

Decision of the European Ombudsman on complaint 3617/2006/JF against the European Commission

Decision

Case 3617/2006/JF - Opened on 26/01/2007 - Decision on 03/07/2008

Strasbourg, 3 July 2008

Dear Mr A.,

On 28 November 2006, acting on behalf of *GSM Association*, you submitted a complaint to the European Ombudsman against the European Commission. Your complaint concerns the procedures for the adoption of a Regulation on tariffs for international roaming services.

On 21 December 2006, I informed you that, because of the volume of the file and the forthcoming holiday period, it might not be possible to complete the analysis concerning the admissibility of your complaint before the end of January 2007.

On 26 January 2007, I forwarded your complaint to the President of the European Commission.

On 22 February 2007, you informed me that the above-mentioned complaint could be treated publicly. On 23 March 2007, I informed the Commission accordingly.

On 29 March 2007, I received a letter from the Commission concerning your complaint. On 25 April 2007, I replied to the Commission's letter.

On 22 May 2007, you sent me a letter advising me of the delay which the Commission was experiencing in submitting its opinion on your complaint.

On 23 May 2007, I received the Commission's opinion. On 5 June 2007, I received from the Commission a CD-ROM with annexes to its opinion, which I forwarded to you along with this opinion, inviting you to make observations.

On 8 and 28 June 2007, I received applications for public access to documents relating to your complaint. On 6 and 11 July 2007, I granted the requested access to the above-mentioned documents.

On 30 July 2007, I received from you further information related to your complaint, as well as a "provisional" version of your observations. On 20 August 2007, I informed you that I have



decided to return to you the "provisional" version of your observations and invited you to submit, as soon as possible, and in any case, by no later than 1 October 2007, a definitive version of your observations.

On 28, 29 and 31 August 2007, I received further applications for public access to documents related to your complaint.

On 6 September 2007, I received another CD-ROM from the Commission with annexes to its opinion.

On 10 September 2007, I received the final version of your observations.

On 20 September 2007, I granted access to the above-mentioned documents. I also informed the Commission of the above and sent it your observations, for information purposes.

On 25 September 2007, I received a letter from the Commission concerning the CD-ROM received on 6 September 2007.

On 1 October 2007, I received a request for public access to your observations on the Commission's opinion.

On 2 October 2007, the Commission contacted my services by telephone regarding issues related to your complaint.

On 10 October 2007, I forwarded to you the CD-ROM received on 6 September 2007 and the Commission's letter, received on 25 September 2007, and invited you to inform me, as soon as possible, whether you wanted to make any observations on the new information contained in the CD-ROM.

On 17 October 2007, I responded positively to the request for public access to your observations.

On 19 February 2008, you requested information about the state of play of your complaint, to which I replied on 27 February 2008.

I am now writing to let you know of the results of my inquiry.

Because of the volume of your complaint and the evidence collected during the inquiry, I decided to apply the following structure to my decision on your complaint:

The part entitled " **THE COMPLAINT** " contains a summary of the facts as provided by you in the complaint. *

In the part entitled " **THE INQUIRY** ", the facts provided by the Commission are summarised in the subsection " **The Commission's opinion** ". *



The part entitled " **THE DECISION** " contains, in summary form, the arguments you submitted in support of the allegations and claims formulated in your original complaint, as well as the additional arguments you presented in your observations. This part also includes and summarises the Commission's arguments referring to your allegations and claims, as provided in its opinion on the complaint.

THE COMPLAINT

On 28 November 2006, the complainant lodged a complaint with the European Ombudsman.

The complainant alleged that, during the adoption process of the draft Regulation on tariffs for international roaming services, the Commission failed:

- to conduct a public consultation properly;
- to carry out an impact assessment properly.

In support of the first allegation, the complainant argued that the Commission: (a) violated its own minimum standards on public consultations; and (b) submitted different versions of the proposal to public and inter-service consultations respectively.

In support of the second allegation, the complainant argued that the Commission: (a) did not comply with its own Impact Assessment Guidelines; (b) used incorrect market data; (c) conducted only a partial analysis; and (d) did not take any initiative to correct the impact assessment undertaken.

The complainant claimed that the Commission should:

- respect its own minimum standards as regards public consultations;
- comply with its own Impact Assessment Guidelines;
- where possible, take the necessary steps to remedy the mistakes made in the consultation process in question, by taking the correct market data into consideration, by conducting a full analysis, and by correcting the impact assessment.

According to the complainant, the facts to which the above allegations and claims refer are, in summary, as follows.

Background

On 8 February 2006, the Commissioner for Information Society and Media announced the Commission's intention to propose a Regulation on tariffs for international roaming services (the "Regulation"). According to the Commission, an impact assessment (the "Impact Assessment") was due to be carried out and the Regulation to be adopted before the second half of 2007.

On 20 February 2006, the Commission launched a general (first) public consultation on the Regulation. The public consultation consisted of a call to comment on three general questions (1). Contrary to what had been initially announced, the Commission decided not to hold a separate industry consultation. Interested parties from the industry had, therefore, to submit



their views in the context of the general public consultation. The deadline for submitting comments was 17 March 2006, that is, just over three weeks from the launch of the consultation. The Commission subsequently extended the deadline for comments to 22 March 2006, thus establishing a four-week period for participation. When the first consultation was closed, stakeholders were uncertain about the Commission's next procedural steps.

On 28 March 2006, that is, only three working days after the end of the first public consultation, the Commissioner for Information Society and Media announced its results. She further made known her intention to proceed with the Regulation.

On 3 April 2006, much to the general surprise of stakeholders, the Commission decided to open a second consultation. It issued a short document summarising, *inter alia*, the objectives and the scope of the Regulation, as well as the broad concepts underlying it, and confirmed that an Impact Assessment would be conducted.

On 12 May 2006, that is, after giving six weeks for market players to submit contributions, the Commission closed the second consultation period.

On 18 May 2006, a group of the complainant's advisors met the Commission. According to the complainant, its advisors informed the Commission that roaming retail and wholesale revenues amounted to a figure of EUR 8.5 billion in the European Union, which was at the time composed of 25 Member States. This information was also attached to notes accompanying slides presented to the Commission during the meeting.

On 19 May 2006, the Commission asked the complainant's advisors, by e-mail, to provide it with the "*underlying volume estimate*" used for arriving the total revenues figure of EUR 8.5 billion.

On 23 May 2006, the complainant sent a hardcopy of the slides presented in the meeting of 18 May to the Commission. However, inadvertently, the hardcopy did not contain the notes to the slides. Note 3 to slide 5 clearly stated that the figure of EUR 8.5 billion referred to both "*retail and wholesale revenues*" and corresponded to a volume of six million minutes.

On 30 May 2006, the Commission informed the complainant's advisors, by e-mail, that the slides sent by the complainant on 23 May 2006 did not contain the requested detailed volume data.

On 4 June 2006, the complainant's advisors, aware of the fact that the complainant had sent the Commission a softcopy of the slides, replied, by e-mail, with detailed instructions about how to print the notes from the softcopy of the slides. Since the Commission did not react to the above e-mail, the complainant assumed that the Commission had been successful in reviewing the slides in accordance with the above instructions.

On 12 July 2006, the College of Commissioners adopted a proposal for a Regulation of the European Parliament and of the Council on roaming on public networks within the Community and amending Directive 2002/21/EC on a common regulatory framework for electronic



communications networks and services (the "Proposed Regulation") (2) . It further submitted the Proposed Regulation to Parliament, under the co-decision procedure of Article 251 of the EC Treaty, and released an Impact Assessment.

On 18 and 27 September, and 3 October 2006, the complainant wrote to the Commission about its usage of incorrect figures with respect of the size of the market in its Impact Assessment.

On 12 October 2006, the Commission replied, by letter, arguing that the figures in question had been provided by the complainant, thus maintaining its position as regards the size of the market.

THE INQUIRY

The Commission's opinion

The Commission referred to persistent concerns relating to roaming services that had been expressed by national and European consumer and user groups, National Regulatory Authorities ("NRAs"), members of the European Parliament ("MEPs"), and some electronic communications operators. The Commission stated that it had long been aware of the need to address the high wholesale and retail prices for international roaming services provided across the Community (3) .

Since the mid-1980s, action has taken at the Community level to promote competition in the provision of telecommunications networks and services and to harmonise the applicable legislation.

On 1 January 1998, the telecommunications sector became fully liberalised and Member States were required to remove all special and exclusive rights for the provision of telecommunications networks and services.

In 2000, after carrying out a sector inquiry covering national and international roaming services, the Commission became aware that, despite the liberalisation of the market and the significant decreases in prices for many other services, prices for roaming remained high and in some cases had even increased. This led the Commission to open proceedings against certain mobile operators in the United Kingdom and Germany for infringement of Article 82 of the EC Treaty.

In 2002, the regulatory framework was modified through the adoption of a package of five directives (4) , applicable to the wider electronic communication sector (the "2002 regulatory framework"). One of the cornerstones of the 2002 regulatory framework is the market review process. Under this process, NRAs (i) define and analyse relevant markets susceptible to *ex ante* regulation; (ii) determine whether or not competition is effective in those markets; (iii) designate undertakings with significant market power ("SMP") in cases where competition is found to be effective; and (iv) impose appropriate *ex ante* obligations on those SMP operators. At the time of the adoption of the 2002 regulatory framework, international roaming was also recognised as an issue for potential *ex ante* regulation.



In 2005, the European Regulators' Group (5) ("ERG") noted that (i) retail charges were very high without clear justification; (ii) this appeared to result both from high wholesale charges levied by the foreign host network operator and also, in many cases, from high retail mark-ups charged by the customer's own network operator; (iii) reductions in wholesale charges were often not passed on to the retail customer; and (iv) consumers often lacked clear information with respect to the charges for roaming. The Commission therefore warned consumers about very high international roaming tariffs and the lack of transparency in international roaming charges. The Commissioner for Information Society and Media also underlined her personal concern about the level of international roaming charges and expressed her hope that reductions would come about through the forces of competition. The Commission further launched a website to inform consumers about charges affecting roaming, which, in some cases, were manifestly excessive, and about the unjustifiable variation in prices across the Community for calls with the same characteristics.

