CONSULTATION REPORT ON THE COMMON POSITION ON WHOLESALE INTERNATIONAL ROAMING
(Consultation doc. n. ERG(05)20)

1. Introduction

This document is a brief report on the answers received within the public consultation on the ERG Common Position on the coordinated analysis of the markets for the Wholesale International Roaming – document n. ERG(05)20 of 25 May 2005.

The consultation period was from 2 June 2005 until 15 July 2005. During this period 12 answers were received from: 01051 Telecom GmbH, Finnet Networks Ltd, INTUG, O2 Group, Orange SA, Polkomtel, Telecom Italia Mobile, Telefonica, Vodafone Group, as well as from 2 other companies that requested to keep confidential their answers and one that agreed to disclose only its non-attributed contribution.

This report tries to summarise the answers and also to cover the ERG appreciation of the comments received. It does not substitute the individual responses and does not try to deal exhaustively with all comments.

ERG carefully considered all the answers received during this consultation. However, given the nature of the Common Position as a guidance for the actual market analysis proceedings, that takes full account of the necessity to consider national circumstances and local effects when assessing the analysis criteria in a given national market, ERG continues to find adequate the WIR Common Position's views and so not necessary to amend the consulted text.

ERG wishes to thank all respondents for their comments.

2. General or Preliminary Issues

Respondent 1
Respondent 1 considers that the emphasis on the high retail tariffs should not hinder the NRAs task of considering the whole value chain of roaming services. This drives Respondent 1 to consider the market as a trans-national one. As a consequence, any regulatory intervention applied on a single national retail market could lead to distortions.

Respondent 2
Respondent 2 stresses the point that the recent launch of a new retail international roaming offer by a leading operator is a relevant development in the retail market that gives rise to incentives in the wholesale market. Also flat rate retail tariffs create incentives for MNOs to reduce charges at the wholesale level. Further, the new offer is a strong step towards transparency and simplicity.

ERG
Regarding **Respondent 2** position, the Common Position, at paragraph 68, states, as a preliminary consideration, that "*there is the possibility to start exerting competitive pressure at the wholesale level, but so far it is unclear whether this is actually happening in a meaningful manner*". In other words it is recognised that reduced retail roaming tariffs would exert pressure on the wholesale level but: a) the group/alliance factor may itself slow the process down; b) there is no evidence that wholesale nominal prices have been changed/reduced significantly; c) from a general perspective the wholesale discounting process is still in early development.
The mentioned offer is an interesting development that may have the effect of reducing prices and increasing pressure at the wholesale level. However, it is currently too early to assess these effects on the market.

Respondent 3
This respondent asked to keep confidential its summary.

Respondent 4
Respondent 4 supports the coordinated approach undertaken by the ERG, and strongly believes that the market is increasingly competitive. Pan-European alliances are radically modifying the roaming market's competitive landscape. They point out that the level of roaming retail tariffs should not be compared with tariffs on domestic mobile market given the added value that international roaming offers, notably the near-universal reachability.

Respondent 5
Respondent 5 stresses the points already raised in other public events, regarding the alleged abuses that happen in the international roaming sector to the detriment of consumers and businesses. They also comments that the ERG CP is remarkably tentative in its analysis and findings.
Respondent 5 points out that so far no market analysis has been completed on the WIR market, nor is it clear that such an analysis would lead to effective remedies. The respondent comments that in contrast to the claims of the operators that they compete fiercely and that they can obtain discounted wholesale prices, users can see no evidence of this on the retail market.

Respondent 5 considers unfortunate the fact that the CP does not address the MVNOs issue. Since these operators are not allowed to conclude international roaming agreements, Respondent 5 considers that these restrictions, that appear to arise from the STIRA agreement, are anticompetitive. It may be necessary to redefine the wholesale market, if MVNOs are to be included and made part of the remedies. MVNOs could be new competitive players on the WIR markets.
Respondent 5 suggests also that traffic direction appears to violate the non-discrimination clause of the GSM Association's STIRA.
Instead of trying to compete to reduce prices, operators appear to try to minimise the net outflows of revenues. So that traffic may be directed not to the cheapest operator but in order to avoid a net outpayment. Prices and discounts may also be used to contain or limit net outflows. Where operators can balance revenue flows, then the level of the wholesale prices can be ignored. The ERG CP does not appear to give sufficient weight to operators behaviour in avoiding net payments.
Respondent 5 welcomes the attention the ERG has given to international roaming. However they stress the slow progress made since the first Commission's Sector Inquiry. The respondent suggests if the market analyses process is not appropriate to tackle the problem, the ERG should say so in the context of the framework review. In the meantime consumers should be warned of high charges for roaming and means to reduce the costs they face.

ERG
Regarding **Respondent 5'**s position, first, from a general perspective, ERG recall paragraphs 8 and 68 of the CP and the ERG press release accompanying the CP publication, and that the CP analysis was concentrated on the wholesale market side.
Regarding the MVNOs, as stated in the CP, the CP does not deal with remedies, nor has analysed the legitimacy of STIRA from the competition law side.
As to the issue of net payments, the Respondent 5's statements are not enough circumstantiated. Yet the situation could be more complex than that expressed only by this answer, when taking into consideration the global possible effects of flat rates and zoned tariffs.
Finally the ERG recognise the need to explore other means other then ex-ante regulation of relevant markets, in order to give answer to the consumers concerns on the international roaming, and has on this purpose set up a project team for possibly devising appropriate measures for improving market transparency.

Respondent 6
Respondent 6 believes that the ERG CP conclusions, although only of an indicative nature, may not fully correspond to the situation on relevant WIR markets in certain new EU Member States, which exhibit a number of different characteristics.
Respondent 6 concentrates on its domestic market and stresses that national circumstances can affect the outcome of market analysis more than that suggested by the CP. In particular they believe that the WIR market has a noticeable expectation of growth in the future. The demand in the new countries is growing, for both a stable increase in business travel and development of tourism. Secondly, they disagree that WIR services are homogeneous. The services may differ among the competitors and MNOs compete on more than just price. Thirdly, the immature markets of Central and Eastern Europe cannot be claimed to be free of competition constraints in terms of the potential supply-side competition. New entrants are expected and this constrains MNOs pricing policies.

