



Brussels, 30 August 2013

Ms. Neelie Kroes, Vice-President of the European Commission
Mr. Joaquín Almunia, Vice-President of the European Commission

Sent via e-mail and followed-up via postal mail

**Subject: European Single Market for Electronic Communications – Roaming Aspects
Expression of utmost concern**

Dear Vice-President Kroes,
Dear Vice-President Almunia,

Please allow me to contact you to express the concerns of the members of the European Association of Full MVNOs¹ - EAFM - <http://eafm.eu/members> relating to a draft European Commission proposal for a *Regulation laying down measures to complete the European single market for electronic communications and to achieve a Connected Continent, and amending Directives* (and amending the EU Roaming Regulation).

The text boxes on pages 3 and 4 of this letter contain the EAFM's readily implementable proposals for modification of the draft European Commission proposal for a Regulation.

MVNOs serve more than 10% of the EU's mobile customers, and are responsible for both technical and commercial innovation. EAFM members have innovated in roaming services, being the first providers of multi-country/multi number offers, and of inclusion of roaming destinations in the retail bundle. EAFM members have also been first movers in domestic services (e.g. large mobile data allowances, bundling of streaming media with mobile offers, launch of near field communications, first operators in France to provide unlimited SMS, and unlimited calls to all networks, etc.). Full MVNOs in particular provide an important competitive stimulus, for the ultimate benefit of end-users. MVNOs buy airtime from host Mobile Network Operators (MNOs) on the wholesale market, assuring the MNOs additional revenues which they can invest in radio access network infrastructure, without causing costly duplication of network assets.

¹ The EAFM was created in 2012 to represent the interests of companies which are active on European mobile markets, and are independent (in terms of ownership and control) from established mobile network operators. The EAFM consists of companies which have negotiated Full MVNO agreements with host mobile network operators, in such a manner that they achieved commercial independence from their host mobile network operators and are involved in the deployment of their own network elements (or are in the process of achieving Full MNVO status). The goal of the EAFM is to create a more openly accessible market for Full MVNOs, in order to contribute to the growth of the fast-moving mobile communications sector, to ensure that consumers and business users have a wider range of diversified services to choose from and to develop competition on the retail mobile market to their benefit. Our members believe that Full MVNOs can stimulate innovation in the telecom sector.

The EAFM is represented on the Steering Committee for the technical implementation of decoupling of international roaming, in application of Article 4 of the existing Roaming Regulation. This Steering Committee consists of the European Commission, BEREC, the GSMA, and the EAFM. The EAFM has also been admitted as an expert participant in COCOM and in the RSPG.

We understand that it may be the European Commission's intention to propose a legislative instrument which, among others, would: (i) amend Article 4 of the EU Roaming Regulation, notably to create a partial exemption to the roaming decoupling obligation, under which only the participants to a collective roaming agreement would be eligible for this exemption, and (ii) no longer (in contrast to a previous draft) reduce wholesale roaming caps from 1 July 2014.

Taken together, these elements are of utmost concern to the EAFM's members.

The reason is that Full MVNOs are most likely to be excluded from participation in collective roaming agreements, given that they are unable, in practice (given that they do not control a radio access network²), to offer reciprocal wholesale roaming access to MNOs and to other MVNOs, i.e. they have nothing to barter to achieve wholesale roaming charges that are below the existing regulated wholesale caps.

This creates a paradox: (large) MNOs (participants in collective roaming agreements) would, under what we understand to be the European Commission's proposals, be exempted from roaming decoupling, whereas other players (in particular Full MVNOs and perhaps some smaller MNOs), which are all comparatively smaller players, would end-up being the only operators required to make the heavy investments in enabling roaming decoupling. Furthermore, the smallest operators would be the only operators exposed to losing roaming traffic to Alternative Roaming Providers. If, at the same time (as we understand is now the proposal), the wholesale mobile roaming caps remain at the existing levels, it will be uneconomic for Full MVNOs to compete with MNOs that are part of a collective roaming agreement, for the supply of retail bundles comprising domestic services and roaming services.

Such a state of affairs (if the retail market trends to default availability of retail bundles comprising both domestic services and roaming services – which is the European Commission's policy objective) could annihilate Full MVNOs' ability to compete not only for retail roaming services, but also on domestic markets, given that they would not be able to match or beat MNOs' retail bundles comprising domestic services and roaming services. If this were to occur, the Full MVNOs, which are an important set of market participants (including for domestic retail mobile services), and other MVNOs, could be evicted from the market, to the detriment of innovation, competition, and ultimately to the detriment of end-users.

We wish to strongly emphasise that the EAFM's members are not opposed to the European Commission's policy objective of stimulating the emergence of retail bundles comprising domestic services and roaming services. In fact, our members would like, if possible, to be first-movers and structural leaders in the provision of such retail bundles, in much the same way as they have led developments (notably reducing retail roaming prices for end-users) and provided competition until now.

