse once national regulatory authorities have determined effective competition exists in the relevant markets – subject to Commission guidance on market definition.

PIBs and peer pressure: Evidently this does not solve the problem of lax or inconsistent application of sector-specific obligations that was noted earlier. However, short of disciplinary action against the relevant Member States, it is encouraging to know that the IRG (independent regulators' group) has been asked to formulate principles of implementation and best practice (PIMS) for leased line pricing and provisioning. Hopefully peer pressure, if need be in the shadow of Commission infringement actions, will ensure that in future the regulatory obligations will bite. This closes off my remarks on leased lines.

IV. Case COMP/C1/37.639 – Sector inquiry/Mobile Roaming

I will now discuss the roaming inquiry and will again start by briefly explaining the reasons for opening this inquiry.

IV.1. Initial Concerns

1. Absence of transnational offers: The first major concern was that no transnational services were emerging. So far telecommunications liberalisation has been a success mainly to the extent that it created liberalised national markets. However, there is only limited evidence that transnational, regional, or pan-European markets are emerging. For mobile telephony, roaming was one of the services that appeared to have potential as the basis of such markets. Given these expectations, an major initial concern was that no transnational or pan-European offers were emerging. Instead the Commission received various complaints about refusals of national roaming access (for example in Finland and Germany). We also received complaints about actions that frustrated permanent roaming and the sale of roaming services to consumers across national borders (for example in Germany).

2. High and rigid prices: The second main concern that triggered the inquiry related to roaming prices. In addition to the complaints already mentioned, we received numerous complaints by users and by users' organisations about roaming retail prices. Increasingly these complaints involved large

corporate users. This is all the more worrying because obviously if corporate users cannot obtain competitive offers, no one else can obtain them either. The concerns involved were highlighted by a 1999 INTUG report that showed that some roaming calls cost up to 5 times as much as comparable non-roamed calls.

3. Industry concentration and collaboration: The lack of cost-orientation on prices was all the more worrying given the concentrated nature of the mobile industry, and its close collaboration at international level. It is true that this collaboration in the context of the GSM Association is probably one of the main reasons behind that the GSM family of mobile standards has enjoyed so far. However such close continuous fraternal contacts as exist between the GSM operators are a potential source of active or tacit collusion.

The GSM Association's activities have also led to the widespread use of standard agreements prepared by the Association. Already in 1996 the GSM Association notified its Standard International Roaming Agreement (STIRA on the slide) to the Commission for a negative clearance or exemption from the cartel prohibition under Article 81(3). In addition, in 1997 the Interoperator Tariff – or IOT – system was notified as a new basis for wholesale roaming agreements between operators. The IOT replaced the earlier normal network tariff or 'NNT' system that was based on national retail prices for non-roamed calls. Both notifications received conditional exemption type – comfort letters, but understandably the GSM Association wished to benefit from a formal decision. Before considering such a formal decision, the Commission clearly needed to verify the effects of the IOT regime, especially because it appeared that under the IOT regime prices were increasing instead of decreasing as had been anticipated.

Jointly, these reasons justified launching the sector inquiry.

IV.2. First Phase

Data collection and Co-ordination: So far, we have mainly collected information, analysed it, and started discussions with National Regulators and Competition Authorities. At first we collected information by way of formal written information requests about market structure, wholesale and retail prices, price structures and costs for 2 G roaming, for the 1997-2000 period.

Working document: This information was summarised in to a comparative report that we presented to the National Regulators and National Competition Authorities at a joint meeting in Brussels on 24 November last year. A public version of our report was published on our website in December. I will now summarise the main findings of the report, before moving on to discuss subsequent developments, and follow-up action.

I will first say something about the relevant markets; and next on prices.

IV.3. Market Definition

Based on the information collected, we have defined the relevant markets as follows: The basic distinction is that between on the one hand wholesale markets, where operators buy and sell roaming rights to each other; and on the other hand retail markets where operators sell services to their own consumers/end users.