Respondent 7
Respondent 7 wishes to highlight a specific national circumstance, namely that in its country a mobile operator needs to cover a very large and sparsely populated area in order to get a minimum customer base to survive, and that Respondent 7 has limited 900 MHz frequencies. This implies that in its domestic country production costs are higher than in other countries, and those of Respondent 7 are even higher, yet its WIR prices are among the cheapest.

ERG
Regarding **Respondent 6**'s and **Respondent 7'**s positions, ERG takes note of their considerations. As mentioned in the CP, the CP conclusions themselves are not and should not be considered as a substitute of national market analysis. National circumstances should always be considered when assessing national markets. Yet in general the arguments presented should not affect the overall CP reasoning and conclusions.

Respondent 8
This respondent asked to keep confidential its summary.

Respondent 9
Respondent 9 fully supports the ERG's strategy of a coordinated approach on the issue. Respondent 9 considers that the WIR market is competitive and does not require regulation. However, if regulation is to be imposed, coordination is essential. Multinational asymmetric regulation would result in market distortions and detriment to some operators (and consumers). This would result in the regulated operator suffering a reduction in roaming revenues, reducing its ability to offer lower retail prices, and lessen the operator's bargaining power when attempting to negotiate lower wholesale roaming tariffs with foreign operators.
Respondent 9 comments on the lack of detailed analysis contained in the paper and the general nature statements in it, without the evidence backing many assertions.
At least in the countries where Respondent 9 operates, Respondent 9 does not agree that retail prices are unaffected by wholesale price reductions. The extent to which these cost savings are passed on to consumers through lower retail prices will depend upon the level of retail competition. So the normal process of competition means that savings are passed on to end users, like the recent example of Vodafone Passport offer shows. Also Respondent 9 recently reduced tariffs for its end users roaming in 4 EU countries. According to Respondent 9, retail mobile markets are national so the effect on retail prices will depend upon the level of retail competition in the national market. In competitive countries consumers will switch away from Respondent 9 if prices are uncompetitive.
Respondent 9 also questions the statement of the CP at paragraph 68 that, although traffic direction can be used to exert competitive pressure, "*so far it is unclear whether this is actually happening in a meaningful manner*". They believe this is actually happening.
Respondent 9 does not agree with the statement of paragraph 72 of the CP that "*a number of competition problems appear also to be present on the relevant market*", since it is not clear which are the alleged problems. Respondent 9 then believes that ERG should refrain from seeking any regulation of this market.

ERG
Regarding **Respondent 9**'s position, ERG wishes to stress the general nature of the statements in the CP, a common position of all the regulators, in agreement with the Commission, that would also not prejudice any national market proceedings outcome in the Member States. The alleged lack of evidences in the CP could derive from the highly confidential nature of the data and information that were analysed and that cannot be rendered public.
Regarding the relative effect between retail prices and wholesale savings, first it is worth noting that the only evidence Respondent 9 put forward was the Vodafone Passport offer, a tariff scheme that was announced one week before the ERG approval of the CP, and some reductions in retail prices of Respondent 9 in 4 countries. The overall impression from the CP work was indeed that international roaming retail prices lagged behind prices in the domestic mobile market. In many countries international roaming retail tariffs were similar for all the operators and the known customer surveys showed that usually the customer's choice of an operator is largely based on national tariffs rather than on the international ones. Further, it appears that in many countries discounts at wholesale level are active only from 2003 and in some case from 2004 (and in some further cases, since they are based on threshold levels, their applicability and magnitude have still to be evaluated). So competition at retail level, and the transfer of benefits at wholesale level to end users, is yet to be proven.
Regarding the impact on wholesale competition of traffic direction, the ERG analysis shows that, in general terms, the pattern of discount agreements is not limited to members of groups/alliances and the effectiveness of traffic direction varies with time and operators. So the effects of increased use of traffic direction and discounting will need to be fully assessed on national basis.
The competition problems briefly referred to in paragraph 72 are described with more reasoning in paragraphs 64 and 68. Nowhere it is stated that these competition problems would then result in SMP findings.

Respondent 10
While not commenting directly on specific aspects of the consultation Respondent 10 responded rather in-depth on the basis of a market analysis, mostly based on its current domestic market. The analysis was set about showing how the wholesale roaming market is a growing market, which has been impacted in a notable way, since the year 2003, by new technical means to redirect traffic. This is the key factor that has favoured a strong growth in buyer's purchasing power and which have increased the instability of market shares of operators on the relevant market.
This growing demand has resulted in an increase in competition in the wholesale market which Respondent 10 states resulted in an improvement in the offers on the market, both in terms of the services offered, as well as in terms of price and quality. The advent of volume discounts resulted in the fact that the level of wholesale prices has fallen. At the same time this is an incentive for operators to pass on to retail users the wholesale advantages, through simpler tariff schemes, prices reductions, etc. This would also drive the retail demand up and conversely a higher service consumption will strengthen the operator's position as a buyer.
Respondent 10 also points out that the fact that retail prices are "high" when compared to prices on the national markets is not incompatible with the existence of competition on wholesale markets. The variable costs of the retail service of international roaming are

dependent to a great extent on the prices for WIR, although the margin applied in order to recover costs is determined in the retail market of the country of origin.
The increase in competition in the wholesale market has also led the operators to devote greater efforts to investments in the development and roll-out of new roaming services and facilities on 2G, 2.5G and 3G networks.
Respondent 10 also stresses the fact that, without prejudice for the positive aspects of a coordinated analysis of different NRAs of the WIR markets, each WIR market has some particular characteristics that have to be evaluated individually. Therefore, although some conclusions in the ERG CP are correct and applicable to all markets, in other cases, notably the evaluation of the existence of joint dominance, a more individualised analysis should be carried out.
Respondent 10 concludes that the domestic market for WIR is effectively competitive and features a great strengthening of bargaining power of purchasing operators, an increase in competitive pressure of local operators as suppliers, many benefits to customers in terms of wider offer, more quality of service, decrease in retail roaming prices, increase in price transparency, high level of technological development, new business models, increase in demand.