In December 2005, Parliament adopted a resolution calling on the Commission " *to develop new initiatives in order to reduce the high costs of cross-border mobile telephone traffic* ". ERG further noted that roaming created an apparent case of consumer detriment that could not be solved by NRAs on the basis of the 2002 regulatory framework.

On 8 February 2006, considering the numerous warnings to industry to bring international roaming prices more into line with the real costs of service provision and taking note of the lack of progress in this regard, the Commissioner for Information Society and Media announced the Commission's intention to develop and adopt an EU regulation on international roaming charges.

On 20 February 2006, the Commissioner for Information Society and Media announced the opening of a public consultation on the new regulatory initiative concerning international roaming tariffs. The Commission sought a general feedback on broad principles. The scope of the consultation was also general. It was for this reason that only three questions were put to stakeholders. It allowed the Commission to collect the widest possible range of information and opinions on a potential regulation relating to the pricing of international roaming services. The announcement of the first public consultation was posted the same day on the website of DG Information Society and Media.

On 22 March 2006, the first round of public consultations was closed. The Commission services received 51 responses from different stakeholders, that is, ERG, mobile network operators, fixed network operators, associations of consumers, associations of fixed and mobile network operators, consumers, and Member States.

On 23/24 March 2006, the European Council highlighted, in its conclusions relating to the need for focused, effective and integrated information and communications technology (ICT) policies at both the European and national level, the importance of competitiveness in reducing roaming charges. It went on to point out that such policies were necessary in order to achieve the renewed Lisbon Strategy goals of economic growth and productivity.



On 28 March 2006, the Commissioner for Information Society and Media announced that a second public consultation would take place.

On 3 April 2006, the Commission opened the second round of public consultation whereby it submitted for comments a proposal for a regulation that had been developed after taking into consideration the results of the first public consultation. The 20-page document that constituted the basis of the second public consultation included a concrete outline for a regulation and a summary of the contributions received in reply to the first round of consultation. The proposal submitted to the second public consultation would apply to wholesale and retail tariffs for international roaming services and would eliminate charges related to receiving calls while roaming. In particular, prices for international roaming would be linked to the prices paid by roaming customers for equivalent calls made on their home networks. On the same day, the Commission launched its updated website relating to international roaming tariffs.

On 21 April 2006, the Commission sent a letter to 17 of the largest European mobile network operators, inviting them to provide information for, *inter alia*, the purposes of the Commission's impact assessment.

On 4 May 2006, Parliament held a public hearing with the participation of three mobile operators, the European Consumers' Organisation and the ERG. This hearing concerned international roaming and the economic implications of the Commission's proposal submitted to the second public consultation.

On 12 May 2006, the second round of public consultation was closed. In response to this second call for comments, the Commission received 101 contributions.

During the whole period of the public consultations, the Commissioner's Cabinet held a series of meetings with 27 stakeholders, including a wide range of mobile network operators and heads of NRAs. A meeting of the Commissioner for Information Society and Media with the complainant was scheduled for 14 March 2006, but the latter cancelled it on short notice. As far as the Commission services were concerned, these contacts included 44 bilateral or multilateral meetings with operators, 2 with the complainant, and 4 with the ERG, which had established a special project team to provide input to the Commission.

On the basis of this public hearing, the contributions made in the second public consultation, and the 74-page document submitted by the complainant, the Commission, acting on the basis of Article 95 of the EC Treaty, adopted, on 12 July 2006, the Proposed Regulation and its Impact Assessment.

The complainant's observations

The complainant's observations essentially contain its counter-arguments to the arguments presented in the Commission's opinion. They appear in summary form in the part entitled "**THE DECISION**".

THE DECISION



1 Preliminary remarks

1.1 The European Ombudsman understands from the facts of the present complaint that, in summary, at the time of its complaint to the Ombudsman, the complainant opposed the proposal for a Regulation of the European Parliament and of the Council on roaming on public networks within the Community and amending Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (the "Proposed Regulation") (6) . In this regard, the Ombudsman notes that, in the meantime, that is, on 30 June 2007, Regulation (EC) 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC (7) (the "Final Regulation") entered into force.

The Ombudsman recalls that he is empowered to investigate potential instances of maladministration in the actions of the Community institutions or bodies and that his inquiries do not, therefore, examine the merits of legislative acts of the Communities. The Ombudsman also takes the view that his inquiries should not examine the merits of legislative proposals presented by the Commission to the Community legislator. The Ombudsman's inquiry in the present case therefore concerns only the administrative activity of the Commission in preparing the Proposed Regulation and does not examine the merits either of the Proposal, or of the Regulation finally adopted.

1.2 The Ombudsman further notes that many of the arguments and counter-arguments advanced by both the complainant and the Commission during the present inquiry amount to an in-depth economic analysis of the mobile telecommunications market data. In this regard, the Ombudsman points out that, in cases such as the present, the analysis he is able to conduct of such arguments is necessarily limited. In particular, the Ombudsman considers that he should not seek to carry out a substantive review of the Commission's economic analysis. In this regard, the Ombudsman recalls the case-law, according to which judicial review is limited in matters involving an appraisal of complex economic situations (8) . The Ombudsman considers it appropriate to adopt the same approach in his inquiry.

2 The allegation of failure to conduct a Public Consultation properly and related claim

2.1 On 8 February 2006, the Commissioner for Information Society and Media publicly announced the Commission's intention to develop and adopt an EU regulation on international roaming charges. The Commission held a first public consultation between 20 February 2006 and 22 March 2006 and a second one between 3 April 2006 and 12 May 2006. As a result, on 12 July 2006, the Commission adopted the Proposed Regulation accompanied by an impact assessment (the "Impact Assessment"), on the basis of Article 95 of the EC Treaty.

The complainant alleges that the Commission failed to conduct the public consultations properly.

In support of this allegation, the complainant argues, in summary, that the Commission (i) violated its own minimum standards on public consultations as regards clear content, publication, and deadlines for participation; and (ii) submitted different versions of the proposal to, respectively, public and inter-service consultations.



The complainant claims that the Commission should respect its own minimum standards as regards public consultations.

2.2 In its opinion, the Commission stated, in summary, that its public consultations complied fully with the "Communication from the Commission towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission" (the "Communication on Consultations") (9) , and the Impact Assessment Guidelines of 15 June 2005 (the "Impact Assessment Guidelines") (10) .

The Commission took the view that the content of its first and second calls for public comments was clear, concise and comprehensible to the general public and the industry, and included all the information required by the Communication on Consultations and the Impact Assessment Guidelines. It further considered that, as made evident by the wide participation of interested parties in the consultations and the significant media coverage of these processes, the calls for comments were published properly and as transparently as possible.

As regards the time-limits for participation in the consultation, the Commission referred to the Communication on Consultations and took the view that the eight-week time-limit for participating in consultations was not absolute. It considered in this regard that by applying shorter deadlines, it had found an appropriate balance between the scope and length of the consultation and the obligation for the Commission to work in an efficient manner.

Finally, as regards the alleged difference between the proposal for a Regulation submitted for the second consultation (the "Proposal submitted for the second consultation") and the Proposed Regulation submitted to inter-service consultation and finally adopted, the Commission stated that, in its view, there were no fundamental differences between these two documents and that there was no obligation on its part to submit that later version of the proposal for an additional consultation.

2.3 At the outset, the Ombudsman points out that all the complainant's arguments in support of its allegation refer to the relevant provisions of the Communication on Consultations and of the Impact Assessment Guidelines which, in its view, were not complied with.

The Ombudsman will deal with all these arguments separately. He will start his assessment by (i) recalling the above relevant *provisions* . He will then take a stance on the complainant's and the Commission's arguments under the following headings: (ii) *the content of the first consultation* ; (iii) *the content of the second consultation* ; (iv) *the publication of both consultations* ; (v) *the time-limits for participating in both consultations* , and (vi) *the different versions of the proposal for a Regulation and the possibility of a third consultation* . Finally, he will take a position on (vii) the complainant's *claim* .

(i) The relevant provisions

2.4 The Communication on Consultations establishes the minimum standards on how the public consultations shall be carried out in order to be transparent. It " *lays down a number of general principles that should govern its relations with interested parties and a set of minimum standards for the Commission's consultation processes* " (11) . It defines " *consultations* " as "



those processes through which the Commission wishes to trigger input from outside interested parties for the shaping of policy prior to a decision by the Commission. " (12) It further provides that the consultation process " must (...) be transparent, both to those who are directly involved and to the general public. " (13)

2.5 As regards the content of the consultations, according to the Communication on Consultation, all communications relating to consultation should be clear and concise, and should include all necessary information to facilitate responses (14) . That means that the information in publicity and consultation documents should include:

" [(i)] [a] summary of the context, scope and objectives of consultation, including a description of the specific issues open for discussion or questions with particular importance for the Commission; [(ii)] [d]etails of any hearings, meetings or conferences, where relevant; [(iii)] [c]ontact details and deadlines; [(iv)] [an] [e]xplanation of the Commission's processes for dealing with contributions, what feed-back to expect, and details of the next stages involved in the development of the policy; [and (v)] [i]f not enclosed, reference to related documentation (including, where applicable, Commission supporting documents). "

2.6 As regards the publication, the communication provides the following minimum standards:

" The Commission should ensure adequate awareness-raising publicity and adapt its communication channels to meet the needs of all target audiences. Without excluding other communication tools, open public consultations should be published on the Internet and announced at the "single access point".

For addressing the broader public, a single access point for consultation will be established where interested parties should find information and relevant documentation. For this purpose, the Commission will use the 'Your-Voice-in-Europe' webportal [<http://europa.eu.int/yourvoice> [Link]].

However, at the same time it might be useful to maintain more traditional alternatives to the Internet (e.g. press releases, mailings). Where appropriate and feasible, the Commission should provide consultation documents in alternative formats so as to make them more accessible to the disabled. " (15)

2.7 As regards the time-limits for participation in the consultation, the Ombudsman, first, notes that the Communication on Consultations provides that "*[t]o be effective, consultation must start as early as possible*" (16) . He also notes that its "Minimum Standards" provide that:

" [t]he Commission should provide sufficient time for planning and responses to invitations and written contributions. The Commission should strive to allow at least 8 weeks for reception of responses to written public consultations and 20 working days for meetings.

