

CLIENT ALERT

Electronic Communications & IT

November 4, 2008

Other sections of this issue:

[Privacy & Data Protection](#) | [ISP-Liability & Media Law](#) | [Contracts & E-Commerce](#) |

[Electronic Communications & IT](#)

- [European Commission takes action to further reduce roaming costs](#)
 - [Operators have to integrate decreases in Mobile Termination Rates in their tariffs](#)
 - [European Parliament amended and voted on the Telecoms Reform Package](#)
 - [Maybe A Significant Shift in the EU Rules on Predatory Pricing? Advocate General recommends overturning European Court of First Instance \(CFI\) judgment in *Wanadoo*](#)
-

European Commission takes action to further reduce roaming costs

On September 23, 2008 the European Commission published its proposals to extend the scope of the Roaming Regulation and to cut costs of roaming text messages and mobile data services abroad. The proposals will now be submitted to the European Parliament and Council.

Introduction

The EU Roaming Regulation, which entered into force on June 30, 2007, introduced limits to the wholesale and retail charges for roaming voice calls in order to ensure the proper functioning of the single market and a high level of consumer protection. These limits are currently at €0.46 for all calls made abroad and at €0.22 for all calls received abroad.

According to Article 11 of the Roaming Regulation, the Commission has to review the Regulation in the course of 2008 and decide whether or not to extend it in time and scope, especially whether to extend it to roamed text messages and data services.

Since prices for text messages have remained very high, especially compared to the actual costs incurred by operators, and data roaming charges remain substantially higher than data services domestically, the Commission has now made proposals to the European Parliament and Council in order to resolve Europe's continuous roaming problem.

Contents of the Commission proposals

The proposals of the Commission are focused on four main elements:

- **Roamed text messages sent abroad in the EU from July 1, 2009** must not cost more than €0.11 (excl. VAT) per SMS for consumers . Receiving a text message in another EU country will remain free of charge. Wholesale charges will be capped at €0.04.
- **More transparency and competition for data roaming services.** Customers traveling to another Member State should receive an automated message indicating the charges that apply for data roaming services. As from summer 2010, they will also be able to determine in advance how high their bill can go before the data roaming service is cut-off. In addition, a €1 per megabyte safeguard limit for wholesale fees will be introduced to tackle the very high charges and make prices that operators charge each other more transparent and predictable and thus stimulate competition.
- **Further reductions in the maximum prices of making and receiving calls while roaming in another Member State.** Prices for making a call will decrease to €0.43 on July 1, 2009, to €0.40, €0.37 and €0.34 the following years and until 2012. Prices for receiving a call will decrease from 19 cents on July 1, 2009 to €0.16, €0.13 and €0.10 respectively the following years and until 2012.
- **The principle of per-second billing will be introduced for all roaming calls made and received.** For calls made abroad, operators will be allowed to ask for a set-up charge equivalent to no more than the price for 30 seconds for the roamed call.

Future developments

The European Commission's proposals will now be transmitted to the European Parliament and the Council of Ministers. We will keep you informed on this topic in one our future bulletins.

For more information, contact: Karel Janssens or [Thomas De Meese](#).

Operators have to integrate decreases in Mobile Termination Rates in their tariffs

In its judgment of July 17, 2008 the Antwerp Commercial Court found Belgacom guilty of unfair trade practices and competition law infringements for not integrating Base's decreased termination rates in its prices towards customers.

Introduction

Termination rates are the costs operators pay other operators for terminating calls on their network. For instance, if one of Belgacom's customers makes a call to one of Base's customers, Belgacom has to compensate Base for terminating the call on its network. When the calls are terminated on a mobile network, the costs are referred to as Mobile Termination Rates ("MTRs").

In Belgium, the maximum amount of the MTRs is fixed by the Belgian Institute for Postal Services and Telecommunications ("BIPT"). According to the so-called "glide path", the MTRs of the three Belgian mobile operators (Mobistar, Base and Proximus), which currently vary, will gradually decrease to a common level in order to apply symmetrical MTRs.