ERG
Regarding **Respondent 10**'s position, ERG takes note of the conclusions drawn from the analyses carried out by this company. However it notes that these very positive conclusions have not yet been substantiated by independent analysis, either in the local country or more generally.

Respondent 11
Respondent 11 designates wholesale international roaming (WIR) as a transnational market. This was evident especially from paragraphs 6 and 7 of the CP. It was therefore required to conduct a joint market analysis and decision-making process in accordance with Article 16(5) of the Framework Directive for which the necessary rules of implementation had not however been made available so far (see Commission Guidelines, paragraphs 122 and 123). A coordinated market analysis under the ERG Document and subsequent separate and country-specific regulation by the various Member States (see paragraph 69 of the CP) was not sufficient. Respondent 11 pleads that the process should first be agreed within the NRAs before a single market analysis procedure is determined with participation of the NRAs within the scope of the Commission. Only by ensuring a single method would it be possible to prevent competition distortions in the Common Market. Due to the rapid progress of new technical innovations, WIR was not a fully developed market based or mature technology, but a strongly growing market. The introduction of new technical means had allowed prices to vary considerably and price competition had been strengthened substantially in the WIR markets.
Respondent 11 emphasises that WIR is a subject dealt with at international level, going far beyond the EU frontiers. To avoid disadvantages in competition, operators from non-EU countries therefore also had to be included in the regulatory system.

ERG
Regarding **Respondent 11**'s position, it should be pointed out that the NRAs are obliged under the current regulatory framework to conduct a market analysis of the national WIR

markets. The possible problems faced on the reciprocity issues with non-EU operators does merit a reflection.

Respondent 12

Respondent 12 argues that mobile operators have excessive profits resulting from the lack of competition. According to one operator in its domestic market such profits can account for 15-20% of the sales of large mobile operators.

Since the high charges of these services enabled mobile operators to make interesting offers as an artificial substitute for offers based on fixed network technology, Respondent 12 as a fixed network operator was also affected by WIR.

Due to the fact that, in the WIR markets, buyers of roaming services were at the same time providers of such services, all users were interested in keeping prices high. Therefore, there was no pressure to enter into negotiations. Only users requesting far more roaming services than offering such services would benefit from lower roaming prices.

ERG

Regarding **Respondent 12**’s position, it should be highlighted that so far fixed network products are not considered substitutable with the mobile ones.

3. Market Definition

Respondent 1
The respondent considers that voice and SMS should not be regarded as a natural bundle since there is no substitutability between them. In the future the operators will provide a complete offer that could include MMS, GPRS, videocalls, etc.
It suggests that there should be coherence between the assessment of the national call and origination market and that of the WIR market. Increasing competition in retail mobile market and the lack of market power in the mobile access will drive lower wholesale roaming charges, as each operator will be incentivised to reduce its retail international roaming tariff in order to compete on the home retail market, and consequently select in each country one or more preferred partner with lower wholesale tariffs.
Respondent 1 agrees with ERG that voice over both 2G and 3G networks are part of the same relevant market and that the market should encompass all operators in a given country.

Respondent 4
Respondent 4 subscribes to the view that voice, SMS and other narrowband data services should be included in the wholesale roaming market definition, but submits that the development and the maturity of the services included in the relevant market should be carefully considered before imposing any obligations.

Respondent 5
In the absence of evidence of data only roaming agreements, the market definition would have to include the full bundle (access, SMS, voice, GPRS, EDGE).

ERG
Regarding **Respondent 1**'s, **Respondent 4**'s and **Respondent 5**'s position, the Common Position, paragraph 26, states that: "*Regardless of the extent of substitutability […] SMS and voice could be regarded as a natural bundle that may be subject to common pricing constraint. Thus there are grounds to regard SMS as being in the same relevant market as voice calls. However, it should be noted that since NRAs have adopted different approaches in including originating SMS within wholesale (call) origination in their respective markets, they should consider national circumstances when analysing whether SMS should be included as part of the WIR market*".

Respondent 2
Respondent 2 agrees with the tentative conclusion that the relevant product market encompasses all MNOs in a given country, and discusses the reasons.
They also point out that the CP ignores the possibilities of the termination of agreements or the blocking of traffic as alternative means of disciplining uncompetitive suppliers. Respondent 2 thinks that NRAs should consider the cumulative strength of the various options available to buyers in WIR negotiations in order to render the SSNIP test unprofitable.
Respondent 2 also points out that the CP ignores the fact that foreign operators need to be able to switch only a sufficient proportion of traffic for the critical loss to constrain pricing and for that operator to be part of a broader market under the SSNIP test. So

Respondent 2 comments that the ERG should clarify that operators must not be able to switch 100% of the traffic in order for networks to be considered substitutable.
Respondent 2 also notes that it would be wrong to assume that internalised traffic was unswitchable or that even were it switchable it was free from all competitive constraints. Crucially, MNOs are not able to price discriminate between switchable and non switchable traffic; it is possible therefore for MNOs to negotiate deals for switchable traffic in order to secure a competitive price for all traffic (whether switchable or not).
Finally Respondent 2 notes that, with the exception of its competition cases in the UK and Germany, the Commission refer to the WIR market as a multi-operator national one.

ERG
Regarding **Respondent 2'**s position, first it must be noted that the termination of an agreement (see CP, paragraph 3) would probably affect also the foreign operator's outbound traffic on its home network.
The appreciation of the significance of switched traffic to be considered sufficient in order to regard networks substitutable should be made on a case by case basis, but the evidence gathered in the joint project gives rise to the presumption that the actual switching, either potential or effective, together with the non-exclusive agreements, is sufficient to judge networks as substitutable.
Also, in the CP there is no suggestion that internalised traffic should be excluded from the relevant market.
It was also out of the scope of the current Common Position the review and comment of past Commission's market analysis in competition cases.