1. Wholesale product markets: We have found three different wholesale product markets:

- First, a market for the provision of wholesale roaming to foreign mobile network operators. This is because so far little to no roaming at all is sold to service providers (SPs) and virtual mobile network operators (MVNOs). It is also defined as distinct from IC markets, within which origination and termination markets could be distinguished;
- Second, there seems to be a separate product market for wholesale airtime provision to (tied/independent) national service providers;
- Third, there appears to be a separate product market to provide national roaming to mobile network operators. So far 2G national roaming access is usually based on regulatory incentives or obligations.

In all three cases the geographic scope is national because so far only nationally licensed operators are actual – or perhaps more accurately – potential competitors to provide roaming services. (Market size estimate 2.4 Billion Euro.)

2. Retail product markets: At retail level, concerning the markets between operators and consumers, we have identified two product markets:

- In the first place the market for retail roaming services (although to a limited extent call-back, pre-paid cards, international prepaid cards, and even hotel phones in combination with calling cards are emerging as partial substitutes -- with major limitations). The relevant geographical market in this case is again likely to be predominantly national.
- Second, as defined in the Vodafone/Mannesmann Merger Case, an emerging market for provision of pan-European mobile telecommunications services to internationally mobile customers/large corporate accounts. In this case the relevant geographical market will be pan-European.

(EEA retail roaming market estimate for 1999: 3.3 Billion Euro.) Following these remarks concerning market definition, I want to say something about our findings on market structure.

IV.4. Market Structure

Generally, the structure of both retail and wholesale roaming markets is highly unfavourable to competition.

1. Wholesale roaming markets are oligopolistic markets that appear to lack competitive pressure. They are characterised by high barriers to entry due to national licensing and spectrum limitations; due to high network infrastructure costs; and due to first mover advantages that appear to work against DCS 1800 licensees.

Most national wholesale roaming markets have extremely high concentration ratios with a combined market share of above 90% for the two largest providers of wholesale roaming services.

In addition, there appears to be a general lack of incentives to compete, due to almost perfect price transparency between operators at wholesale level and a near complete absence of price transparency for consumers at retail level.

Externalities make it difficult realise price volume trade-offs that could lead operators to cut their IOTs in order to benefit from attracting additional traffic. Because so far it has been difficult to attract additional traffic by lowering wholesale prices, operators have preferred keeping prices high. The handful of operators that did have lower prices has not been very successful at increasing their market share on this basis, and has instead increased their prices.

Industry-wide non-discrimination obligations reduce competitive pressure: The wholesale roaming agreements are based on standard terms defined by the GSM Association that play a key role in determining the structure and functioning of these roaming markets. Standard non-discrimination obligations introduced by the GSM Association may make it difficult to realise price-volume trade-offs that could encourage price competition.

Market entry and the development of new products are blocked: the GSM Association's standard international roaming agreement and its electronic "Infocentre" foster wholesale price transparency and reinforce the oligopolistic structure of national roaming markets. Use of the standard international roaming agreement leads vertically integrated operators to conclude roaming agreements exclusively with other licensed mobile network operators, blocking competitive entry and the introduction of new roaming products at retail level by independent service providers and virtual mobile network operators.

Finally, instead of incentives to compete, there are perverse pricing incentives: because the wholesale and retail markets are located in different countries, excessive wholesale prices in one Member State are passed on to retail customers of operators in other Member States and vice versa. In other words – operators have an incentive to mutually rip off each other's customers.

So to sum up: with

- high concentration ratios
- wholesale price transparency
- a homogeneous product
- similar cost structures
- high barriers to entry
- inelastic market demand, and
- absence of a competitive fringe

national wholesale roaming markets appear to have the characteristics of oligopolistic markets favourable to collective dominance and conducive to tacit or active collusion.