At present, Base decreased its MTRs three times according to this glide path. However, Belgacom only modified its tariff plans two times and thus did not integrate all MTR decreases in its prices. According to Base, Belgacom hereby creates additional profits since it has lower costs (Belgacom has to pay lower MTRs to Base) but equal income since its prices towards customers did not decrease simultaneously.

In a recent case, the Antwerp Commercial Court was confronted with Base's and Belgacom's arguments.

The decision

The Antwerp Commercial Court agreed with Base. According to the Court, by not decreasing its prices conformable the decreased MTRs, Belgacom charged its customers "excessive" prices. Moreover, by doing so, the Court held, calls towards mobile phones were artificially presented as more expensive than they actually are. This resulted in distortions in market analyses, more specifically with regard to the substitutability of the market for calls from fixed to fixed networks with the market for calls from fixed to mobile networks. Where these markets are currently qualified as non-substitutable, this analysis may be different when applying correct prices for calls from fixed to mobile networks, i.e. when integrating decreases in MTRs.

For the above reasons, the Court found that Belgacom had infringed Belgian competition law and had violated several provisions of the Act on Trade Practices and Consumer Protection (violation of Base's professional interests, unfair and misleading trade practices).

However, the Court did not impose any cease and desist order upon Belgacom. The reason for this was that Base appeared to be guilty of the same shortcomings (not modifying its tariffs in conformity with MTR decreases). The Court coupled its cease and desist order towards Belgacom to a reciprocity condition for Base. Base will therefore first have to demonstrate its own conformity with the court order, before it can start claiming penalties from Belgacom.

For more information, contact: Karel Janssens or [Thomas De Meese](#).

European Parliament amended and voted on the Telecoms Reform Package

In its plenary session of September 24, 2008 the European Parliament voted on the European Commission's proposals of November 2007 to reform the EU Telecom rules, in place since 2003. It is now up to the Telecoms Ministers to give their views. They could reach a first political agreement during the European Telecom Council of 27 November 2008.

Introduction

As discussed in our previous newsletters, the Telecoms Reform Package is intended to increase competition in the EU telecoms market, strengthen consumer rights, promote investments into new infrastructures and make communication networks more reliable and secure. The proposals for the reform were tabled by the European Commission on November 13, 2007. The Council of Telecoms Ministers expressed its views on these proposals in November 2007 and June 2008. The European Parliament then debated the reform at Committee level in July 2008 and during its plenary session on September 2. Recently, during the plenary session of September 24, the European Parliament amended the package and took a vote.

Contents of the vote

The European parliament supported the new remedy of "**functional separation**", which requires an incumbent operator to separate its network infrastructure from its services branch in order to give competitors easier access to their networks. The EU assembly voted by 597 in favor, with 55 against and 29 abstentions.

Another key part of the package, the plan for a "**super regulator**", was watered down. We already indicated the Telecoms Ministers' objections to this proposal. The EU assembly now voted 490 in favor with 105 against and 14 abstentions on creating a less powerful alternative Body of European Regulators in Telecoms. The new body will be smaller than proposed by the Commission and will not have any responsibility for network security. However, according to EU Telecoms Commissioner Viviane Reding, the Parliament's amendments have made sure that the new European telecoms regulator will be fit for purpose, namely to deal efficiently with the remaining business obstacles and consumer problems in the single market. It will be financed from the EU budget in order to strengthen its independence and to ensure equality among national regulators. The goal is to promote fair competition and high-quality services across the EU by ensuring that national regulators use similar tools when faced with similar market situations.

With regard to investment in **next-generation networks**, the Parliament upgraded the original Commission's provision and proposed a series of measures to spur investment in high-speed fibre optical broadband networks. Moreover, the directive, as revised by the European Parliament requires all Member States to co-operate with each other and the Commission in the strategic planning, co-ordination and harmonization of **radio spectrum use**.

The Parliament went further than the Commission on **consumer rights** to information on prices, tariffs and contract conditions. The final resolution says that contracts must give full, clear and up-to-date details of access to emergency services, restrictions on content or equipment use (e.g. blocking of VOIP services on mobiles supposed to provide internet access), client and after-sales services, payment methods and charges for number portability or for terminating a contract.