Respondent 6
Respondent 6 points out that other competitive constraints are the new alternative technologies, such as R-LAN or WiMax, that are emerging. They could be considered in the market definition since the number of customers regarding them as a substitute to retail roaming services is likely to grow.

ERG
Regarding **Respondent 6'**s position, it may well be that in a single specific market some emergent technologies, i.e. VoIP over WiFi or similar, could be considered a substitute to a WIR product, after passing the SSNIP test. Yet in the surveyed markets there was no evidence that this would be the case, nor that this situation would likely change during the next 12-18 months.

Respondent 7
Respondent 7 notes that some operators in its country are using re-rating for outbound roaming, implying that they could not pass eventual discounts to end users. This may mean that also outbound roaming may cause roaming prices to be high.
Secondly Respondent 7 suggests that GPRS and 3G services are to be included in the market, since some foreign operators have denied Respondent 7 to conclude GPRS roaming agreements, even if a voice/SMS agreement is in place.
They also argue that they are subject to a discrimination from some foreign operators, that refuse to conclude roaming agreement with them, and so hamper their possibility to offer a full quality service to their customers.

ERG
Concerning **Respondent 7'**s position, ERG can do very little in the CP to deal with any alleged discrimination against Respondent 7, and refers to the art. 21 of the Framework Directive provisions, or to GSMA association rules. Regarding the inclusion of data service in the market, the Respondent 7 arguments seem not requiring, within the CP scope, a change of the conclusions on the relevant market. Anyhow, as stated elsewhere, national circumstances can lead to different market definition from the CP's.

Respondent 9
Respondent 9 fully agrees with the CP consideration that only inbound roaming should be part of the relevant product market. However, since the CP states that the NRAs can take into account any connected market and proceed to examine how the whole sector works, Respondent 9 finds unclear how it is proposed that the outbound roaming traffic could affect the conclusions about wholesale roaming.
Respondent 9 does not agree with the statement "*As long as no roaming charges are levied, the inclusion of terminating roaming traffic is* […] *nor relevant for a competition analysis of the WIR market*". Respondent 9 considers that the cost of both originating and terminating roaming traffic should be taken into account when assessing WIR prices. It is irrelevant that operators usually levy a wholesale charge only for originating calls, not for terminating them, as often it happens in the toll bridge business.

ERG
Regarding **Respondent 9**'s position, in the CP there is no proposal how the analysis of retail markets would affect the NRAs' conclusions on WIR market assessment. The relations between the markets are the usual in case of up and downstream markets.
For the terminating calls the Respondent 9's statement is a matter of discussion. The CP is not aimed at depicting the cost and profits account of the international roaming business. The cost allocation issue in a multiservice business, per se, would require a dedicated investigation. The roamed terminating calls impose costs on the visited network, but they also attract revenues, as the normal national and international termination calls on mobile domestic customers. These revenues are not, strictly speaking, a wholesale revenue of the same nature of the IOTs, used by a third operator to build a retail product. So the example of the toll bridge business is not a completely perfect analogy. The analysis conducted for the CP showed: a) that mobile roamers have a somewhat stable originating/terminating ratio, b) that, as far as the wholesale revenues are concerned, the driver is the originating call traffic (the voice terminating inbound traffic revenues from interconnection are in general an order of magnitude less than the voice originating inbound traffic revenues, while the former revenues are even non existent for SMS and data), and c) that, as far as the terminating calls revenues are concerned, these could be affected, in some countries, by regulated prices. These considerations have been taken into account when forming the views as set in the CP for the relevant market definition (see CP paragraph 25), that in any way prejudices an eventual different conclusion by a given NRA (for instance in case of unbundled services).

Respondent 10

Respondent 10 shares the ERG's opinion with regards to the inclusion within the scope of the market of all network operators of the same country. The non-exclusivity of contracts and the availability of technologies that enables the choice of the network visited with a very high degree of reliability, allow operators demanding wholesale international roaming services to change supplier without switching costs and practically without time delay.

Respondent 10 also stresses the importance of the development of new technologies such as WiFi/WiMax in assessing the potential competition to roaming, in particular for data services (and in future also for voice when data services are coupled with VoIP technologies).

Respondent 11

Respondent 11 criticises that arguments such as "*high prices*" from the consumer perspective (see paragraph 8 of the CP) and market characteristics of the retail markets are discussed in the ERG Document to a not inconsiderable extent. This was the wrong approach to analysis because there was no focus on the analysis of upstream services. The correct approach in terms of the method to be applied was addressed in paragraph 71 of the CP.

If only the originating traffic was to be included in the market analysis as set forth in paragraph 24 of the CP, namely access and call setup to mobile networks, these would however be identical with the services of market 15. In Respondent 11's country this market had been found to have effective competition. This outcome would then also have to be valid for the WIR market. However, as compared to users in the national market, customers of foreign mobile operators had the advantage partially to decide on the roaming services network themselves by manual selection.

Respondent 12

In principle, Respondent 12 agreed with the market definition of the ERG Document.

According to ERG's definition of the WIR market the only difference between the WIR market (market 17) and the market for access and call setup originating in national mobile networks (market 15) was at least one country border existing in between. Both cases referred to traffic originating in a foreign network. The difference between the two markets thus being minimal only, the market analyses of market 17 and market 15 would usually have to yield the same results. According to Respondent 12 call by call originating in national markets should therefore also be introduced to strengthen competition.

ERG

Regarding **Respondent 11**'s and **Respondent 12**'s positions, first it must be stressed that the upstream market analysis was indeed the core of the CP analysis, then it is difficult to see the homologation process between markets n. 15 and 17 of the Commission Recommendation. The products in the 2 markets are sold to different buyers, under specific agreements, with reciprocity, and downstream market products are consumed by different end-users. The 2 markets have been defined differently in the regulatory framework, and so has the CP. Finally, discussing of remedies on market 15 (as well as 17) is out of the CP analysis work.