2. Retail roaming markets: At retail level similar factors are at play: concentration ratios for the combined roaming retail market shares of the two largest providers are between 60% and 100%. Consumers are generally badly informed, prices are in most cases completely intransparent. In this context the manual override is as good as meaningless. And in particular for business users, alternatives that involve using multiple phone numbers are of limited use.

IV.5. Preliminary Findings: Pricing

I will limit my remaining comments on our findings to pricing issues.

1. Wholesale rates: First, I will say something about the transition from NNTs to IOTs. NNTs, or normal network tariffs, were wholesale roaming rates based on a standard national retail tariff with a mark-up of a maximum of 15%. Under the NNT system, wholesale roaming rates were therefore in

theory both subject to a price cap, and to indirect competitive pressure due to the increasing competition in national retail markets.

After IOTs were introduced between May 98 and April 1999 no more price cap applies. The link with the more competitive national retail markets, and thereby with at least indirect price competition, has been cut. The results are clear: in the period under review many operators raised the wholesale rates for international roamed calls by up to 80%; for wholesale national roamed calls, for more than third of the operators involved prices went up between 50% and 250%. Although the quality of the cost figures submitted by the operators was generally laughable, it is safe to assume that at the same time prices for comparable non-roamed calls and network costs generally fell. Clearly the introduction of IOTs has not increased wholesale roaming price competition. Instead, there is evidence that in most cases prices have increased, and often have increased significantly, even although costs dropped. Meanwhile, in numerous national markets different operators charge almost identical rates.

2. Retail rates: Mobile operators traditionally price retail roaming rates at a standard mark-up over the wholesale rate that varies between 10% and 35%. Because of mark-up pricing, retail roaming rates have followed the upward trend of wholesale rates. Because of the complexity of wholesale rates, retail roaming prices have been completely untransparent to consumers. The existence of mark-up margins of up to 35% on wholesale prices that are already very high do not suggest price competition exists at retail level. Such mark-ups may amount to an exploitative abuse of consumers.

IV.6. Incentives to Reduce Prices and Costs?

Clearly, the data present a pretty bleak picture. In fact it was bleak in more than one sense: the price data we received was highly complex, the cost data, as mentioned, were often a bad joke. Mobile network operators obviously prefer competition law to regulation - and the new regulatory framework goes in that direction. But they must realise that competition law has to be enforced for it to be credible, and in mobile roaming this will involve providing credible cost data. Alternatively they may not know what their costs are - which leads me to believe that there is no competitive pressure in roaming markets at all. In any event, we received sufficient information to make clear that the structure of both wholesale and retail markets favours collective dominance and collusion. There is no real evidence of any price competition at all.

Nevertheless, we have tried to identify incentives to reduce prices and costs. We have found a number of market developments that may open such possibilities. There are also possible regulatory incentives. Neither, incidentally, appears to be working for the time being.

1. Technical developments: Technical developments related to over the air programming of SIM cards will allow increasing direction of roaming traffic by home country operators onto a particular preferred network abroad. Some operators claim this will be effective for over 70% of calls. This should enable operators to exploit price/volume trade-offs based on preferential roaming and discounts. Other technical developments may improve retail discounting of individual calls and promote offerings of pre-paid roaming and closed user group features. Together, these technical developments should increase at least the potential scope for price competition, by reducing or eliminating some of the externalities involved.

2. Commercial developments

In addition, there are a number of commercial developments that appears to be pointing in the right direction.

