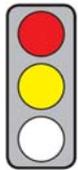


MAIN ISSUES

Objective of the Regulation: The Commission wishes to protect users of roaming services (mobile phone calls, SMS and data services) in EU countries from “excessive prices” by setting price limits which are to be gradually reduced. Moreover, it wishes to encourage competition between mobile communications companies.

Parties affected: Users of roaming service, mobile communications providers (network operators and service providers).



Pros: The obligation to grant access to networks and to provide information on roaming rates strengthens competition between mobile communications companies.

Cons: (1) Setting price limits without having observed market power (abuse) is a mistake in terms of ordoliberal thinking.

(2) The price limits are extremely inconsistent.

CONTENT

Title

Proposal COM(2011) 402 of 6 July 2011 for a **Regulation** of the European Parliament and of the Council **on roaming on public mobile communications networks within the Union** (recast).

Brief Summary

► Context and objectives

- The Regulation substitutes the Roaming Regulation of 2007 [(EC) No. 717/2007] and its Amendment Regulation of 2009 [(EC) No. 544/2009].
- “Union-wide roaming” means the use of a mobile phone or any other mobile telephony device (calls, SMS and data communications services) within a foreign EU Member State (Art. 2 (2) lit. d).
- Mobile communications providers operate mobile communications networks and/or offer mobile communications services. Network operators are normally service providers at the same time. In addition, there are also pure service providers who depend on the networks of others.
- According to the Commission, the roaming market exhibits “unique characteristics which justify exceptional measures” that go beyond the regulatory framework for electronic communications (Recital 13).
- The Directive regulates (Art. 1 (1) sub-par. 2)
 - the separate sale of roaming services by domestic service providers other than that of the main provider;
 - the conditions for access to public mobile communications services for other domestic service providers;
 - the admitted maximum rates for both the wholesale level (between network operators and service providers) and the end customer level (between service providers and users).
- When travelling within the EU, roaming users should not have to pay “excessive” prices. The Commission’s Proposal is to ensure the “smooth functioning of the internal market” and a “high level of consumer protection”, to foster competition and transparency in the market and set incentives for innovation and consumer choice. (Art. 1 (1) sub-par. 1)

► Opening mobile networks to competing service providers

- All service providers are to receive access to networks of mobile network operators in other EU states if deemed “reasonable” (Art. 3 (1) S. 1). This is to stimulate competition which hitherto has been “only limited” (Recital 16).
- Access prices must not exceed the admitted maximum rates at wholesale roaming level (Art. 3 (1) S. 2).
- Access must be granted within two months upon the receipt of the request (Art. 3 (3)). The Commission and the body of European Regulators for Electronic Communications (BEREC) are to lay down guidelines for wholesale access conditions (Art. 3 (4)).

► Mobile users’ right to switch

- As of 1 July 2014, mobile users of roaming services may switch from their roaming provider to an alternative domestic provider “at any moment” (Art. 4 (1)).
- All service providers must inform their roaming users of this option (Art. 4 (2)). The switch is free of charge and must be carried out within five working days (Art. 4 (3), (4)). The user can keep their telephone number also when switching to other providers (Art. 5 sub-par. 2).

► **Price regulation**

- The Commission sets price limits for roaming at both the retail and the wholesale level. All price limits will be gradually reduced until 1 July 2014 and then will remain constant (see table). (Art. 6 (1) and (2), Art. 7 (2), Art. 8 (1), Art. 9 (2), Art. 11 (1), Art. 12 (2))

Maximum charges		since 1 July 2011	from 1 July 2012	from 1 July 2013	from 1 July 2014
Calls (per minute)	wholesale level	18 Cents	14 Cents	10 Cents	6 Cents
	incoming calls at retail level	11 Cents	11 Cents	10 Cents	10 Cents
	outgoing calls at retail level	35 Cents	32 Cents	28 Cents	24 Cents
SMS Messages	wholesale level	4 Cents	3 Cents	3 Cents	2 Cents
	incoming SMS at retail level	0 Cent	0 Cent	0 Cent	0 Cent
	outgoing SMS at retail level	11 Cents	10 Cents	10 Cents	10 Cents
Data services (per 1000 kilobyte)	wholesale level	50 Cents	30 Cents	20 Cents	10 Cents
	retail level	-	90 Cents	70 Cents	50 Cents

- Billing is carried out on a per second basis, for data services on a per kilobyte basis (Art. 7 (2) sub-par. (3), Art. 12 (2) sub-par. 2). At retail level, providers may charge 30 seconds per call (Art. 7 (2) sub-par. 4).
- Receiving SMS messages is free of charge.
- The ceiling for wholesale level rates will remain in effect until 30 June 2022, those for retail rates until 30 June 2016 (Art. 6 (2), Art. 8 (1), Art. 11 (1), Art. 7 (2), Art. 9 (2), Art. 12 (2)).