4. Single Dominance Assessment

Respondent 1
Respondent 1 considers that the market share analysis should be based on both revenue and volume, since limiting to only one could lead to overlook some relevant market aspects. A comparison of both information is preferable, but in any case Respondent 1 considers that the revenue market share analysis gives a more complete and representative method, since the revenue market is the most adequate for understanding the entire business of an operator.

ERG
Regarding **Respondent 1**'s position, the Common Position in paragraph 39 gives examples of possible market shares analysis, while the conclusions in paragraph 40 are based on all the available market shares, both in volumes and revenues. It must be highlighted that a proper revenue market shares analysis at wholesale level need to take into account the actual discounts applied. Other respondents (see Respondent 7) think differently and prefer volumes.

Respondent 2
Respondent 2 agrees with the CP discussion. In particular they believe that wholesale roaming prices often differ between operators because roaming is a differentiated product market where operators compete on a variety of non-price dimensions (i.e. differences in coverage, short code dialling, etc.). So wholesale pricing as far as Respondent 2 has noticed is consistent with effective competition. Also, it must be considered the extensive discounting activity in the market. Further it would be very unlikely that an NRAs find SMP (single or joint) in a WIR market when such SMP is not found in the wholesale market for access and origination.

ERG
Regarding **Respondent 2's** position it should be pointed out that the statement that current wholesale pricing is consistent with an effective competition is given without strong corroborating evidence. Actually, as mentioned before, a preliminary analysis of pricing shows in general terms no nominal downward tendency and also the discounting policy is still in general in an early development.

Respondent 4
Respondent 4 submits that the lack of dominance on the WIR market is confirmed by the existence of a powerful countervailing buying power in the market, as illustrated by the increased use of traffic direction techniques. The dynamics of alliance membership prevent an operator from behaving to an appreciable extent independently of competitors, customers and consumers.

ERG
ERG notes that taking into account **Respondent 4**'s observations on the importance of the buyers' retail market position does not bring a significant change to the CP reasoning. In fact, in several case it might be too early to conclude on the effects of traffic direction and its relation with alliance membership and countervailing buyer power.

Respondent 7
Respondent 7 thinks that volumes are better suited then revenues to defining market shares.
Respondent 7 points out that also overall traffic volumes of MNOs affect their ability to act as SMP. In other words having large outbound roaming volumes, an MNO is able to put pressure on foreign MNOs to prefer its network and hence keeping higher inbound roaming prices while getting more inbound roaming.

ERG
Concerning **Respondent 7'**s position, the CP analysis considers the situation described as an example of countervailing buyer power on the foreign WIR market. This seem a pro-competitive factor. In theory, in presence of traffic direction techniques, nothing prevent a "small" operator to divert traffic away from the network abroad of a "big" operator, if this is in its interest. Anyhow, it would not be only the threat to lose the outbound traffic of a "small" operator to cause a big operator to switch its outbound traffic to a different operator with higher IOTs for retaliation.

Respondent 9
Respondent 9 does not consider that any operator enjoys single dominance in any of the markets where Respondent 9 itself operates. WIR services are highly homogeneous and substitutable and so any operator (Respondent 9 in particular) cannot act to an appreciable extent independently of its competitors, customers or consumers.

Respondent 11
According to information supplied by Respondent 11, traffic routing mechanisms such as over-the-air (OTA) were suitable to strengthen the own negotiating power. The associated cut in prices could then be passed on to the end user.

ERG
Concerning **Respondent 11**'s remarks, as mentioned, it should be noted that the CP does not make any in-depth analysis of the retail roaming pricing, however from the information gathered and the survey made by ERG, as well as the known market surveys, it was not shown evidently and in general that any development in the wholesale side was actually passed on to the retail side as end user tariff reduction.

Respondent 12
According to Respondent 12 the criteria set by the ERG to test for joint dominance were correct, but incomplete. The company additionally refers to the 16 criteria of the "*ERG Working Paper on the SMP Concept for the New Regulatory Framework*" (ERG (03) 09

Rev1 of October 2004). As there were many different types and variants of market power, clearly defined and ever repeating criteria could not be determined.

Respondent 12 comments on paragraph 49 of the CP that not only the relative price level but also excessive absolute prices are a clear sign of absolute market power. Hence the absolute price level would also have to be analysed.

According to Respondent 12 it was not clear how the ERG wanted to consider the role of the end user with regard to the "*countervailing buyer power*" and "*buyers*" criteria. The company points out that, in practice, the buying customer's ability to exercise negotiating power will be extremely restricted due to the lack of substitutability of mobile roaming abroad, the minor importance of roaming services as compared to the whole range of offers made by the operator (mobiles, access, national calls, etc) and the customer's lack of information on mobile operators abroad and their prices.

Respondent 12 considers it possible to conduct a market power analysis on the basis of Michael Porter's "*competitive five forces*"[1] according to which the threat by new competitors/market entry, the threat of products serving as substitutes, the negotiating power of buyers, the negotiating strength of providers and the rivalry among existing competitors are criteria suitable for the study of the intensity of competition. By applying these criteria Respondent 12 comes to the conclusion that there is no intensity of competition.

ERG

Regarding **Respondent 12'**s position, it should be noted that the ERG Working paper on SMP concept is as such a working paper, that has not yet been finalised and has a scope wider then the specific WIR market. However NRAs should follow the criteria set in the Commission Recommendation and the Commission Guidelines in their SMP analysis, and look at and assess the whole set of them. In this sense are the views expressed in paragraph 50.

[1] M. Porter, "Competitive Strategy", Free Press, 1980.