The main rule is to give those participating in Commission consultations sufficient time for preparation and planning.



Consultation periods should strike a reasonable balance between the need for adequate input and the need for swift decision-making. In urgent cases, or where interested parties have already had sufficient opportunities to express themselves, the period may be shortened. " (17)

The Impact Assessment Guidelines, in turn, provide that " *a balance has to be struck between the scope and length of the consultation and the obligation for the Commission to work in an efficient manner. " (18)*

2.8 As regards the potential need to make further consultations, the Impact Assessment Guidelines further state that:

" consultation should be seen as a recurring need in the policy development process rather than a 'one-off' event. Depending on the issue at stake and the consultation objectives, you may therefore find it useful to arrange for a series of consultations as the proposal develops. For example, an initial consultation might be held to ascertain stakeholder perceptions about the nature of the problem; a subsequent consultation might ask stakeholders for their views about the possible range of options, while a third round of consultation might aim to sound out stakeholders on the likely acceptability of any preferred option. " (19)

(ii) The content of the first consultation

2.9 As regards the content of the first consultation, the complainant argued that, contrary to the provisions described in point 2.5 above, this consultation was limited to only three general questions and did not give any indication as to the substance of the contemplated measures.

2.10 The Commission explained in this respect that, in summary, the first call for comments was intended to (i) raise the general problem of unjustifiably high roaming prices; (ii) explain the Commission's intention to legislate in this field as rapidly as possible and the legal nature of the regulation to be developed; and (iii) enable the Commission to gather more information in order to develop such a regulation and an impact assessment. In order to achieve the above objectives, the Commission decided to pose three general questions which, however, would be " *comprehensible for consumers and the industry* ". It also specified the email address to which contributions could be sent and the deadline for responses. As a result, the Commission received 51 contributions from interested parties, including a 23-page document submitted by the complainant. According to the Commission, this demonstrated that the consultation was sufficiently clear to generate a substantive response.

2.11 The Ombudsman examined the document "Regulation of international roaming charges - Call for comments (1st phase 20 February - 22 March 2006)" (20) and notes that it had the following wording:

" The European Commission believes that consumers continue to pay unreasonably high prices for using their mobile phone abroad. This is reducing cross-border use of mobile phones and presents an obstacle to the European market for electronic communications. For that reason the Commission services have started work on an EU regulation on international roaming charges which the Commission intends to propose to the European Parliament and to the Council as



rapidly as possible.

From its entry into force - which could be in the second part of 2007 - it will have immediate effect in all 25 Member States and will not require further transposition into national law.

To assist with the preparation of this Regulation, and with the corresponding impact assessment, the Commission Services would welcome views from interested parties on the following questions:

- What form should a regulation of international roaming charges take i.e., should it be targeted at wholesale level charges or retail level or both?*
- What regulatory and pricing mechanism (or control) would achieve the desired objectives of such a regulation in the most effective and simple manner?*
- What is your view on the impacts, positive and negative, that regulation of international roaming charges at EU level could have?*
- In general economic and social terms?*
- On industry players?*
- On consumers? "*

2.12 The Ombudsman further notes that the Commission did not deny the complainant's classification of the questions of the first public consultation as "*general*". Instead, it justified why it decided to pose those three general and easily understandable questions. In light of the above wording of the first Consultation, the Ombudsman considers that the Commission's justification described in point 2.10 above is reasonable.

Moreover, it may be expected that the Commission would provide general explanations concerning the foreseen measures, which would correspond to the general questions asked. If the consultation had to be understood by non-specialists, that is, the general public, it is reasonable to expect that the questions and the information provided therein should not be unnecessarily technical. In sum, the information provided by the Commission in the first consultation appears to correspond to the requirements of the Communication on Consultations as regards the Commission's self-imposed duty of conciseness and clarity in the public consultations (point 2.5 above).

(iii) The content of the second consultation

2.13 As regards the content of the second consultation, the complainant argues that, again contrary to the provisions described in point 2.5 above, it only (i) set out the pricing principles that the Commission proposed to introduce at the retail level and (ii) contained a limited analysis of the extensive responses received in the course of the first consultation.

2.14 According to the Commission, this consultation served the purpose of soliciting the views



of interested parties on a potential proposal for a regulation and impact assessment. It therefore (i) included a proposal and an extensive summary of contributions received in response to the first call for comments. Further, it (ii) clearly specified that, on the basis of the results of the first public consultation, the Commission intended to come forward, before summer 2006, with a proposal to Parliament and the Council for a regulation to be adopted under Article 95 of the EC Treaty. It also invited interested parties to provide comments on a specific outline for a regulation. Furthermore, it explained (iii) the reasons leading the Commission to propose the adoption of a regulation; (iv) the objectives of the proposed regulation; and (v) the scope of such a regulation with respect to roaming calls or calls received while roaming. It also (vi) specified the precise mechanism of a regulation, specifying that it would apply to the making of roaming calls to at both wholesale and retail levels, as well as to received calls. In addition, the Commission explained that (vii) it was preparing an impact assessment. Finally, it (viii) referred to the e-mail address to which contributions could be sent and the deadline for responses. As a result, the Commission received 101 contributions, including a 74-page document submitted by the complainant.

2.15 The Ombudsman examined the document "Second Phase Public Consultation on a Proposal for a Regulation (EC) of the European Parliament and of the Council on mobile roaming services in the Single Market" (21) .

As compared to the document of the first consultation, the document submitted under the second consultation is rather extensive and appears to have been correctly described by the Commission in the terms summarised in point 2.14 above. In this regard, the Ombudsman further notes the Commission's explanations that, in summary, the second public consultation also proposed options as regards wholesale pricing, on which stakeholders were invited to express their views. The Ombudsman cannot therefore agree with the complainant that the document referred only to pricing principles at the retail level, even if it is clear that the high level of roaming prices was the main reason for the Commission's proposal and therefore that the consultation should reasonably have focussed on this point (22) .

Moreover, the Ombudsman notes that, in the second consultation, the Commission summarised in a separate annex to that document the responses it received to the first consultation (23) . The Ombudsman considers that such a form of presentation of 51 contributions, presumably including a sizeable amount of rather extensive documents, appears to be justified. Moreover, it cannot be reasonably expected that the summary could reflect in their entirety the responses in question. The Ombudsman does not therefore consider that, in its second consultation document, the Commission's analysis of the extensive responses received to the first consultation was limited.

2.16 In light of his findings in points 2.12 and 2.15 above, the Ombudsman takes the view that the Commission's position that the content of its first and second calls for comments included all the information required by the Communication on Consultations appears to be reasonable. The Ombudsman therefore finds no maladministration as regards this aspect of the complaint.

(iv) The publication of the first and the second consultations

2.17 According to the complainant, the Commission limited itself to posting the first consultation



on the website of the Directorate-General ("DG") for Information Society and Media and neglected to issue a press release announcing the consultation. It argued that this was contrary to the relevant provisions of the Communication on Consultations.

2.18 The Commission explained that it had proceeded as transparently as possible and that the publication of both calls for comments was fully in line with the "Minimum standards" of the Communication on Consultations.

According to the Commission, the first public consultation was published on the "Information Society Consultations" page of the DG Information Society and Media website. That page is available from the starting page of the "Your-Voice-in-Europe" webportal ("Consultations by policy activity"). In addition, on 20 February 2006, DG Information Society and Media issued on its website a press release related to the "Call for comments on an EU Regulation on international roaming charges". This was done by means of the DG's "Newsroom update" link dedicated to news relating to the DG. More than 11000 subscribers, including many stakeholders, received these regular Newsroom Updates by e-mail.

The second public consultation was also published on the "Information Society Consultations" link of the DG Information Society and Media website, which is available from the starting page of the "Your-Voice-in-Europe" website ("Consultations by policy activity"). In addition, on 3 April 2006, the Commission issued a press release on the opening of the second phase of public consultations, which was entitled "New EU Regulation on international mobile roaming: Commission opens final phase of consultations" (IP/06/420).

DG Information Society and Media has further put in place and operated a comprehensive specialised website dedicated to all Commission activities related to international roaming. These included (i) consultations; (ii) a comparative list of international roaming prices in the (then) 25 Member States of the European Union, which was updated every six months; (iii) fact sheets on international roaming; (iv) the texts of the Proposed Regulation and of the Impact Assessment; and (v) the *Eurobarometer* survey on international mobile roaming charges.

2.19 The Ombudsman first notes, in summary, that the complainant did not contest, in its observations, the above factual arguments made by the Commission.

2.20 Second, the Ombudsman understands that, in the complainant's view, the Commission did not comply with the requirement of the Communication on Consultations. According to the Communication on Consultations, publications should, in summary, not only be made through the Internet but also by using more traditional alternatives, such as press releases. According to the complainant, the Commission failed to do so.

2.21 The Ombudsman points out however that the relevant provisions of the Communication on Consultations, quoted previously in point 2.6 above, provide that " (...) *at the same time* it might be useful *to maintain more traditional alternatives to the Internet (e.g. press releases, mailings)*. " It appears therefore that the use of these more traditional means like press releases was in no way mandatory. Moreover the Ombudsman notes, on the basis of the Commission's



explanation, that both calls for comments appear to have been published in two separate press releases. In this regard, nevertheless, the Ombudsman notes that the first one, dated 20 February 2006, was published on the DG Information Society and Media website only. The second one, dated 3 April 2006, was an "IP/XX/XXX" (24) document and therefore was, in principle, accessible to the general public, through the "EU press room" webpage, and searchable through the "RAPID" database, of the Europa website.

The question arises therefore as to whether the above way of publishing the press releases was adequately tailored to the needs of the groups targeted by them. In this regard, reference should be made to the general purpose of the Communication on Consultations, that is, to ensure transparency of the consultation process.

2.22 The Ombudsman considers that the mere fact that the Commission appears to have adopted two different approaches to providing publicity for the two press releases concerning the two public consultations does not constitute lack of transparency. In this regard, the Ombudsman notes that, according to the Commission, a significant number of registered subscribers received, by e-mail, the "Newsroom Update", where the press release of 20 February 2006 had been posted.

2.23 The Ombudsman finally notes in this respect the complainant's position, expressed in its observations, that "*never a regulatory initiative of such impact on the industry in the communications sector has been launched with so little publicity*".