► **Advance non-application of maximum charges**

- As of 1 July 2018, the regulation for wholesale rates will be no longer be applied if the actual average rate does not exceed 75% of the maximum rate of all providers (Art. 13 (2)).
- Between 1 July 2014 and 1 July 2016 the regulation for end customer rates will be no longer applied if the actual average charge does not exceed 75% of the maximum charge of all providers (Art. 13 (3)).

► **Price information obligation**

- When concluding contracts, providers must notify customers of both the contract rates and the regulated maximum roaming rates. Information on changes in rates must be provided “without undue delay”. (Art. 14 (3) sub-par. 1)
- Before the use of roaming services, providers must inform mobile communications users of roaming rates again and free of charge, namely:
 - the telephone and SMS rates per SMS message when entering another Member State (Art. 14 (1) sub-par. 1, 2);
 - rates for data services “by an appropriate means” via SMS messages, email or pop-up windows on the computer at the start of use (Art. 15 (2) sub-par. 1, 2).
- The information must include the rates for calls within the visited country, for calls back to the home country and for sending SMS messages (Art. 14 (1)).

► **Additional safeguard mechanisms for data services**

- Users may specify a financial limit for data services in Euro or data volume limits which must not be exceeded without their consent (Art. 15 (3) sub-par. 1 to 4).
- If a user does not specify any limit, the cap is to be 50 Euro or an equivalent data volume (Art. 15 (3) sub-par. 5).
- When 80% of the specified limit is reached, providers must inform their customers (Art. 15 (3) sub-par. 6).
- When the specified limit is reached, providers must inform mobile phone users as to the procedure and associated costs if customers wish to proceed using data roaming services. Service provision must be ceased immediately if the user does not wish any further use. (Art. 15 (3) sub-par. 7)

► **Duration of the Regulation’s validity**

- The Regulation will be in effect until 30 June 2022 (Art. 22 sub-par. 2). The current Roaming Regulation expiring on 30 June 2012 will be repealed (Art. 21 sub-par. 1).

Changes to the Status quo

For the first time, the Commission proposes measures to open mobile communication networks to competing service providers and the mobile phone users' right to change providers in order to promote competition. Moreover, it now also specifies price limits for data services at retail level and reduces already existing price limits for calls, SMS and data services at wholesale level.

	calls	SMS	data services
wholesale level	since 2007	since 2009	since 2009
retail level	since 2007	since 2009	new

Legislative Procedure

06 July 2011 Adoption by the Commission
 Open Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union and entry into force.

Options for Influencing the Political Process

Leading Directorate General: GD Information Society and Media
 Committees of the European Parliament: Industry, Research & Energy (in charge), rapporteur not yet appointed; Internal Market and Consumer Protection; Legal Affairs
 Committees of the German Bundestag: Economics and Technology
 Decision mode in the Council: Qualified majority (approval by a majority of Member States and at least 255 out of 345 votes; Germany: 29 votes)

Formalities

Legal competency: Art. 114 TFEU (Internal Market)
 Form of legislative competency: Shared competence (Art. 4 (2) TFEU)
 Legislative procedure: Art. 294 TFEU (ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

The EU Commission also wishes to continue in future to regulate the prices for mobile communications services in foreign EU Member States. Mobile service users benefit from falling prices for calls, SMS messages and data services.

However, high prices per se are not a legitimate reason for setting **price limits**. They **are justified only if**, firstly, one or several **companies hold a significant market power position and** abuse it to the disadvantage of consumers, and secondly, if **new market participants do not have access to the market**. However, a **significant market power cannot be identified**, at least not on retail markets for roaming services. A number of competing companies are active on this, hence the preconditions for competition are given on the part of suppliers.

It is much more the case that the **high roaming prices are rooted in a lack of price consciousness of mobile phone users**. When choosing providers and tariffs they do not adequately consider the related roaming rates. They accept high prices instead of actively searching for lower rates. **To this end, there is no ordoliberal justification for price limits**.