5. Joint Dominance Assessment

Respondent 1
Respondent 1 states that in order to assess a joint dominance position, the NRAs should verify if all the essential conditions set out in the ECJ jurisprudence relating to art. 82 of the Treaty, and in the light of the criteria of the Airtours case, are satisfied. In this light the company believes that, in order to evaluate if the structure of the market can be conducive to tacit collusion, in addition to transparency and the setting of a retaliation mechanism, the following aspects should be considered: the different economies of scope and sale resulting from a pan-European footprint, the countervailing buyer power of business customers, the participation to alliances and the development of traffic steering agreements, the development of alliances that compete among themselves and so excludes, per se, any risk of collusion.

ERG
Regarding **Respondent 1**'s position, the aspects that they wish to be taken into consideration were actually considered, when forming the CP views, that, as described, are without prejudice for the NRAs national proceedings.

Respondent 2
Respondent 2 states that the checklist approach to an assessment of joint dominance as outlined in the CP at paragraphs 52-63 is incomplete and inadequate. Respondent 2 believes that some elements, namely the suggestion that roaming is a homogeneous product and the assertion that wholesale demand is relatively stable, are highly contestable. The CP ignores the disruptive impact in the future of new technologies such as WiFi. This means that the statement of the CP in paragraph 64 that: "*the aforementioned features are expectedly conducive to a supracompetitive market outcome*" is wrong.
Respondent 2 has concerns that the checklist approach to joint dominance is not followed by a rigorous treatment of the Airtours considerations. According to Respondent 2, an NRA would need to consider a range of fundamental questions: i) how can operators agree on a particular equilibrium pricing over a significant time period, when there is evidence that both prices and market shares are dynamic, ii) why would a recent new entrant agree to a tacit equilibrium when there is evidence that they switch large amount of traffic via discounts which cannot be readily detected by rivals and which reveal price elasticities, iii) why would any operator agree to a tacit equilibrium when it has few barriers to expansion and capture most or even all the demand, iv) how would operators detect deviations when discounts agreements remain confidential, v) on what basis could operators retaliate.
Respondent 2 notes that the CP is silent on these fundamental questions and that if they were answered there would be no question of joint dominance. In this light the concluding comments in paragraph 72, which allude to competition problems, are imprecise and unsupported by the analysis undertaken.

ERG
Regarding **Respondent 2'**s position, the checklist approach shown in the CP is a high level appreciation of the actual analysis work. The conclusion in paragraph 64 are actually

the common position as agreed at ERG level of that work. Actually the Airtours considerations are deeply taken into consideration. The analysis behind the Common Position try to give answers to the Respondent 2's questions. The first 3 questions i), ii) and iii) are considered when outlining the mentioned conclusion in paragraph 64. The other 2 questions, iv) and v) are indeed the key points of the discussion regarding the assessment of tacit collusion, as stated in paragraphs 66 and 67.
Given this and the analysis that has been conducted, ERG continue to find adequate the statement in paragraph 72.

Respondent 4
Respondent 4 disagrees with the opinion that voice and SMS are mature services in a roaming context. The WIR market boasts some innovative products such those of a virtual home environment (i.e. short codes). Furthermore, traffic direction enables an MNO to buy the most competitive WIR products, and so exert competitive pressure. Finally, Respondent 4 indicates that WIR products may not all be homogeneous given the variety of data services and range of technologies on offer, and the demand for roaming services is growing (the penetration rate is still low, especially in the new member states). This leads Respondent 4 to disagree with the conclusions in paragraph 64 of the CP.
Respondent 4 also believes that the WIR market dynamics are not conducive to joint dominance as tacit collusion.

ERG
Concerning **Respondent 4**'s remarks as to the maturity of voice and SMS, ERG, as described in the CP, has analysed little information on the retail aspect of the market, however there is nothing to contradict the finding that the overall increase of the roaming market is linked to a widening customer base (growing penetration rate of mobile telephony and increasing travel patterns), but not to a surge in per capita demand. Furthermore, there is no product differentiation as such on data services on the wholesale level, and the technology used is neutral in terms of supply of wholesale roaming products. Some other respondents (see for example Respondent 9) considers WIR services as "*highly homogeneous*".

Respondent 7
Respondent 7 stresses that in the local country not all operators have similar cost structure. Respondent 7 in particular having mostly 1800 MHz band and the need to cover a wide territory, has a higher cost structure.

ERG
Concerning **Respondent 7'**s position, ERG notes this, yet this consideration is not likely to affect the overall general CP reasoning and conclusions.

Respondent 9
According to Respondent 9 none of the markets in which Respondent 9 operates is conducive to tacit coordination. In the WIR markets it is not possible to satisfy the Airtours conditions, in particular transparency. In fact the discounts for example are highly commercially confidential.

Respondent 10

The existence of positions of joint dominance has to be analysed in an individual way by each NRA. Respondent 10 reviews in its analysis a number of market characteristics, based on the national market.

Mature product / Homogenous product. Respondent 10 disagrees with the conclusion that there is little room for product differentiation. They argue that operators actually seek to differentiate service from competitors. For example: growth in SMS and data services; and UMTS, allows further differentiation, high degree of technological development, new business models (including single tariffs across countries, alliances, etc.) and roaming agreements. The market is, thus, far from mature and experiencing clear expansion led by technological innovation. They argue that the product is also not homogenous due to the introduction of CAMEL services, GPRS, MMS or video telephony. There is further product differentiation in service quality conditions or coverage offered.

Evolution of demand / Maturity of the market. Respondent 10 disagrees with the ERG conclusion that there is no substantial evidence to suggest that wholesale demand for roaming services is increasing dramatically. They note that ERG SMP Concept paper (working document) criticises the ambiguity of this indicator: "*the interpretation of this criterion with respect to collective dominance is ambiguous*". They argue anyway that demand for roaming services is growing.

Respondent 10 also notes the strong seasonality of some holiday destinations countries. They argue that in these markets tacit collusion is even more difficult to sustain. The retaliation mechanism is undermined by short seasonal spikes in demand which encourage the breaking of eventual agreements with minimal consequences, while unpredictability of traffic flows each year (as demand) makes it almost impossible to predict whether a fall in traffic is due to a fall in demand for the operators services or due to the breaking of a collusive agreement by a competitor.