The Ombudsman cannot agree with the complainant's above view. In this regard, he recalls his findings in case 948/2004/OV (25), to which the Commission referred in its opinion. He also recalls the Commission's explanation in its opinion that the public consultations had been published on the "Information Society Consultations" page of the DG Information Society and Media website, which was available from the starting page of the "Your-Voice-in-Europe" webportal ("Consultations by policy activity"). The Commission has also emphasised that a specialised website, dedicated to all of the activities of the Commission relating to international roaming, had been put in place by DG Information Society and Media.

2.24 In view of the above findings, the Ombudsman considers that the Commission's position that, in summary, its method of publication complied with the "Minimum standards" set out in the Communication on Consultations appears to be reasonable. In light of the foregoing, the Ombudsman finds no maladministration as regards this aspect of the complaint.

(v) The time-limits for participation in the consultations

2.25 The complainant pointed out that, although there was no particular urgency that could have justified departure from the eight-week participation deadline set out in the Communication on Consultations, the first consultation lasted for only four weeks and the second for less than six weeks.

2.26 According to the Commission, consultation periods should strike a reasonable balance between the need for an adequate input and the need for swift decision-making. Consequently, the eight-week consultation period provision is not absolute. Furthermore, the Communication



on Consultations itself provides for two situations where the indicative eight-week participation period would not apply. This is also supported by the provision in the Impact Assessment Guidelines that "*a balance has to be struck between the scope and length of the consultation and the obligation for the Commission to work in an efficient manner*".

The Commission takes the view that it had struck a reasonable balance and taken appropriate account of the "*relative urgency*" and of the fact that the interested parties had already had sufficient opportunities to express themselves.

2.27 The Ombudsman first notes that the Communication on Consultations foresees that the period "*for reception of responses to written public consultations*" should last "at least 8 weeks" (emphasis added). In the Ombudsman's view, any shorter period of consultation may reasonably undermine the entire concept of public consultation. It is difficult to reconcile the possibility that the public may simply have not enough time to reply, with the assumption that it was, nevertheless, consulted.

The Ombudsman further points out that, in the present case, the participation period was 50% shorter than the eight weeks foreseen in the Communication on Consultations in the first consultation and 25% shorter in the second consultation.

2.28 The Ombudsman also notes that the Commission argued, in summary, that in light of the applicable rules, it had no obligation to justify or give reasons, in the public consultation documents, for any departure from the recommended eight-week time frame for public consultation. The Ombudsman however considers that public consultations are important for the Commission in its role as the drafter of proposals for legislation. Public consultations are also important for citizens in general, who as individuals or groups are affected by such legislation. The Commission should take due account of the interests of such individuals or groups in participating in the consultation process. As such, the Commission should, in particular, abstain from reducing the normal deadlines for submitting comments without first providing an appropriate justification based on the grounds set out in its Communication on Consultations. Furthermore if the Commission considers it necessary to reduce those deadlines, it should justify this reduction at the moment the consultation is launched, preferably in the consultation documents themselves, with a view to enhancing transparency and citizens' trust in the overall consultation process.

2.29 Moreover the Ombudsman recalls that the Communication on Consultations refers to the possibility of reducing the minimum eight-week time period foreseen for consultation in alternative terms: "*[i]n urgent cases, or where interested parties have already had sufficient opportunities to express themselves, the period may be shortened*" (emphasis added).

2.30 According to the Commission, its departure from the eight-week participation period indeed relates to both (i) imperatives of urgency and (ii) events during which interested parties had had sufficient opportunities to express themselves.

2.31 As regards the first explanation, the Ombudsman notes that the Commission stated that (i)



it had been urged by Member States, National Regulatory Authorities ("NRAs") and by Parliament to propose new regulatory measures on roaming, and (ii) the unjustifiably high level of international roaming prices and its consequences for the completion of the Single Market, and for the competitiveness of the European Community as a whole, clearly called for such new measures.

In relation to point (i), the Ombudsman considers that pressure from those who are already well-placed to make their views known to the Commission cannot justify limiting the opportunity, through public consultation, for others to make their views known.

In relation to point (ii), the Ombudsman understands that, in the present case, the urgency invoked by the Commission should have meant that if the first consultation were to have lasted four weeks longer than it actually did, and the second consultation two weeks longer, this would have had an adverse impact on the Commission's ability " *swift[ly]* " to adopt the proposal for a regulation to be submitted for Parliament's deliberation. On the basis of the explanation provided to him by the Commission however, the Ombudsman is not convinced that this would have been the case. It is indeed far from evident and the Commission has not been able to justify why the extra six weeks delay, which would have resulted from using the normal consultation period, would have had a negative impact on its decision to propose a Regulation and on the adoption of that Regulation by the Community legislator.

2.32 As regards the second explanation, the Ombudsman understands that, according to the Commission, interested parties had sufficient opportunities to express themselves before the date of publication of each of the consultations, that is, before 20 February 2006 as regards the first consultation, and before 3 April 2006 as regards the second consultation.

The Ombudsman notes that the Commission referred in this respect, first, to investigations initiated by the European Regulatory Group ("ERG") in December 2004 by means of a questionnaire aimed at establishing how mobile network operators behave both as purchasers and providers of wholesale international roaming services. It also referred to a Parliamentary hearing, held on 16 March 2005, concerning, essentially, the transparency of international roaming prices, a better application of competition rules, or the opportunity for further regulatory action. This Parliamentary hearing was attended by MEPs, a mobile network operator, the International Telecommunications Users Group, and the Irish NRA.

The Ombudsman is not convinced by the Commission's second explanation either. He first points out that, in his understanding, the public consultations on such an important subject as the prices of roaming services, which affect the life of many citizens, are targeted at both the general public and the economic actors involved in roaming, such as, *inter alia*, industry and trade associations. In this regard, the Ombudsman emphasises that, according to the Communication on Consultations:

" [d]epending on the issues at stake, consultation is intended to provide opportunities for input from representatives of regional and local authorities, civil society, organisations, undertakings and associations of undertakings, the individual citizens concerned, academics and technical



experts, and interested parties in third countries. " (26)

Relatedly, "[f]or consultation to be equitable, the Commission should ensure adequate coverage of (...) those affected by the policy; those who will be involved in implementation of the policy; or bodies that have stated objectives giving them a direct interest in the policy. " (27)

The Ombudsman is thus not convinced that all interested parties had the opportunity to express their views before the first call for comments was launched. As regards stakeholders, even on the assumption that some of them had the opportunity to express themselves in reply to the ERG's questionnaire and/or during the Parliament's hearing, the Ombudsman notes that such an opportunity would have been exercised about a year before the launching of a call for comments that included a description of the proposed reforms. It would therefore appear that it cannot be excluded that the circumstances or the issues consulted upon previously were different or may have changed, in the meantime.

2.33 On the other hand, in the event that the circumstances did not substantially change within the year that preceded the publication of the public consultations, the Ombudsman still does not consider that the Commission has demonstrated the existence of any urgency that would have justified its decision to shorten the participation period in such a considerable manner.

2.34 After carefully considering the explanations offered by the Commission, the Ombudsman concludes that the Commission's decision to substantially shorten the public consultation periods below the normal minimum of eight weeks foreseen by the Communication on Consultations was not in accordance with the conditions laid down in that Communication on Consultations for departing from the normal consultation period.

Given that this instance of maladministration relates to facts of the past the Ombudsman considers that no possible solutions can be proposed to correct it by means of friendly solution or draft recommendation. He will, therefore, make a critical remark in this regard below.

(vi) The different versions of the proposal for a Regulation and the possibility of a third consultation

2.35 According to the complainant, the Proposed Regulation was fundamentally different from the proposal submitted to the second public consultation. The Commission had decided not to use the "Home Pricing Principle", whereby retail tariffs for roamed calls may not be higher than tariffs charged by the home operator for comparable domestic or international calls. Instead, it adopted the "European Home Market Approach", whereby retail tariffs would be capped on the basis of wholesale costs and wholesale tariffs unified across the European Union. The complainant took the view therefore that the final proposal should have thus been submitted to a further public consultation. In support of its view, it referred to the relevant provision of the Impact Assessment Guidelines (quoted in point 2.8 of the present decision).

2.36 The Ombudsman notes that the Commission does not take any stance on the complainant's position arguing, in summary, that, in the Proposed Regulation, the Commission abandoned the "Home Pricing Principle" of the proposal submitted to the second consultation and adopted the "European Home Market Approach".



The Commission does express the view however that the Proposed Regulation was not fundamentally different from the proposal submitted to the second public consultation. In this regard, it explained that the Proposed Regulation and the proposal submitted for the second public consultation both contained the safeguard relating to maximum price limits for the provision of roaming services for voice calls between Member States applied, at retail and wholesale level, to terrestrial mobile operators within the Community. Therefore, an extra call for comments was not needed. In addition, the Commission argued that this was not even appropriate because of potential "*consultation fatigue*".

2.37 The Ombudsman examined point "4.1 Roaming calls - retail" (28) of the proposal submitted to the second public consultation, as well as (i) point 1 ("Context of the proposal/ Grounds for and objectives of the proposal") (29) ; (ii) point 2 ("Consultation of interested parties and impact assessment/ Consultation of interested parties/ (...) Summary of responses and how they have been taken into account") (30) ; (iii) point 3 ("Legal elements of the proposal/ Summary of the proposed action") of the Explanatory Memorandum to the Proposed Regulation (31) ; and (iv) point 14 of the Preamble of the Proposed Regulation (32) . It would indeed appear that, as is argued by the complainant, the Commission departed from the "Home Pricing Principle" as set out in its proposal submitted to the second public consultation and, in its Proposed Regulation, adopted instead the "European Home Market Approach".

2.38 The Ombudsman notes that, according to the Commission, there was no fundamental difference between the two proposals because the proposal submitted for the second consultation also provided for the safeguarding of maximum price limits for the provision of roaming services for voice calls between Member States that apply, at retail and wholesale level, to terrestrial mobile operators within the Community. The Ombudsman considers that he is not in a position to assess whether such a difference is fundamental.