At the same time, the Commission infringes its own principles laid down under the EU legal framework for telecommunications. According to this, before taking regulatory measures, each national regulatory authority is obliged to carry out a thorough market analysis in order to examine whether a market is dominated by companies with significant market power. Only if this is the case, can an authority set national rates. However, the Commission deviates from this procedure here and declares roaming as a market requiring "extraordinary measures". Although roaming can be seen as an issue of cross-border nature and therefore is subject to – if at all, then – European regulation, this, too, would require the same examination and justification as with any other national regulation.

Moreover, setting price limits on both the wholesale and the retail level leads to double regulation and therefore to overregulation. Tariff regulation should, if at all, be restricted to the wholesale level. There might be a demand for regulation, since in order to deliver calls to foreign networks, they must be used and therefore are essential for this service provision. At the retail level, however, mobile phone users can choose freely from a vast number of service providers. Free competition is possible here.

Furthermore, price limits are inconsistent in terms of their volume. For instance, in 2011 and 2012, a service provider has to pay a higher wholesale rate to the foreign network operator (18 Cents or 14 Cents) than they

are allowed to charge end customers for the calls received (11 Cents), unless a lower price was agreed upon with the foreign network operator. **Thus the EU imposes losses on mobile phone companies.**

The Commission also weakens national regulatory authorities in a problematic manner: the maximum prices for roaming at wholesale level limit their scope of action in setting wholesale tariffs on the domestic market. The domestic wholesale rates must be below the roaming rates at the wholesale level if they are to prevent domestic calls from becoming more expensive than calls to other EU countries.

The obligation to grant network access to competing service providers – also to those without their own network – **can encourage the market entry** of companies which hitherto have not been active on the roaming market **and thus strengthen competition on this market.** Moreover, it can contribute to price reductions for roaming services. **Also, the obligation of network operators to provide information as to the prices** for calls, SMS and data services when crossing borders is reasonable from an ordoliberal standpoint. **It can strengthen the users' consciousness for the demanded prices.** Capping the costs for accumulated data volumes can increase price sensitivity, too. **Both measures can increase** the willingness to change the provider and thus to an increased **competition** and reduced prices.

Impact on Efficiency and Individual Freedom of Choice

Mobile rates are mainly offered as package solutions. In addition to domestic rates they often also comprise foreign roaming rates. The possibility for mobile phone users to use roaming services separately increases their individual choice options and can stimulate pricing competition. However, at the same time, the potential of mobile communications providers to use high margins on the roaming market to lower prices in the domestic services decreases. Consequently, price increases can be expected.

Legislative Assessment

Competency

As with the previous 2007 Roaming Regulation, the Commission uses Art. 114 TFEU (Ex-Art. 95 TEC, Internal Market) as its legal basis. Although the European Court of Justice (ECJ) confirmed this legal basis in 2010 (C 58/08), it is not justified. In fact, the Regulation is not subject to Art. 114, hence the EU has no competency in this field (s. [CEP Analysis](#) in German only).

Subsidiarity

Even if national regulatory authorities have very low incentives to regulate roaming rates, they are generally responsible for the regulation of telecommunications (Art. 15 and 16, Framework Directive 2002/21/EC). Therefore, the Regulation infringes the principle of subsidiarity.

Proportionality

The ECJ declared price limits to be appropriate also at the retail level, because the reduction in wholesale rates would not be necessarily passed to cheaper end customer rates and roaming prices would play a minor role for most users in choosing mobile service providers (C 58/08).

As a result of the **price limits** that have already existed for years, even the Commission admits that there has been almost no competition (Recital 16). Therefore, price limits might lead to low prices but **are not appropriate means to foster competition.** To this end, price regulation is not suitable for achieving the aim to establish effective competition. Consequently, the regulation infringes the principle of proportionality. An ordoliberal policy would therefore be limited to the obligation of providers to inform users of prices, which is a much softer tool.

Compatibility with EU Law

Unproblematic.

Conclusion

The high roaming prices are rooted not in market power but in the lack of price consciousness of mobile service users. Therefore, an ordoliberal justification for price limits does not exist. Moreover, price limits cannot achieve the aspired target of establishing competition and are therefore neither suitable nor proportionate. Moreover, the EU has no regulation competency in this field. The planned price limits are inconsistent and thus possibly impose losses on mobile communications companies. The obligation to grant access to networks even to competing service providers – also to those without their own network – strengthens competition on the roaming market. Also, the obligation of network operators to provide information as to the prices of SMS, calls and data services when borders are passed, can help strengthen the consciousness of users for pricing and thus promote competition.