At **wholesale level**, two commercial developments are worth noting:

- First, the emergence of roaming brokers negotiate contracts/hub traffic allow new entrants to provide retail roaming without numerous individual roaming contracts. They could potentially protect operators that individually do not have leverage, as they are not members of pan-European groups from discrimination. Currently they are not playing this role yet.
- Second, preferential roaming agreements, either by operators in the same corporate group or between non-integrated operators, may offer price-volume trade-offs that encourage IOT discounting and retail price reductions. Where dominant operators are involved discounts must evidently be objectively justified. Vodafone must in addition respect its undertakings. The main preferential roaming scheme, Eurocall, was launched by the Vodafone Group at the beginning of this year and notified to the Commission on 1 February. The Eurocall scheme is currently under consideration for an Article 81(3) exemption. It is worth pointing out however that even the discounted wholesale rates remain much higher than the best practice benchmark identified in the inquiry. This is all the more shocking as it relates to what for Vodafone is intended to cover mainly transactions within the same economic group. Some other operators are likewise trying out discounted wholesale rates.

Just as an aside: it may well be that with further industry consolidation we will in the near future see IOTs disappear as roaming becomes internal traffic within pan-European groups that may compete for the external roaming business of non-affiliated networks. This would call into question whether the present GSM Association model of continuous joint planning exercises by competitors can survive, as it would appear that integrated pan-European operators will have incentives to defect from this system. Again, we are clearly not there yet.

At **retail level**, there are three developments that I want to mention.

- First: Pan-European roaming offers are gradually emerging, some based on international pre-paid cards. One would assume that such offers will eventually be based on integrated pan-European networks of operators licensed in different Member States that form part of the same economic group, or based on more loosely affiliated operators.
- Second: So-called flat rates are multiplying. Increasingly, operators are offering simplified retail rates with identical per minute charges covering various types of calls within a broad geographical area. By making it easier for consumers to compare prices, these flat rates could promote price competition. However, for the time being flat roaming rates are being introduced at levels that involve price increases for many types of call, and perhaps even average net price increases. A number of flat rates are converging around an apparently convenient level of 1€/minute. In the case of the Vodafone scheme, even the manual override possibility is effectively lost, removing a source of price competition. So even if competition does emerge it may be some time before it produces net benefits to consumers.
- Third, and finally, GSM Europe, the interest group of GSM family of standard mobile network operators, has produced a code of conduct that promotes a minimum standard of retail price information to consumers. It is not very ambitious, doing such things as encouraging members to respect existing consumer protection rules, but it may be better than nothing at all.

As a second aside I should mention that on the other hand, the GSM Association is also active in extending the IOT system to new services, such as SMS roaming – and into the future, for GPRS

roaming. As for incoming roamed calls, it appears that SMS roamed calls should probably be covered by interconnection payments, not roaming charges. Finally, it is not very encouraging to see a system that appears to fail consumers being extended from the circuit switched world into the brave new world of packet switching.

In sum, there are some market developments that could potentially promote more competitive roaming markets, but for the time being are failing to do so.

3. Regulatory Measures: This makes it all the more important to consider the possible regulatory measures that may contribute to increasing competitive pressure:

- These may include lowering switching costs for consumers (promoting number portability) and increasing retail price transparency;
- They may include making mobile retail markets more competitive by introducing mobile indirect access by carrier selection or pre-selection, backed up by third party billing. This would make manual override a real source of competitive pressure;
- It could include giving SPs and MVNOs mandatory access to roaming agreements (one-way roaming) at reasonable rates
- Finally, bringing roaming within the scope of ex ante regulation is probably the only way to obtain workable cost data, and to deploy the necessary resources to assess and act on such data.

Of course, under the present sector specific ONP regime the status of roaming as a form of access covered by the Interconnection Directive is still not clear. One obvious solution would be to ask the national regulators, united in the IRG, to contemplate taking a joint position on the status of roaming under the Interconnection Directive. They could do so by adopting one of their Principles of implementation and best practice papers, just as they have been asked to do concerning leased lines. This should also cover SMS and GPRS roaming.

At the same time, roaming will be explicitly covered as a form of access under the proposed new Access Directive that is now before the EP and Council.