2.39 However, such an assessment does not appear to be relevant in light of the provisions of the Impact Assessment Guidelines, according to which "*a third round of consultation might aim to sound out stakeholders on the likely acceptability of any preferred option*" (emphasis added).

In this respect, the Ombudsman notes the Commission's view that, according to the Communication on Consultations and the Impact Assessment Guidelines, it had, in summary, no obligation to initiate a period of consultation with respect to the Proposed Regulation. He further notes the Commission's position that, in accordance with the Impact Assessment Guidelines, it needed to avoid "*consultation fatigue*" on the part of stakeholders (33) , and therefore decided not to consult "*on the changes in the details*".

2.40 The Ombudsman notes that the model of the Proposed Regulation, irrespective of whether or not it was fundamentally different from a model that had been subject to a previous consultation, provided for a principle which cannot be perceived as having previously been submitted to interested parties for comments in the context of the consultation process.



In this regard however, the Ombudsman notes, in summary, that, according to the Impact Assessment Guidelines, repeated or prolonged consultation should be avoided. The Ombudsman thus notes that to assert that the Commission has an obligation to consult on modifications possibly resulting from previous consultations could entail the risk of prolonging the consultation process indefinitely and hinder the decision-making process. The Ombudsman therefore takes the view that the Commission's position that, in summary, it needed to avoid "pitfalls" appears to be reasonable.

2.41 Relatedly, the Ombudsman notes the Commission's additional argument that it did not need to consult stakeholders on the Proposed Regulation and the Impact Assessment because (i) external interested parties had been sufficiently consulted before and during the pre-legislative phase and (ii) they had therefore contributed to the shaping of the Commission's policy prior to the adoption of the Proposed Regulation and the Impact Assessment.

2.42 As regards (i), the Ombudsman refers to his analysis in point 2.32 above of the Commission's argument relating to previous consultation of interested parties, and repeats that he cannot accept this argument.

2.43 As regards (ii), the Ombudsman notes however that, in addition to the two calls for comments, the Commission (a) invited, on 21 April 2006, 17 of the largest European mobile network operators to provide information in relation to the Impact Assessment; and (b) attended, on 4 May 2006, a Parliamentary meeting, also attended by three mobile operators, ERG (34), and the European Consumers' Organisation. In this regard, the Ombudsman notes that both of the above initiatives took place at a time when the second public consultation was still open (between 3 April and 12 May 2006).

Moreover, the Ombudsman recalls, in summary, that the Commission accepted several contributions after the expiry of the deadlines for participating in the consultations. According to its opinion, it also held over 40 meetings, including 2 meetings with the complainant (at the Cabinet level and at the level of its services), and with different stakeholders on the issues relating to the adoption of a proposal for a regulation and to its impact assessment. Those stakeholders comprised associations of market players, fixed and mobile network operators, consumer protection associations, Member States and NRAs.

In the Ombudsman's view, it not unreasonable to consider that issues concerning the merits of the "European Home Market Approach" compared to "Home Pricing Principle" may have been put forward and/or discussed by the external interested parties with the Commission during the above occasions.

In light of the above, the Ombudsman finds no maladministration as regards this aspect of the complaint.

(vii) The complainant's claim that the Commission should respect its own minimum standards as regards public consultations

2.44 In light of his findings in points 2.12, 2.15, 2.24, 2.34, and 2.43 above, the Ombudsman does not consider that further inquiries are necessary into the complainant's above claim.



3 The allegation of failure to conduct a proper Impact Assessment and related claim

3.1 At the outset, the Ombudsman notes that Impact Assessment Guidelines "*set procedural rules for [Impact Assessment] in the Commission and explain how to practically conduct the required analysis.*" (35)

The complainant alleges that, during the adoption process of the draft Regulation on tariffs for international roaming services, the Commission failed to carry out an impact assessment properly (36) .

The complainant claims that the Commission should comply with its Impact Assessment Guidelines.

The complainant also claims that the Commission should take the necessary steps, where possible, to remedy the mistakes made in the consultation process in question, by taking into consideration the correct market data, conducting a full analysis, and correcting the impact assessment.

3.2 In its opinion, the Commission took, in summary, the view that the Impact Assessment complied fully with the Impact Assessment Guidelines.

3.3 The Ombudsman notes the complainant's arguments that the Commission (i) *did not comply with its own Impact Assessment Guidelines* ; (ii) *used incorrect market data* ; (iii) *conducted only a partial analysis* ; and (iv) *did not take any initiative towards correcting the impact assessment* .

The Ombudsman will deal with each of the above arguments of the complainant separately. He will finally look into (v) the complainant's *related claims that the Commission should* (a) *comply with its Impact Assessment Guidelines* and (b) *take the necessary steps, where possible, to remedy the mistakes made in the consultation process in question, by taking into consideration the correct market data, conducting a full analysis, and correcting the impact assessment* .

(i) Compatibility with the Impact Assessment Guidelines

3.4 The complainant criticises the Commission for, allegedly, not submitting to public consultation either its i mpact assessment, or any of its specific elements.

3.5 The Commission countered by arguing again that all interested parties had been consulted on the Impact Assessment before and during the pre-legislative period. It further emphasised that the first round of public consultation was intended to gather general feedback on broad principles in order "*[t]o assist [with] the preparation of this Regulation, and with the corresponding Impact Assessment*". In particular, the third question of the consultation solicited the views of stakeholders "*on the impacts, positive and negative, that regulation of international roaming charges at EU level could have in general economic and social terms, - on industry players, - on consumers*". The second public consultation referred clearly to the fact that the Commission, parallel to the drafting of a regulation, was preparing an impact assessment, taking into consideration, among other things, (i) potential outcomes for users and consumers in terms of prices; (ii) the financial impact on the sector; (iii) the effects on



competition; (iv) the effects on levels of service at retail and wholesale level; (v) enforceability at European and national level; and (vi) the overall impact on the competitiveness of the European economy. Stakeholders were invited to provide comments on all of these. Both public consultations therefore had made clear that information and data were sought to prepare a regulation and to form the basis for a sound impact assessment.

Finally, according to the Commission, the Impact Assessment Guidelines do not require a separate consultation on the final version of an impact assessment. Point 7 of the Impact Assessment Guidelines refers to "*Consultation of interested parties during the impact assessment*" (emphasis added). Moreover, the paragraph in these Guidelines entitled "When to consult" indicates that "*consultation should be seen as a recurring need in the policy development process rather than a 'one-off' event*". It is normal for the final impact assessment to accompany a Commission's adopted proposal. A further consultation would have resulted in a delay and led to a "*consultation fatigue*".

In light of the above, the Impact Assessment should, in the Commission's view, be considered to have been the subject of public consultations within the meaning of the Impact Assessment Guidelines.

3.6 The Ombudsman understands the Commission's position as follows: the Impact Assessment Guidelines do not require the Commission to seek consultation on its Impact Assessment as such. It requires rather consulting stakeholders during the development of the impact assessment. In this regard, and as far as the public consultations are concerned, the Commission argued, in summary, that it did solicit the stakeholders views by asking a specific question and by making references to different parameters it could take into consideration vis-à-vis "*impacts*". Since it was not required to consult on the result of its impact assessment, the Commission's Impact Assessment should be considered as having been subject to consultation, within the meaning of the Impact Assessment Guidelines.

The Ombudsman notes the complainant's position that, in summary, the Commission (i) did not present any evidence that it had conducted any consultation on the Impact Assessment or on any of its versions during the two consultations; and (ii) is confusing consultation on the proposal for regulation and consultation on the impact assessment of such a regulation. In this regard, the Ombudsman takes the view that the Commission's position that, in summary, its Impact Assessment had been subject to public consultation within the meaning of the Impact Assessment Guidelines, does not appear to be manifestly unreasonable. The Ombudsman further notes that it would appear that the complainant had the opportunity to present its views on the impact assessment in the proposal submitted for the second consultation (37) .

In light of the foregoing, the Ombudsman finds no maladministration in relation to this aspect of the complaint.

3.7 The complainant further takes the view that the Impact Assessment failed to (i) identify and describe the problem that demanded potential regulatory intervention properly; (ii) explain duly why this was considered to constitute a problem; and (iii) define precisely the objectives of the



regulation, by linking them directly to the problem and its causes. According to the complainant, the impact assessment should, further, at least cover the issues of (iv) the shortcomings of the existing regulatory framework in meeting expected objectives in relation to roaming; (v) the implications arising from a decision to depart from the flexibility afforded to NRAs; (vi) the short, medium and long-term impact of the proposed regulation on competition within the EU, as well as the position of EU versus non-EU operators; and (vi) the assessment of the impact of such regulation on operators.

3.8 According to the Commission, its Impact Assessment is, in summary, very clear and unambiguous as concerns the identification of the problem, contains a lengthy analysis, and clearly defines the objective of tackling the market failure, by lowering prices for all consumers of international roaming services. Furthermore, the Impact Assessment Guidelines do not require any 'minimum list' for the scope of an impact assessment. Although the Commission believes that any impact assessment which concentrated primarily on the issues referred to by the complainant, rather than on broader ones such as overall economic welfare, would be fundamentally flawed, all of these issues were treated by the Impact Assessment. The Impact Assessment analyses various policy options with regard to a clearly defined and meaningful set of parameters including economic, social and political aspects. All primary (or first-order) effects of the Proposed Regulation are dealt with by this model. Furthermore, the Impact Assessment offers a qualitative analysis of different second-order impacts, such, for example, as the likely impact on investment, domestic price structures, redistributive issues, as well as firm and market structure. To extend the scope of the Impact Assessment beyond these impacts to include even more secondary effects would at best only marginally add to a proper understanding of the impacts arising from various policy options, and would more likely be a source of confusion. In any case, no economic model can capture all the direct and indirect impacts of a proposed regulation. The Commission therefore takes the view that the chosen scope of the Impact Assessment is correct, that is, it is neither too broad nor too narrow and fully complies with the requirements laid down by the Impact Assessment Guidelines.

3.9 The Ombudsman notes the Commission's references to pages 10 to 13 of the Impact Assessment. According to the Commission, those pages contain a lengthy analysis that confirms that the above instance of market failure is compounded by a lack of retail price transparency, which cannot be solved by using the existing regulatory framework or competition policy.