The Parliament also amended the Commission's proposal with regard to the **e-Privacy Directive**. The European Parliament amended *inter alia* the security breach notification provision (pursuant to the Parliament's amendment the provider of a publicly available electronic communications service must inform the subscribers only in case of a particular risk of a breach of the security of the network) and the right of individuals or legal persons having a legitimate interest to initiate legal proceedings for infringements of the e-Privacy Directive.

Following the European Parliament vote, it is again up to the Telecoms Ministers to give their views. They could reach a first political agreement during the Council of November 27, 2008. If approved, there may be a second-reading of the text by the European Parliament in March 2009 and a definitive adoption under the Czech presidency.

Links :

- [European Parliament - Electronic communications networks and services](#)
- [European Parliament - Electronic communications networks and services, protection of privacy and consumer protection](#)
- [European Parliament - European Electronic Communications Market Authority](#)

For more information, contact: Karel Janssens or [Thomas De Meese](#).

Maybe A Significant Shift in the EU Rules on Predatory Pricing? Advocate General recommends overturning European Court of First Instance (CFI) judgment in *Wanadoo*

In the “Wanadoo” Opinion delivered on 25 September, the Advocate General (AG) of the European Court of Justice (ECJ) has recommended that the ECJ would take a new stance on predatory pricing, in requiring that potential recoupment should be shown in order to find predation.

Introduction

In an Opinion delivered on 25 September, the Advocate General (AG) of the European Court of Justice (ECJ) has recommended that the ECJ overturn the CFI judgment in Case C-202/07P France Télécom v Commission (*Wanadoo*). One ground for the recommendation is that the CFI failed to consider the likelihood of recoupment when upholding a Commission finding of predatory pricing against France Telecom. In previous cases, the ECJ has held that it was not necessary to show potential recoupment in order to find predation.

The AG's recommendation, if followed, would represent a significant shift in the EU jurisprudence on predatory pricing, bringing it more closely into line with U.S. law. It could also signal a change in the treatment of abuse of dominance issues by the ECJ towards a more economic, 'effects-based' analysis. The AG's recommendation is not binding. However, such recommendations are followed by the ECJ in approximately 80% of cases.

The Commission decision

On 16 July 2003, the European Commission decided to impose fines of €10.35 million on France Telecom's subsidiary Wanadoo Interactive for predatory pricing in relation to retail Internet access services. The Commission found that, up to October 2002, the retail prices charged by Wanadoo (WIN) were below cost, which restricted market entry and the development of competition to the detriment of consumers. WIN appealed the Commission decision based *inter alia* on the complaint that the Commission had not proven that WIN could 'anticipate the possibility' of recouping its losses.

The CFI decision

The CFI rejected this appeal on 30 January 2006 and upheld the Commission decision. It held that, in accordance with the ECJ's case law in *Akzo* and *Tetra Pak II*, the Commission was right to take the view that proof of recoupment of losses was not a precondition to making a finding of predation. In line with Community case-law, the Commission was able to regard prices below average variable costs as abusive. In that case, the eliminatory nature of such pricing was presumed. In relation to full costs, the Commission had also to provide evidence that WIN's predatory pricing formed part of a plan to 'preempt' the market. In neither of those two situations was it necessary to prove, in addition, that WIN had a realistic chance of recouping its losses.

The AG's opinion

However, in his opinion on the appeal lodged against the CFI's judgment by France Télécom, AG Mazák expresses the view that proof of the possibility of recoupment is indeed required in order to find predation pursuant to Article 82 EC. Unless there is a possibility of recoupment, the dominant undertaking is probably engaged in normal competition. In such a case, where there is no possibility of recouping losses, consumers and their interests should, in principle, not be harmed.

Links :

- [Court of First Instance Judgment, 30 January 2007](#)

- [Advocate General's Opinion](#)

For more information, contact: [Thomas De Meese](#).

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Thomas De Meese

Partner – Brussels

Phone: +32.2.282.1842

Email: tdemeese@crowell.com