



O2 Response to the ERG Common Position on the Co-ordinated Analysis of the Markets for Wholesale International Roaming - Summary

Executive Summary

This O2 Group response to the ERG common position consists of this executive summary and a supporting paper in which O2 fully supports the ERG's strategy of attempting to take a co-ordinated approach to the subject of market definition and the assessment of significant market power (SMP) in wholesale roaming markets.

O2 considers that the wholesale roaming market is competitive and does not require regulation. However, if regulation is to be imposed, co-ordination is essential as remedies would have to be applied on a multi-lateral basis. Almost all mobile network operators both sell wholesale roaming in their own member state and purchase it in other member states. Asymmetric regulation would therefore result in the distortion of market conditions to the detriment of operators (and, ultimately, consumers) in member states where regulation is imposed and in favour of those in member states where there is no regulation.

As a general comment, O2 is disappointed by the lack of analysis contained in the paper as a whole. The paper makes many statements of a very broad and general nature, but provides little or no evidence for many of its assertions and contains no clear conclusions.

O2 group companies along with operators in other member states provided their NRAs with large amounts of data in response to the information request received from them in December 2004. However, most of the comments in the Common Position Paper appear to be based on information which has been publicly available for some time. The production of data in response to regulatory requests is not without cost and in this instance it is not clear to what purpose it has been put.

It is also unclear from the paper how regulatory activity in the wholesale roaming market will be co-ordinated going forward and what role, if any, the ERG will play in this.

O2 broadly agrees with the description of inbound and outbound traffic, and agrees that outbound traffic does not form part of the wholesale roaming market

O2 submits that the cost of both originating and terminating roaming traffic should be taken into account when assessing wholesale roaming prices.

Wholesale roaming services provided by different operators in the same member state are very similar. For example, roamers are unlikely to perceive much difference between the services offered by the O2 and Vodafone networks when travelling in the UK. Thus the wholesale roaming services offered by different operators in a particular member state are highly substitutable.

Wholesale roaming services are highly homogeneous and substitutable. This means that O2 is never an 'essential trading partner' where wholesale roaming is concerned. Other operators are equally capable of meeting foreign operators' roaming requirements, in all the member states in which O2 operates. Accordingly, O2



cannot act to an appreciable extent independently of its competitors, customers or consumers in wholesale roaming markets.

The Common Position Paper correctly notes that it is not possible to decide whether a market is conducive to joint dominance by mechanistically applying the criteria listed in Article 14, paragraph 2 of the Framework Directive as a 'check list'. Rather, it is necessary to consider the characteristics of that market as a whole. Instead of doing this, however, the paper does, in fact, mechanistically consider each of the criteria on the list. In fact if the three conditions for a finding of collective dominance as set out by the Court of First Instance in *Airtours v Commission*¹, are used international roaming does not even pass the first transparency test let alone the other two.

At least in the countries in which O2 operates, O2 does not agree that retail prices are unaffected by wholesale price reductions. O2 is unable to comment on the level of retail prices in other countries. As is acknowledged in the Common Position Paper, wholesale competition is driving down wholesale roaming charges. The extent to which these cost savings are passed on to consumers through lower retail prices will depend upon the level of retail competition. In competitive markets, undertakings cannot simply 'pocket' cost savings. The normal process of competition means that savings are competed away and passed on to consumers generally in the form of lower prices and we provide examples of this in the accompanying document.

For the reasons explained in this paper, O2 considers that the wholesale roaming markets in all the countries in which it operates are competitive. Accordingly, O2 sees no basis for the ERG's conclusion at paragraph 72 that "*a number of competition problems appear ... to be present on the relevant market*". O2 sees no need for regulation in this market.

As has been noted, any asymmetric regulation of wholesale roaming markets risks causing severe competitive distortions. In particular, price regulation would be likely to act to the detriment of consumers in the countries where it is imposed. This is partly because the regulated operator may suffer a reduction in roaming revenues, which would reduce its ability to provide lower retail prices for its domestic customers. It is also because the regulated operator's bargaining power when attempting to negotiate lower wholesale roaming tariffs from other operators would be curtailed.

Given the competitive nature of wholesale roaming markets, and the risks involved in imposing regulation, O2 urges the ERG to refrain from seeking to regulate this market.

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¹ Case T-342/99, *Airtours v Commission of the European Communities*, 6 June 2002.



O2 Response to the ERG Common Position on the Co-ordinated Analysis of the Markets for Wholesale International Roaming – Detailed response

This document sets out the views of the O2 group on the ERG's Common Position on the co-ordinated analysis of the markets for wholesale international roaming, published on 8 June 2005 (the "Common Position Paper").

Introduction

O2's position

O2 fully supports the ERG's strategy of attempting to take a co-ordinated approach to the subject of market definition and the assessment of significant market power (SMP) in wholesale roaming markets.