Similar cost structures. Respondent 10 disagrees with the statement that cost structures are similar across networks. Some operators have various market shares, available capacity and spectrum. Where an MNO is close to capacity it must increase its infrastructure to obtain more traffic. This MNO will thus have higher marginal costs than MNOs which have more excess capacity. Also incremental costs can be very different between operators of different spectrum and network design. In any case the influence of marginal cost differential on competition is not primary.

Low Elasticity of Demand. Again Respondent 10 quotes the ERG SMP Concept paper (working document) as a document which undermines this indicator as "*an ambivalent criteria in the context of the evaluation of joint dominance*". They argue that there are two types of demand creating elasticity in the WIR market: immediate demand derived from traffic direction and indirect demand from the retail level. They argue that prices are increasingly transparent at the retail level and lower wholesale prices (through volume discounts) are being transferred to retail level. Respondent 10 dismisses the conclusion that alliances create a fall in elasticity at the wholesale level and are a vehicle to ensure exclusivity. They instead argue that MNOs direct traffic to other members purely due to discounts offered.

Absence or insufficient price competition. Respondent 10 argues that the increase in the use of volume discounting, as a consequence of traffic direction results in price competition. In addition, they disagree with the conclusion that wholesale savings are not being passed on to end users. They argue that retail price transparency is increasing and lower retail prices have materialised for a significant number of operators. This in turn induces end users to use their phones more and give operators more strength in negotiations for more discounts.

Absence of countervailing buyer power of operators. Respondent 10 states that there is high and growing countervailing buyer power in wholesale markets across Europe due to demand concentration and availability of strong traffic direction. This is supported by the immediateness of the change of the preferred network and absence of switching costs. Respondent 10 then believes that traffic direction has already significantly put competitive pressure on wholesale level.
Lack of technological innovation, technology that is almost obsolete. Respondent 10 states that technological innovation is the most characteristic feature of the WIR market, as it is demonstrated by e.g. traffic direction, SIM cards with greater capacity, new versions of CAMEL, improved capacity offered by UMTS technology, etc.
Lack of potential competition. Respondent 10 identifies sources of potential competition in new operators with 3G licences, WLAN/WMAN, providers such as Skype, the possibly regulated mobile call termination.
Overall evaluation of joint dominance. Respondent 10 believes there exists a number of issues that complicates the existence and the sustainability of tacit agreements, such as the difficulty to reach agreements on market prices that maximise the interests of all players (due to different cost structures and market shares), the limited transparency of discounts, the complexity to deter the effective break up of an eventual agreement, the weak ability to retaliate in those markets where demand is seasonal and there are asymmetries in excess capacity, the concentration of demand in a limited number of operators, the appearance of alternative networks as an exogenous threat for reducing the expected lifespan of any agreement.

ERG
Regarding **Respondent 10**'s position, the following discussion is made for the points raised:
Mature product / Homogenous product. In respect of the services identified in the market definition as provided in the CP, voice and SMS, the general view is that this market can be considered to be a mature market. Further evaluation could be needed whether other services are included in the relevant market, taking into consideration their relative importance, in individual cases. The "*high degree of technological development*" referred to is relatively constant across all operators. The business models provided by Respondent 10 do not support the conclusion that products are differentiated by suppliers. Service quality and coverage offered are increasingly homogenous across markets.
Evolution of demand / Maturity of the market. ERG note first that the SMP Concept paper has not been finalised, that this paper is aimed at drawing conclusions on SMP analysis across the communications markets as a whole, while the Common Position is aimed at providing specific guidance for the WIR market alone, and that, as stated in the CP, the evaluation of a given criteria should not be made mechanistically, but the assessment should be made as a whole. ERG acknowledges that retail level demand may yet be in an early phase and witness a high level of growth in the future. This is also linked to the retail price dynamic for international roaming services. As of today there seem to be no need to change the view reported in the Common Position.
With regards to seasonal influences in the local market, the Common Position paper is not intended to comment on individual markets. However, ERG is of the opinion that also the following considerations should be noted: a) seasonal influences/fluctuations have been present for a long time in many markets and in that sense are predictable; b) it must be assessed whether the long-term benefits of an anti-competitive conduct outweigh any short-term gain resulting from a resort to a competitive behaviour. Thus, breaking of a tacit agreement in a seasonal period could become known and would influence the behaviour

of competitors in future periods. The market would resort to a more competitive outcome in future periods rendering an initial deviation unprofitable.

Similar cost structures. In general, the marginal cost of serving a new customer is lower for more established networks. However, in the WIR market (where handset subsidies, advertising costs, etc., are less significant) this advantage is less evident. While ERG will not comment on conditions in individual markets, the costs of upgrading and expanding the network should be allocated across both the domestic market and the WIR market.

Low Elasticity of Demand. Again, ERG note that the SMP Concept paper has not been finalised and the conclusions on an eventual findings of joint dominance should be made after assessing all criteria as a whole. There is ample consumer survey evidence to suggest that consumer price awareness and price elasticity of demand at the retail level is so far relatively low. There is as yet no evidence to suggest that movements of prices at the retail level exactly mirror movements at the wholesale level. The use of traffic direction and associated discounting is at an early stage and the general conclusion in the CP analysis is that there is no clear evidence that within groups/alliances traffic direction is primarily linked to a pricing policy. However, taking note of the assertions of Respondent 10, this should be verified in the specific case, as also the CP states at paragraph 61.

Absence or insufficient price competition. Arguments provided on the existence of an effective price competition are not supported by facts, at least in the analysed countries for the CP. Discounts have started to develop mostly over the last couple of years and very often their applicability is subject to complex evaluation. Also modifying a discounting contract may take a time longer then simply relying on the price dimension. However ERG already recognised this factor as one of the most important to assess. Even if the CP has not dealt with a detailed retail analysis, a first view is a general lack of transparency in retail pricing. Only very recently, after the CP was published and the same ERG and the Commission issued specific communications, this issue has begun to be tackled by some operators.