3.10 The Ombudsman examined the pages of the Impact Assessment referred to by the Commission (38) . Page 17 of the Impact Assessment provides that:

" [t]he core problem is that prices for EU-wide roaming at both wholesale and retail levels stand in no meaningful relationship to the underlying costs of providing the service. This problem is compounded by a lack of transparency of prices at retail level which means it is extremely difficult for consumers to understand what they will actually pay. The Commission and some national regulatory authorities have attempted to address the transparency problem by creating websites for roaming prices but these initiatives have not led to sufficient improvements ".



According to the Commission, page 23 of the Impact Assessment refers to the fact that prices for EU-wide roaming services at both the wholesale and retail levels are not justified by the underlying costs of providing the service. Finally, pages 64 to 73 of its Impact Assessment attest that its assessment is based on a carefully constructed economic model that yields detailed quantitative results for economic welfare, consumer surplus and industry profits under various policy options.

The complainant refers to the objectives of the regulation as corresponding to an immediate and significant retail price reduction to promote the creation of a single market for electronic communications services. In summary, the complainant does not agree, in its observations, with the sufficiency of the Commission's definition of the problem or of the above objectives of the proposed action.

In this regard, the Ombudsman considers that, ultimately, the general ideas of the Impact Assessment may be perceived as understandable to the general public. The Ombudsman further notes that, in its observations, the complainant still considers, in summary, that the Impact Assessment is incomplete. Although the Ombudsman accepts that divergences may remain as to the definition or completeness of the parameters of the Impact Assessment as explained in point 3.8 above, he is of the view that it does not appear that the approach used by the Commission is manifestly incorrect. In light of the above considerations, the Ombudsman finds no maladministration in relation to this aspect of the complaint.

(ii) The alleged usage of incorrect data: the estimated value of retail revenues

3.11 In the complainant's view, the data used by the Commission to draft the Impact Assessment are incorrect. In this regard, the complainant referred to the allegedly wrong figure of EUR 8.5 billion which was used by the Commission as an estimate for the retail roaming market revenues. According to the complainant, the above estimate corresponded to both retail and wholesale market revenues and the retail revenues corresponded to only about EUR 5 billion. The incorrect usage of the figure of EUR 8.5 billion resulted from a misunderstanding between the complainant's advisors and the Commission.

3.12 The Commission, in summary, rejects the complainant's criticism that it used incorrect data. It counter-argues that the exchange of e-mails of 19, 24, and 30 May, and 5 June 2006 (39), between the Commission services and the complainant's consultants who were acting on its behalf, show that the Commission made every effort - "*above and beyond what was formally required*" - to give the complainant the opportunity to submit market data for the purpose of the Impact Assessment. This includes "*both price and volume data*" (40), the latter of which the complainant failed to supply at all.

In any case, the Commission did not only rely on the complainant's data but also on a wide variety of different data sources. Moreover, the complainant's "*new*" estimate contradicted the evidence it had submitted to the Commission earlier, during a meeting of 18 May 2006, and was not compatible with other parameters submitted by it.

3.13 The Ombudsman first notes the complainant's argument that, in summary, it was the misinterpreted figure of EUR 8.5 billion that was used by the Commission in its impact



assessment, which, as a result, is necessarily flawed. In this regard, the Ombudsman notes the complainant's references to page 36 of the Impact Assessment where it is stated that " (...) *the model takes as its point of departure aggregate EU retail revenues from mobile roaming services which according to the GSM Association can be estimated to have reached € 8.53 billion in 2005.* " (41)

3.14 According to the Commission, the figure of EUR 8.5 billion concerning aggregate industry retail revenues was justified by sources other than the complainant, notably NRAs, mobile network operators, ERG, academics, and financial research by investment banks and consultancies, and was more compatible with the measurements of EBITDA (42) .

3.15 In this regard, the Ombudsman notes that, in its observations, the complainant especially disagrees, in summary, with the Commission's assessment of a report prepared by a named investment bank ("MS") referred to by the Commission in its opinion.

3.16 The Ombudsman examined the financial report prepared by the investment bank in question and notes the complainant's references, in its observations, to column 2 of "Exhibit 3" contained in the table appearing on page 6 of the report.

In this regard, the Ombudsman notes the Commission's argument that, in summary, it is sufficient to take into consideration only the major network operators in order to reach the figure of EUR 8.5 billion. The complainant however points out, in summary, that such a calculation is incorrect because, according to page 5 of the report, it is " *assume[d] for most operators that 60% of roaming revenues are from EU roamers or to EU destinations (...)* ". The Ombudsman therefore notes that, according to the complainant, only 60% of the above figure, as mentioned in the report under the column of "Exhibit 3" entitled "total retail roaming revenues", would thus correspond to EU "retail roaming revenues". This revised figure would thus bring the "retail roaming revenues" in the EU closer to the figure advanced by the complainant.

3.17 In this regard however, the Ombudsman notes that he cannot exclude that some errors concerning market data may have existed. However, as he pointed out in his preliminary remark made in point 1.2 above, he cannot, reasonably, consider that he has sufficient expertise to assess the data on the basis of the divergence between the two positions, or to take an appropriate stance on the compatibility of the Commission's estimates with the complainant's calculations of EBITDA, and/or to review the parties' financial calculations.

3.18 The Ombudsman will therefore focus his analysis of the complainant's allegation on whether the Commission could have duly known what the complainant argued was the correct figure, but failed to do so.

The Ombudsman notes that, according to the complainant, the complainant's advisors " *orally* " informed the Commission on 18 May 2006 about its EUR 8.5 billion estimate of the total roaming retail and wholesale revenues. In this regard, the Ombudsman notes the Commission's position, expressed in its letter of 12 October 2006 to the complainant that, in summary, according to its records, the complainant had mentioned the above figure as corresponding to



the EU retail roaming market (43) .

3.19 In light of the evidence available to him, the Ombudsman is of the view that he cannot establish with certainty what was said during the above-mentioned meeting. Moreover the Commission's above letter of 12 October 2006 to the complainant contains references to its records and to participants in the meeting of 18 May 2006 and attests that " *[t]he [complainant's] revenue estimate of €8.531 billion for the size of the EU retail roaming market was originally submitted by the [complainant] in [that] meeting (...)* ". In light of the above, the Ombudsman does not consider that any additional inquiry into this aspect of the complaint would lead to any useful outcome in this respect.

3.20 However, the Ombudsman also notes that, on 19 May 2006, that is, the day following the meeting, the Commission requested the complainant to provide it with " *the underlying volume estimates (...)* ". The Ombudsman therefore notes that it would appear that the Commission did not have any doubts as to whether the above figure of EUR 8.5 billion corresponded to the retail roaming market alone, or alternatively, to the wholesale and retail market, but rather sought " *to understand fully the work [the complainant's advisors] have done and to situate it in the broader context of other submissions and other aspects of the impact assessment.* "

Although the complainant replied to the above request by letter of 23 May 2006, it failed, as it admits itself, to attach the "Additional Notes" to the hardcopy of the PowerPoint presentation of 18 May 2006 (44) which, still according to the complainant, would have informed the Commission that:

" *[t]he overall roaming traffic estimate is around 6 billion minutes (with the same number of minutes for retail and wholesale roaming with no double counting). However, each minute of roaming traffic would generate two types of revenue - retail revenue for the visiting network operator and wholesale revenues for the visited network operator. Hence, data presented here includes both wholesale and retail revenues in line with what operators would report in their financial statements. Hence please note that dividing the total wholesale and retail revenue by the total number of minutes at an aggregate level, would result in a meaningless and misinterpretative number.* " (45)

This is further demonstrated by the Commission's e-mail of 30 May 2006 to the complainant's advisors, in which it informed them that it " *received from the [complainant] a letter (...) [with] a copy of [their] original presentation attached to it, but it contained no further clarifying material.* " The Commission therefore asked the complainant's advisors whether " *there [was] anything else [it] should expect from [them] at this stage* ".

3.21 In this respect, the Ombudsman notes that, on 4 June 2006, the complainant's advisors replied that " *[they had] added clarifying material in the 'Notes' section of the same PowerPoint document [they had] presented in Brussels and these comments were circulated by [their staff] after the meeting.* " The e-mail then explained that, " *in order to view the comments, [the Commission needed] to see the presentation in 'Notes view'* " and described how to do so in PowerPoint. It further emphasised that, should this not be of help, the Commission needed to "



let [the complainant's advisors] know [so that they] will try by resending [it] another version. "

3.22 The Ombudsman therefore understands that, according to the complainant, had the Commission followed its advisors' instructions of 4 June 2006, it would have obtained the information that it had requested on 19 May 2006. Furthermore, had it received that information, it would have become aware that, in accordance with note 3 to slide 5, the figure of EUR 8.5 billion corresponded to both retail and wholesale revenues, which, in turn, corresponded to an overall roaming traffic estimate volume of six billion minutes.

3.23 The Ombudsman notes that the Commission did not give any indication during the present inquiry as to whether or not it followed the technical instructions contained in the complainant's advisors' e-mail of 4 June 2006. Nor did it indicate whether, in the event that it followed the above technical instructions, it was able to find the "Additional Notes", allegedly attached to the slides, either in the version in its possession since 18 May 2008, or subsequently received along with the complainant's advisors' e-mail of 4 June 2006. Nor was it clear whether, ultimately, it again contacted the complainant's advisors for further assistance, in case it was not able to find the said "Additional Notes". It did say, however, in its opinion, that it "*ha[d] made every effort - above and beyond what was formally required - to give the complainant the opportunity to submit market data for the purpose of the Impact Assessment. This includes both price and volume data - the latter of which the complainant failed to supply at all.*"

3.24 The Ombudsman is not convinced by the above explanation that the Commission made every effort - "*above and beyond what was formally required*" - to give the complainant the opportunity to submit market data for the purpose of the Impact Assessment. In the Ombudsman's view, it would only appear reasonable that, once the Commission had asked the complainant's advisors whether there would be anything it could expect from them at that stage (46) , it would have expected a reply and would, ultimately, take that reply into consideration. This would, in this case, correspond to following the instructions therein. In this regard, it is worth noting that the complainant's advisors' e-mail or reply was sent within only four (or five) days after the Commission's request (47) .