² If a Full MVNO would nevertheless find a way (agreed with its host MNO) to provide reciprocal roaming wholesale access to Mobile Network Operators (MNOs) and to other MVNOs, the latter should implement the IMSI code of the Full MVNO in the SIM cards of their customers. The roaming provider would therefore have to change the SIM of their customers. In practice, this is highly unrealistic.

We believe that damage to competition and innovation can be avoided, by tweaking the European Commission's proposals, along the following lines.

EAFM Proposal

The EAFM's proposal consists of two readily implementable modifications to the European Commission's proposals. We stress that both elements are necessary in order to avoid damage:

Reduce wholesale roaming caps to a level which enables all market participants to compete for the supply of retail bundles comprising domestic services and roaming services (irrespective of their participation in a collective roaming agreement),

and,

Allow any provider to be exempted from the roaming decoupling obligation (without requiring participation in a collective roaming agreement) conditional upon the provider offering the retail bundle comprising domestic services and roaming services on the terms envisaged for the gradual introduction of the retail bundle.

Note 1: Concerns about permanent roaming/price arbitrage can be addressed ex-post if such phenomena emerge, or can be prevented ex-ante, by other means than inflating the level at which the wholesale roaming caps are set, e.g. through EC Decisions/Guidance, BEREC Guidelines, etc.

Note 2: We are unclear as to what the justification would be for the EU institutions to stimulate alliances/collective roaming agreements in order to achieve the policy objective of the emergence of retail bundles comprising domestic services and roaming services. Alliances/collective roaming agreements entail risks of anticompetitive behaviour. We consider that the policy objective can best be achieved by allowing all market participants to vigorously compete. We also note that roaming alliances have existed for many years, with wide coverage of EU Member States, but have not led to the phasing-out of retail roaming charges, and indeed have broadly failed to produce outcomes creating consumer surplus.

Note 3: We observe that the European Commission itself foresees the possibility that its proposals on roaming could fail to achieve the policy objective, given that we understand that the European Commission intends to include a review clause worded along the following lines:

(d) to change the duration or reduce the level of maximum wholesale charges provided for in Articles 7, 9 and 12 with a view to reinforcing the ability of all roaming providers to make available in their respective retail packages for reasonable use tariff options in which the applicable domestic service rate applies to both domestic services and regulated roaming services, as if the latter were consumed on the home network.

The best way to prevent this state of affairs from materialising is to ensure, from the outset, that: (i) the wholesale roaming caps are set at a level (for instance the wholesale caps envisaged in a previous draft) which enables all market participants to compete for the retail bundles, and(ii) exemptions from the roaming decoupling obligation are not linked to participation in roaming cooperation agreements, but to the supply of the retail bundle which reflects the policy objective.

A possible alternative way to avoid damage to competition (which is not our preferred solution), in particular to avoid inflicting damage to Full MVNOs, would be to add a clause in the envisaged Regulation, requiring that collective roaming agreements are constituted in such a manner that

participants are required to pass-on the benefits gained to the Full MVNOs hosted on their network and/or to Full MVNOs using the participant's wholesale services to support their roaming requirements.

Additional EAFM Request

The EAFM has a further request to the European Commission, as follows:

Exempt Full MVNOs from the roaming decoupling obligations, on grounds of lack of proportionality.

In addition to our proposals formulated above, the EAFM also believes that the paradox we have described must be avoided (i.e. Full MVNOs finding themselves among the few market participants having to make the heavy investments in enabling roaming decoupling, and among the only operators exposed to losing roaming traffic to Alternative Roaming Providers, whereas the large MNOs in particular would likely escape from the decoupling obligations).

Full MVNOs are an important source of competition, notably on account of their specialised offers for retail international roaming customers (among other innovative offers). Given that Full MVNOs already provide end-users with roaming alternatives, it is disproportionate to impose costly roaming decoupling obligations on Full MNOs (implementation is actually more complex for Full MVNOs than for MNOs) in favour of a new class of Alternative Roaming Providers. Imposing decoupling on Full MVNOs would generate little consumer surplus, i.e. the balance between producer and consumer surplus is fundamentally misdirected if Full MVNOs are required to support roaming decoupling. The balance between large MNOs and Full MVNOs (and perhaps some smaller MNOs) would also be further distorted if large MNOs would be subject to less regulation than their smaller competitors.

We stress that this additional EAFM request stands completely separate from our proposal above, and is not an alternative to our proposal above. This additional request is focused on avoiding disproportionate expense for little or no consumer benefit; our proposal above is aimed at ensuring a future for Full MVNOs in a European Union where separate retail prices for roaming are on their way out.

* * *

Thank you in advance for giving consideration to the points set out in this letter.