It is worth recalling that the Commission's proposals for the new sector-specific framework use the competition law concept of single or collective dominance as the trigger for ex ante obligations. However, the European Parliament has generated a proposed amendment that would impose cost-orientation for roaming access on all mobile operators, irrespective of market power. So far it looks like there is a consensus on the general rule that only dominance should trigger ex ante regulation. However, there may be an exception to this rule for roaming access.

Finally, of course, competition law enforcement may be needed in this area.

IV.7. Phase Two: Follow-up

To conclude, just a few general remarks about the follow up to the inquiry in general and the competition law remedies that I have just mentioned:

Our consultation and co-ordination with the national regulatory and competition authorities on the follow-up to the sector inquiry continues. In particular where restraints of competition and consumer prices at national level are concerned, it would appear logical that national authorities will take the lead. DG Competition itself is likely to take an interest in wholesale prices and agreements between operators in different Member States, perhaps in collaboration with national competition authorities. Meetings on this are ongoing, and we will probably request the national authorities to inform us on

developments in their national markets by the end of this year so we can take stock and perform a further benchmarking exercise.

I have already mentioned that national regulators have not yet taken a clear position on whether roaming is covered by the present regulatory framework, and perhaps should be asked to do so, jointly. This is also necessary because both national regulators and national competition authorities generally find it difficult to address transnational aspects individually. In addition, national competition authorities have few incentives to take action on competition problems in wholesale roaming markets that may help consumers in other national markets, but cannot help consumers in their own markets. And although the conditions for co-operation between competition authorities are being improved, for the time being such co-operation is difficult to implement. Although efforts at increased burden sharing and co-operation obviously remain desirable this pleads in favour of action by the Commission.

As far as competition law remedies are concerned, as you may know we are actively investigating all German and UK mobile network operators concerning possible collusive and excessive pricing under Articles 81 and 82. As was widely reported, the Commission and the relevant national authorities carried out dawn raids on all these operators July. If the suspected infringements are demonstrated this could lead to fines of in theory up to 10% of turnover of the companies involved, depending on the seriousness and the duration of the infringements found. Specific performance to end any violations may also be required.

Apart from any findings of infringements in individual cases we will also use our powers under the competition rules to promote the emergence of pro-competitive incentives and to give guidance on the application of the competition rules in the light of new developments such as preferential roaming and wholesale discounting. As I have already mentioned we are examining the scope for improving structural conditions and promoting incentives to increased competition roaming in Vodafone's Eurocall and the GSM Association's STIRA/IOT notifications. A key test for any possible 81(3) exemption in this area will be evidence of immediate consumer benefits, and as always modifications of the schemes involved may be required.

V. Conclusion

To sum up the conclusions on Roaming – and with that the conclusions of this presentation – briefly:

The sector inquiry findings give rise to serious concerns both regarding structural market failures as well as possible collusion/dominance abuse. At the same time there seem to be serious constraints on the ability of individual national authorities to act based on the current sector-specific framework or on national competition rules.

Meanwhile the political pressure concerning the high and rigid roaming prices is increasing. This may lead the European Parliament to impose ex ante cost orientation regulation on all mobile operators, something that DG Competition has so far resisted on the theory that the application of competition law principles should suffice.

However:

- if it turns out that competition policy will in fact not enable the Commission to address roaming prices in an effective and timely manner, or perhaps at all,
- and if market developments do not become more a lot more encouraging very quickly,

we can no longer justify standing in the way of regulation even if this does potentially lead to mandatory cost-orientation.

In fact, as Commissioner Monti pointed out in Barcelona last week, in this case we will actively promote the speedy adoption and implementation of such regulation. We have to be realistic about the limits of the application of the competition rules in the current institutional environment. The fact that the sectoral rules are converging toward competition standards does not mean sectoral regulators will fall idle prematurely while competition law enforcement strains under systemic overload.

Instead, as applies in the case of leased lines: if the necessary resources are available at national level, we should use them, ensure that the relevant principles are applied consistently, and exploit the available synergies in the interest of the European consumer.