Therefore, considering the Commission's position that, in summary, the complainant had failed to supply volume data, it would appear that, ultimately, the Commission did not see the "Additional Note" 3 of page 5 of the slides.

Relatedly, the Commission's argument that, in summary, it had obtained information also from other sources cannot prevail because, as regards the figure of EUR 8.5 billion, its Impact Assessment specifically refers to an "*aggregate EU retail revenues from mobile roaming services which according to the GSM Association [that is, the complainant] can be estimated to have reached €8.53 billion in 2005*". In light of the above, the Ombudsman concludes that, by not seeking in a sufficient manner the complainant's advisors' assistance, the Commission was not diligent.

However it does not appear certain that had the Commission been diligent, this could have changed the above figure to bring closer to the figure the complainant considered to be correct.



Moreover, the Ombudsman cannot take a position on the correctness of such figures or reach a conclusion whether the Commission's proposal would have been substantially modified, had the figures concerning market data, which were provided by the complainant and used by the Commission to calculate the ultimate savings for consumers, been taken into account by the Commission in the Impact Assessment. Therefore the Ombudsman considers that no further inquiries are justified into this aspect of the complaint.

(iii) The allegedly partial analysis

3.25 The complainant further criticises the Commission for allegedly omitting or underestimating (i) retail price decreases in the absence of any regulation; (ii) wholesale price reductions "pass-through"; (iii) tariff rebalancing; and (iv) investment decreases.

3.26 The Commission states that, in summary, its Impact Assessment received favourable comments from Parliament and the Council, and is compatible with the conclusions of an independent study, published by "Copenhagen Economics", which only diverges in minor ways from what the Commission decided to propose. In this regard, the Ombudsman notes that the complainant argues, in summary, that the above study was not an Impact Assessment and that, in any case, it found flaws in the Commission's assessment and endorsed a number of the complainant's views.

3.27 The Ombudsman recalls his second preliminary remark made in point 1.2 above and takes the view that no further inquiries into this aspect of the complaint are justified.

(iv) The lack of initiatives towards correcting the impact assessment

3.28 The complainant finally criticises the Commission for allegedly not taking any initiative to correct its Impact Assessment. In the complainant's view, after that it became aware of its errors, the Commission should have corrected its Impact Assessment instead of insisting that it had based it on data provided by the complainant.

3.29 The Ombudsman recalls the date when the Commission's Impact Assessment was reviewed by the complainant's advisors, that is, 6 September 2006. The Ombudsman therefore understands the complainant's allegation to refer to that date.

In this regard, the Ombudsman notes the complainant's statements that, in accordance with its advisors' review of the Impact Assessment:

" it was clearly indicated that the €8.5 billion estimate of total industry roaming revenues comprises both the retail and wholesale revenues. In addition, it was also indicated that the overall roaming traffic estimate is around 6 billion minutes. With the Commission's own estimate of average roaming price of €0.77 for active and passive calls, it should have been clear that the retail market is only €4.6 billion. " (48)

In its letters of 18 and 27 September, and 3 October 2006, the complainant further called the Commission's attention to this error.

3.30 According to the Commission however, the " €4.6 billion " estimate given by the complainant's advisors contradicted the complainant's previous submission which, to



paraphrase the wording used in the Impact Assessment, estimated " *EU retail revenues from mobile roaming services (...) to have reached € 8.53 billion in 2005* ".

3.31 The Ombudsman therefore notes that the Commission, in summary, does not consider that it misinterpreted the estimate advanced by the complainant. In this regard, the Ombudsman notes the complainant's statement in its observations that " *the Commission never questioned the misinterpreted data* ". Furthermore, according to the Commission, the six billion minutes estimate was provided to it only with the review of 6 September 2006 and thus could not have, unfortunately, been taken into consideration any earlier. In the Commission's words, " *in light of the above, [it had] no valid reason to change any of the assumptions on which its impact assessment and proposal for a regulation on mobile roaming [we]re based.* " (49)

3.32 The Ombudsman notes that, according to the Commission, " *page 23 of [the complainant's advisors'] recent submission (dated 6 September 2006), [provides that] consumer welfare can be estimated to increase by between €1.583 and €1.927 billion even in [the complainant's] revised scenario.* " The Ombudsman therefore notes that, according to the Commission, even if it had used the complainant's advisors' " *revised estimate as well as other changed assumptions* ", it would still consider that the complainant was not able to show that the Proposed Regulation would result in an adverse outcome for the consumers (50) .

3.33 The Ombudsman again emphasises, in summary, that he cannot take a position on the correctness of the parties' calculations or on whether revised figures would or would not imply substantively different results as regards savings for consumers. Indeed, as pointed out in his preliminary remark 1.2 above, the Ombudsman is not in a position to assess with certainty whether the figures and calculations used in the Impact Assessment, or in the complainant advisors' review of the Impact Assessment, are correct or not. Therefore, the Ombudsman considers that no further inquiries are justified into this aspect of the complaint.

(v) The complainant's related claims that the Commission should (a) comply with its Impact Assessment Guidelines and (b) take the necessary steps, where possible, to remedy the mistakes made in the consultation process in question, by taking into consideration the correct market data, by conducting a full analysis, and by correcting the impact assessment.

3.34 In light of his conclusions in points 3.6, 3.10, 3.24, 3.27, and 3.33, the Ombudsman takes the view that no further inquiries are justified into the complainant's related claims.

4 Conclusion

On the basis of the Ombudsman's inquiries into the complaint, the Ombudsman concludes the following:

As regards the complainant's allegations that, during the adoption process of the draft Regulation on tariffs for international roaming services, the Commission failed

- (i) to conduct the public consultations properly,
 - no instance of maladministration has been found concerning the complainant's arguments relating to clear content, publication, and different versions of the proposal for a Regulation submitted to public and inter-service consultations; and
 - an instance of maladministration has been found in relation to the time limits for participation in



the consultations. A critical remark will be made below.

(ii) to carry out an impact assessment properly,

- no instance of maladministration has been found concerning the complainant's arguments relating to compatibility with its Impact Assessment Guidelines; and
- no further inquiries are justified into the complainant's arguments related to alleged usage of incorrect data, partial analysis, and lack of initiatives to correct the Impact Assessment.

In light of the foregoing, no further inquiries are justified into the complainant's related claims. The Ombudsman therefore closes the case with the following critical remark:

After carefully considering the explanations offered by the Commission, the Ombudsman concludes that the Commission's decision substantially to shorten the public consultation periods below the normal minimum of eight weeks foreseen by the Communication on Consultations was not in accordance with the conditions laid down in that Communication on Consultations for departing from the normal consultation period.

The President of the Commission will be informed of this decision.

Yours sincerely,

P. Nikiforos DIAMANDOUROS

* Both the complainant and the Commission made voluminous submissions in the course of this inquiry. Two detailed summaries of those submissions were made by the Ombudsman's services. The first contains the complainant's detailed arguments originally submitted in the complaint, as well as his subsequent observations. The second contains the arguments submitted by the Commission in its opinion on the complaint. These documents are too extensive to reproduce in full in the present decision, which therefore contains briefer summaries of the submissions. The detailed summaries are included in the file and are available on request.

(1) " *What form should a regulation of international roaming charges take i.e., should it be targeted at wholesale level charges or retail level or both?*
What regulatory and pricing mechanism (or control) would achieve the desired objectives of such a regulation in the most effective and simple manner?
What is your view on the impacts - positive and negative - that regulation on international roaming charges could have:

- *in general economic and social terms?*

- *on industry players?*



- on consumers? "

(2) COM(2006)382 final.

(3) According to the Commission's opinion: "*international roaming refers to the ability of the end-users to use his/her mobile phone when travelling abroad. Since the home network operator does not provide service in the country in which the end-user is travelling, when calls are made or received abroad, the end-user uses the network of a mobile network operator in that country, that is, the end-user is "roaming" on the foreign network. For providing this service, the foreign network operator will charge a wholesale rate to the end-user's home operator who will, in turn, charge the end-user a retail price for using his/her mobile phone abroad. According to the data the European Commission has been provided with by the complainant, at least 147 million EU citizens use "roaming" services. Of these, 110 million are business customers, while 37 million are travelling abroad for leisure purposes.*"

(4) According to the Commission, these five Directives were:

Directive 2002/19/EC of the European Parliament and the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, OJ 2002 L 108, p.7 (the "Access Directive");

Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services, OJ 2002 L 108, p. 21 (the "Authorisation Directive");

Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, OJ 2002 L 108, p. 33 (the "Framework Directive");

Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, OJ 2002 L 108, p. 51 (the "Universal Services Directive");

Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ 2002 L 201, p. 37 (the "Directive on privacy and electronic communications").

(5) According to the Commission, ERG is composed of NRAs of all the Member States of the European Union, that is, as of 1 January 2007, 27 NRAs.

(6) COM(2006)382 final.

(7) According to Article 13 of the Final Regulation, OJ 2007 L 171, p. 40.

(8) See, *inter alia* , Case C-150/94 *United Kingdom v Council* [1998] ECR-I-7235, paragraph



54: " *In a situation (...) which involves an appraisal of complex economic situations, judicial review must be limited to verifying whether the relevant procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated, and whether there has been a manifest error in the appraisal of those facts or a misuse of powers (see, inter alia, Case C-156/87 Gestetner Holdings v Council and Commission [1990] ECR I-781, paragraph 63). (...).* "

(9) COM(2002) 704 final.

(10) SEC(2005) 791.

(11) See "I. Introduction", page 3 of the Communication on Consultations, which is available on the Eur-Lex website (<http://eur-lex.europa.eu> [Link]).

(12) See "V. General principles and minimum standards for consultations by the Commission/ Nature and scope", pages 15 and 16 of the Communication on Consultations.

(13) See "V. General principles and minimum standards for consultations by the Commission/ General principles/ Openness and Accountability", page 17 of the Communication on Consultations.

(14) See "Minimum standards/ A. Clear content of the consultation process", page 19 of the Communication on Consultations.

(15) See "Minimum standards/ C. Publication", page 20 of the Communication on Consultations.

(16) See "V. General principles and minimum standards for consultations by the Commission/ General principles/ Effectiveness", page 18 of the Communication on Consultations.

(17) See "Minimum standards/ D. Time limits for participation", page 21 of the Communication on Consultations.