Absence of countervailing buyer power of operators. As a general statement, not all markets reflect the characteristics described by Respondent 10 regarding the use and effectiveness of traffic direction. Further, as stated in the CP, at paragraph 68, there are not enough and clear evidence that traffic direction is directly used to negotiate a pricing policy (see also paragraph 61). However, ERG acknowledges that as the efficiency of traffic direction increases countervailing buyer power should also increase, as described in paragraph 42 and 45, and that each market should be individually assessed, as amply explained.

Lack of technological innovation, technology that is almost obsolete. ERG do not deny in the CP what stated by Respondent 10, yet some of these technological developments and innovations and their impact on competition should be assessed in the light of the defined relevant market.

Lack of potential competition. Operators running W-LANs/W-MANs (and related VoIP services) could conceivably compete with MNOs in the provision of WIR services, however there are at present significant technical obstacles that would have to be overcome before such a service could become viable and it is not expected that comparable services to WIR appear in the market for the time span by a market analysis. 3G operators already present in the market were included in the CP assessment. Roamed terminated calls are not suggested to be included in the market definition.

Overall Evaluation of joint dominance. ERG take note of the Respondent 10's conclusions and refer to the local national market analysis proceeding for having them verified and formally assessed.

Respondent 11

According to Respondent 11, it is possible to create and strengthen pressure on the demand side by membership of an alliance and affiliation to a group of companies. From Respondent 11's perspective this had no negative impact on competition.

Respondent 11 classifies three operator groups, each having different market opportunities: a) Small undertakings, which have entered the market late and only handle little roaming traffic of foreign customers, with larger competitors usually sharing the majority of this traffic among themselves. Additionally, they are not interconnected to a large extent and their traffic volumes are low, preventing them to exercise any power on the demand side. b) Medium-sized providers, which are members of alliances and benefit from lower roaming costs of their alliance partners and in turn collect lower roaming charges. c) Large providers, with equity participations in several countries and parent/subsidiary company relations achieve "intra-company" improvements in addition to alliance benefits, allowing upstream prices to be reduced within the group. They largely handle international roaming traffic fully within their group.

Respondent 11 emphasises that, consequently, there is no balance of power in international roaming as the power on the supply and demand side varies according to the size of the undertakings.

Respondent 11 does not question the joint dominance criteria established in the ERG Document. Yet many of these criteria did not apply so that there was no joint dominance overall. In particular informal or other links between the undertakings concerned would require a high degree of coordination which undertakings would however shy away from in practice. Moreover, operators in the domestic country did not have similar cost structures.

At upstream level the roaming product was homogeneous, but the decisive aspect was how "end-user roaming products" would be implemented at a later date.

Respondent 12

Respondent 12 states that the criteria for determining single dominance in the ERG Document are valid, but insufficient. The list of criteria given in the "*ERG Working Paper on the SMP Concept for the New Regulatory Framework*" (ERG (03) 09 Rev1 of October 2004) would in addition have to be consulted if a test for joint dominance was to be made. Even this list was not final because there was an even larger number of criteria to describe significant market power. In this context Respondent 12 quotes the Framework Directive (Annex II) of the EU Commission. "*The* [list of criteria] *above is not an exhaustive list, nor are the criteria cumulative. Rather, the list is intended to illustrate only the sorts of evidence that could be used to support assertions concerning the existence of joint dominance.*"

ERG

Regarding **Respondent 12'**s position, it should be noted again that the ERG Working paper on SMP concept is as such a working paper, that has not yet been finalised, with a wider scope then the WIR market assessment. The Annex II of the Framework Directive has also been quoted, see paragraph 52 of the CP, and, more, considered.

6. Overall ERG Assessment

ERG carefully considered all the answers received during this consultation. However, it is not the purpose of this document to formally consider each response in detail or provide counterarguments to all the issues raised.

With due consideration to some comments regarding market definition and some appreciations regarding characteristics of the market that could differ from those described in the CP (i.e., market not maturity, growth, homogeneity, or technological developments), and to some remarks about the necessity of considering national circumstances, the main issues of the consultation were raised onto three points.

The first refers to the statement at paragraph 64, where it was concluded that, as a first view and without prejudice for the actual market analysis findings by NRAs, the surveyed features of the markets are conducive to a supracompetitive market outcome. Those who challenged this statement expressed the view that the WIR market is on the contrary very competitive.

The second regards the statement at paragraph 68, where it is hinted that, at a first survey, it was not brought to evidence that savings emerging from a discount policy at wholesale level are directly passed on to end user. The challengers of this point again consider that the competitive market at wholesale level is already providing for consistent tariffs reductions at retail level.

The third regards the consideration that the WIR market characteristics, according to some respondents, cannot sustain any finding of joint dominance as tacit collusion. The Common Position however does not state any firm conclusion on this point, as shown in paragraphs 65-67.

Given the nature of the Common Position as a guidance for the actual market analysis proceedings, that takes full account of the necessity to consider national circumstances and local effects when assessing the analysis criteria in a given national WIR market (see paragraphs 1 and 3), ERG continues to find adequate the WIR Common Position's views and so not necessary to amend the consulted CP text.

7. Abbreviations

CP	Common Position
GPRS	General Packet Radio Service
ECJ	European Court of Justice
EDGE	Enhanced Data rate for GSM Evolution
ERG	European Regulators Group
IOT	Inter Operator Tariff
MMS	Multimedia Messaging Service
MNO	Mobile Network Operator
MVNO	Mobile Virtual Network Operator
NRA	National Regulatory Authority
RLAN	Radio Local Area Network
SMP	Significant Market Power
SMS	Short Message Service
SSNIP	Small Significant Non-temporary Increment in Price
VoIP	Voice over Internet Protocol
WIR	Wholesale International Roaming
WLAN	Wireless Local Area Network
WMAN	Wireless Metropolitan Area Network