Yours faithfully,

DRAFT EC SINGLE MARKET REGULATION

ROAMING ASPECTS

FULL MVNO CONCERNS AND PROPOSAL

WHO WE ARE: MOBILE VIRTUAL NETWORK OPERATORS

MVNOs serve more than 10% of the EU's mobile customers, with technically and commercially innovative offers, incl. multi-country/multi-number, roam at/near domestic price for certain destinations, large data allowances, unlimited SMS, off-net calls, etc.

Full MVNOs are independent in terms of ownership/control/commercial terms from established Mobile Network Operators (MNOs), and deploy their own network elements. Full MVNOs contribute to financing the radio access network of MNOs without unnecessary network duplication.

WE AGREE WITH EC POLICY OBJECTIVES

We agree with the EC policy objective to stimulate retail bundles comprising domestic + roaming services, where roaming is offered at the same retail price as domestic services ('roam like at home services').

We agree with the policy objective to 'scale up' competition to the EU level, insofar as it does not reduce competition, is not exclusionary, and is not damaging to users of mobile services in the EU.

WHAT WE WANT: CONTINUE TO COMPETE, CONTINUE TO LEAD

Our members have led the market with innovative offers and any reform of the regulatory environment should enable us to continue to be first-movers and structural leaders in the provision of retail bundles, where roaming is offered at the same retail price as domestic services.

PROBLEM 1: TRIGGER FOR DECOUPLING EXEMPTION

We do not see any justification for participation in collective roaming agreements (Art 4a1) being the 'trigger' for the exemption from roaming decoupling. Such a mechanism is likely to harm competition as Full MVNOs will be excluded from participation in collective roaming agreements given that, in practice, they are unable to offer reciprocal wholesale roaming access (and hence have nothing to barter to achieve wholesale roaming charges below wholesale caps). It would be much more logical for the 'trigger' for such an exemption to be the offering of retail roaming at the same price as domestic services (subject to the 'fair use' and 'phasing in' clauses which are provided for).

It is necessary to avoid a potentially harmful asymmetric approach to decoupling between MVNOs and MNOs with attendant risks to competition. More broadly, we consider that the policy objectives, and benefits to users, can best be achieved by allowing all market participants to vigorously compete, as opposed to the adoption of policy that entails risks of being exclusionary, and which is highly likely to be damaging to users of mobile services in the EU.

PROBLEM 2: LEVEL OF WHOLESALE ROAMING CAPS

Full MVNOs (and othersⁱ) cannot compete for retail roaming at the same price as domestic services if they have to pay for wholesale roaming at the Roaming III wholesale caps.

PROBLEM 1+2 = EXISTENTIAL THREAT TO FULL MVNOS

Full MVNOs would be among the few remaining small operators not to be exempted from roaming decoupling (incurring disproportionate costs + losing roaming traffic to Alternative Roaming Providers (ARPs). Large mobile network operators could act as ARPs to damage smaller players.

If the market trends to widespread offer of bundles in which retail roaming is sold at the same price as domestic services, and Full MVNOs cannot offer it (due to the level of the wholesale caps and not having the ability to negotiate lower rates/be part of collective roaming agreements), Full MVNOs are at risk of being evicted from not only the international roaming segment of the market, but also from markets for domestic mobile services.

OUR PROPOSAL = 2 READILY IMPLEMENTABLE TWEAKS

1) Reduce wholesale roaming caps to a levelⁱⁱ which enables all market participants to compete for the supply of retail bundles comprising domestic + roaming services, *irrespective of participation in a collective roaming agreement.*

and

2) Change the 'trigger' for exemption from roaming decoupling, i.e. allow any provider to be exempted, conditional upon the provider offering the retail bundles domestic + roaming, *irrespective of participation in a collective roaming agreement.*

REDUCED WHOLESALE ROAMING CAPS ARE NOT BELOW COST

As part of the merger clearance of the acquisition of Orange Austria by H3G Austria, H3G Austria entered into a formal commitment to practice wholesale mobile charges which are well belowⁱⁱⁱ the reduced roaming caps envisaged by DG CNECT in its July ISC draft. Providing wholesale roaming does not entail materially greater cost than providing wholesale mobile access as done by H3G Austria.

Concerns about permanent roaming/price arbitrage can be addressed ex-post if such phenomena emerge, or can be prevented ex-ante, by other means than inflating the level at which the wholesale roaming caps are set, e.g. through EC Decisions/Guidance, BEREC Guidelines, etc.

CONTACT

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ⁱ H3G's announcement of 30 August 2013 supports this analysis; its new retail roaming offer is only applicable within H3G footprint+national roaming: *Three says arrivederci to roaming charges in seven countries*: <http://www.threemediacentre.co.uk/Press-Releases/Three-says-arrivederci-to-roaming-charges-in-seven-countries-335.aspx>

ⁱⁱ For instance the reduced wholesale cap levels contained in July ISC draft of the EC Regulation.

ⁱⁱⁱ See pages 28-32 of:

http://www.drei.at/portal/media/bottomnavi/ueber_3/wholesale/2012H3GReferenceOffer.pdf