(18) See "7. Consultation of interested parties during the impact assessment/ (...) 7.2 Consultation planning", pages 9-10 of the Impact Assessment Guidelines, which are available on the Europa website (http://ec.europa.eu/dgs/information_society/evaluation/data/pdf/guidelines_SEC2005_791.pdf [Link]).

(19) See "7. Consultation of interested parties during the impact assessment/ (...) 7.2 Consultation planning/ (...) When to consult", page 10 of the Impact Assessment Guidelines.

(20) Attached to the complaint and the Commission's opinion.

(21) Attached to the complaint and the Commission's opinion.



(22) According to question " 4. How could the regulation work? ", the document of the second consultation provided for:

" 4.1 Roaming calls - retail

At this stage the Commission's services' preferred approach to the regulation of roaming calls, in line with the objectives described above of transparency, comprehensibility for the consumer and parallelism with home-country prices, is to 'peg' retail roaming prices to the customer's home prices for comparable domestic mobile services.

Under this 'home pricing' approach, a Belgian customer, for example, roaming in Spain and making a local call (i.e. a call to a Spanish number) would be charged a rate not exceeding the rate (as charged by his or her home network) for a local call in Belgium. The same customer roaming in Spain and making a call home to Belgium (i.e. a call to a Belgian number) would be charged a rate not exceeding the rate (as charged by his or her home network) for an international call 5 to Spain from Belgium. (...).

4.2 Roaming calls – wholesale

Under this approach to retail regulation, action would need to be taken in parallel to ensure that prices for the services provided by the visited network ('wholesale' prices) were also regulated, otherwise market distortions could ensue.

Wholesale regulation could take the form of cost-orientation obligations, in particular in relation to calls assimilated to local calls in the home country, or a capping mechanism, possibly on a transitional basis until regulatory authorities had developed the cost models and enforcement mechanisms to verify and implement cost orientation.

4.3 Received calls

As stated above, the regulation would abolish charges to consumers for receiving calls while roaming in another EU Member State.

While settlement of charges made at wholesale level for the termination of calls in the visited network, as well as for the termination of calls in the home network, would continue in the normal way, it would no longer be permissible for operators to levy charges on end customers receiving calls while roaming in the EU. Moreover, callers originating calls in the home country should not face any additional charge as a result of this provision. "

(23) Annex 1 to the second call for contributions, corresponding to a " *Synthesis of contributions received following the call for comment launched on 20 February* ", provided for a summary of responses from interested parties to the first call for comments under headings such as, *inter alia* , "2. Regulation - yes or no?"; "3. Wholesale or retail regulation or both?"; "4. Comments on possible pricing mechanisms", comprising "Mechanisms for wholesale regulation" and



"Mechanisms for retail regulation"; and "5. Impact of regulation".

(24) Given that "IP" documents are published on the "EU press room" webpage of the Europa website, the Ombudsman considers these to constitute, by definition, press releases.

(25) The Commission quoted point 3.13 of the Ombudsman's Decision on complaint 948/2004/OV, according to which " *the Ombudsman notes that the Commission has foreseen (...) an appropriate publicity by centralising all the relevant information concerning the Cohesion Policy on one single internet page of DG REGIO. The Ombudsman further notes that the Commission uses the single access point "Your-Voice-in-Europe" webportal (...) which is the general internet page for consultations in all the policies covered by the European Commission* " (emphasis added).

(26) See " *II. Overall rationale of the Commission's consultation process / Consultation - A win-win situation all round*", page 4 of the Communication on Consultations.

(27) See "Minimum standards/ B. Consultation target groups", page 19 of the Communication on Consultations.

(28) " *At this stage the Commission's services' preferred approach to the regulation of roaming calls, in line with the objectives (...) of transparency, comprehensibility for the consumer and parallelism with home-country prices, is to 'peg' retail roaming prices to the customer's home prices for comparable domestic mobile services. Under this 'home pricing' approach (...).* "

(29) " *The objective of this proposal is (...) to amend the existing regulatory framework for electronic communications [and] to provide the necessary legal basis for effective and timely action to bring about substantial reductions in the level of mobile roaming charges across the Community in a harmonised manner. This is to be achieved by applying the approach that prices paid by users of public mobile networks for roaming services when travelling within the Community should not be unjustifiably higher than the charges payable when calling within their home country (the "European Home Market Approach").* "

(30) " *As a result of the submissions received, the Commission adapted its original concept of the "home pricing principle", which would have linked the prices for international roaming to the prices paid by roaming customers for equivalent calls made on their home network, to arrive at the concept of the "European Home Market Approach", under which roaming prices are brought closer to domestic prices through the application of common Community-wide safeguard maximum price limits, thereby achieving a high level of protection for users while safeguarding competition.* "

(31) " *The proposal provides for the establishment, on the basis of the 'European Home Market Approach', of common, Community-wide maximum price limits on the charges that mobile network operators may levy for the wholesale provision of mobile roaming services for mobile voice telephony calls made from a visited network in the Community and terminating on a public telephone network also located within the Community.* " The Proposed Regulation is available at



<http://eur-lex.europa.eu> [Link].

(32) " *A common mechanism, to be called the European Home Market Approach, should be employed for ensuring that users of public mobile telephone networks when travelling within the Community do not pay excessive prices for international roaming voice services when making calls or receiving voice calls, thereby achieving a high level of consumer protection while safeguarding competition between mobile operators. In view of the cross-border nature of the services concerned, a common mechanism is needed so that mobile operators are faced with a single coherent regulatory framework based solely on objectively established criteria.* "

(33) "7. Consultation of interested parties during the impact assessment/ (...) 7.2 Consultation planning/ (...) When to consult", on page 11 of the Impact Assessment Guidelines, provides that " *[f]or efficiency reasons and in order to avoid 'consultation fatigue', repeated consultations should nevertheless be kept to a minimum.* " Also "7. Consultation of interested parties during the impact assessment/ (...) 7.4 Pitfalls", on page 12 of the Impact Assessment Guidelines, provides that the Commission needs to " *[b]eware of 'consultation fatigue' on the part of stakeholders. Consulting stakeholders too often will always be detrimental to the number of responses and their quality. Don't repeat consultation unless you are seeking additional option/information, or unless there is new information to present them. For example, it is not a good idea to consult stakeholders on the results of a previous consultation!* "

(34) In this regard, the Ombudsman notes that the programme of the Parliamentary meeting entitled "International Roaming - its economic implications", provided to him by the Commission along with its opinion and forwarded to the complainant for its observations, refers to " *National Regulatory Authority, France* " ("NRAF"). The Ombudsman therefore understands that NRAF was, at the time, chairing ERG.

(35) In accordance with the footnote in the cover of the Impact Assessment Guidelines.

(36) The Ombudsman understands the complainant's allegation to refer to the entire period from 20 February to 12 July 2006.

(37) The complainant's letter of 23 May 2006 to the Commission states that " *[t]he results of our impact assessment demonstrate that the Commission's proposal contains fundamental flaws and that the 'home pricing principle' would distort the market and leave the majority of roaming customers worse off. As I also mentioned, the GSMA has shared its conclusions with many Commission officials, from your own and other Directorates. I have not heard any counter arguments from the Commission but, rather, have encountered broad agreement with its conclusions. You confirmed that it was your intention to complete an impact assessment in the time remaining before the 29th May. I understand that you have requested operator data to support your analysis but I am not aware of any other progress having been made. I would be grateful if you could confirm that you will share the impact assessment with the GSMA, in order that we may continue to provide informed input to your process.* "

(38) In this regard, the Ombudsman notes that neither the complainant nor the Commission



provided him with a copy of the Impact Assessment. The Impact Assessment is available on the Europa website (http://ec.europa.eu/information_society/activities/roaming/docs/assessment_en.pdf [Link]).

(39) The Ombudsman notes that the complainant's copy of the e-mail provides for the date of 4 June 2006.

(40) The Ombudsman understands "volume data" to correspond to the amount of time spent making and receiving phone calls while roaming.

(41) The Ombudsman further notes that, still according to page 36 of the Impact Assessment, "*[the model] also uses an estimate of aggregate EU per minute wholesale and retail prices, which is based on data provided for the purposes of this impact assessment by various MNOs and NRAs. "*

(42) The Ombudsman understands EBITDA to correspond to "Earnings Before Interest, Taxes, Depreciation and Amortization", and which was a parameter that appears to have been referred to by the complainant, notably, in its meeting with the Commission of 18 May 2006.

(43) According to the Commission's letter: "*[t]he GSMA revenue estimate of €8.531 billion for the size of the EU retail roaming market was originally submitted by the GSMA in a meeting held on 18 May 2006. This is what our records say, and this is what all participants from our side clearly and distinctly remember. "*

(44) The Ombudsman inspected the hardcopy of the PowerPoint presentation attached to the complaint, entitled "International Roaming Regulation in Europe - Impact Assessment for the European Commission's proposals". Page 5 of the presentation provides that "*[t]he proposed regulation will reduce European operators' roaming revenues in the EU25 by €4.3bn and EBITDA margins by €2.3 bn "*. The graphic attached under this sentence refers to an "*Overall EU25 Roaming Market Revenues Drop - 2005, millions € (...)*" from "*8 531 "* to "*4 250 "*. The Ombudsman therefore notes that the above graphic contains the data in question, that is, EUR "*8 531 "* million for the "*Overall EU25 Roaming Market Revenues "* in 2005.

(45) In accordance with Point 3 of the "Additional Notes" to page 5 of the PowerPoint presentation.

(46) The Ombudsman notes the Commission's arguments that "*nearly four weeks [had passed] after the end of the second public consultation "*.

(47) Although the complainant's advisors apologise "*for the late response in dealing with [the Commission's] email "*, the e-mail is dated 4 June 2006 (Sunday, 23:43) according to the complainant's copy of the e-mail, or Monday, 5 June 2006 (0:43) according to the Commission's copy of the e-mail. The Ombudsman understands the difference to be due to the different locations of the complainant advisors' and the Commission's premises.



(48) Footnote of page 14 of the Impact Assessment's review.

(49) In accordance with the Commission's letter to the complainant dated 12 October 2006.

(50) All quotations are from the Commission's letter to the complainant dated 12 October 2006.