O2 considers that the wholesale roaming market is competitive and does not require regulation. However, if regulation is to be imposed, co-ordination is essential as remedies would have to be applied on a multi-lateral basis. Almost all mobile network operators both sell wholesale roaming in their own member state and purchase it in other member states. Asymmetric regulation would therefore result in the distortion of market conditions to the detriment of operators (and, ultimately, consumers) in member states where regulation is imposed, and in favour of those in member states where there is no regulation.

The Common Position Paper

O2's detailed comments on the Common Position Paper are set out below. As a general comment, O2 is disappointed by the lack of analysis contained in the paper as a whole. The paper makes many statements of a very broad and general nature, but provides little or no evidence for many of its assertions and contains no clear conclusions. For example, the paper asserts that:

"a number of competition problems appear ... to be present on the relevant market, and NRAs should address them with all the available instruments and applicable market assessment procedures, under the relevant legislative and regulatory frameworks" (paragraph 72)

However, nowhere does the paper identify the alleged 'competition problems' or provide any evidence to support this statement. Accordingly, O2 is unable to respond to the allegation.

O2 group companies provided the NRAs in the UK and Ireland with large amounts of data in response to the information request received from them in December 2004. However, most of the comments in the Common Position Paper appear to be based on information which has been publicly available for some time. It is not clear how, if at all, the operators' data has been used.

It is also unclear from the paper how regulatory activity in the wholesale roaming market will be co-ordinated going forward and what role, if any, the ERG will play in this. O2 notes, in this regard, that the Common Position Paper is not binding on NRAs, who are required to conduct their own analysis of the wholesale roaming market.



Competition investigation

As the ERG is aware, O2 UK is the subject of ongoing proceedings by the European Commission for alleged breach of Article 82 of the EC treaty in the wholesale roaming market. As summarised in paragraph 16 of the Common Position Paper, the Commission has alleged that wholesale roaming on the network of O2 UK constituted a separate market from 1998 to September 2003, and that O2 UK abused its dominant position in that market by charging excessive and unfair prices.

It is important to note that the Commission has not yet taken any final decision in relation to this case. O2 believes that the Commission's allegations are entirely without foundation and that its conclusions are based on fundamental errors of fact and law, as demonstrated by O2's Reply to the Statement of Objections.

As the Common Position Paper concerns the application of *ex ante* regulation, O2 will limit its comments in this paper to the wholesale roaming market from 2005 onwards and will not comment further on the past conditions of competition in that market.

Market definition

O2 has the following comments about the descriptions of wholesale roaming services in the Common Position Paper.

Inbound and outbound traffic

O2 broadly agrees with the description of inbound and outbound traffic, and agrees that outbound traffic does not form part of the wholesale roaming market. However, this section goes on to state that:

"following the Commission's guidelines on the market analysis and SMP assessment the NRAs can take into account any connected market and proceed to examine how the whole sector works".

It is unclear from this remark, precisely how it is proposed that outbound roaming traffic might be taken into account and what conclusions about wholesale roaming might be drawn from an analysis of outbound roaming traffic. If a co-ordinated approach is to be adopted then O2 submits that further clarification is necessary here.

Inbound originating and terminating roamed traffic

O2 agrees that wholesale international roaming services comprise both originating and terminating roamed traffic. It is also true that it is generally only originated roamed calls which attract wholesale roaming charges. However, O2 disagrees with the ERG's conclusion that:

"As long as no roaming charges are levied, the inclusion of terminating roaming traffic is ... not relevant for a competition analysis of the WIR market".



O2 submits that the cost of both originating and terminating roaming traffic should be taken into account when assessing wholesale roaming prices. It is irrelevant that operators usually levy a wholesale charge only for originating calls, not for terminating them.

This point can be illustrated by analogy with, for example, bridge crossings. Many bridge crossings around the world charge tolls in one direction only. The system was first used by the Golden Gate Bridge in San Francisco in 1968, and has since been adopted by many others including the Sydney Harbour Bridge, Brooklyn Bridge in New York, and the Severn Crossings between England and Wales. However, it would clearly be absurd to describe one direction as profitable and the other as loss-making. The single stream of income is required to support the operations of the bridge as a whole.

For both roaming and bridges it is operationally more efficient to extract the charges for the service (in combination) in one direction.

Substitution between operators in a given national market

Wholesale roaming services provided by different operators in the same member state are very similar. For example, roamers are unlikely to perceive much difference between the services offered by the O2 and Vodafone networks when travelling in the UK. This homogeneity is acknowledged by the Common Position Paper which notes at paragraph 58 that:

“The vast majority of the wholesale international roaming services being provided by MNOs in the different national markets could be regarded as extremely homogeneous”.

Accordingly, the wholesale roaming services offered by different operators in a particular member state are highly substitutable.

As a result of this high level of substitutability, operators can and do use traffic directing technology to switch between different wholesale roaming providers. As noted in the Common Position Paper, operators will often enter into wholesale roaming agreements with all MNOs in a particular country. This contractual framework enables operators to switch their roaming customers' traffic between different wholesale roaming providers using traffic directing². This is usually done in order to negotiate IOT discounts.

For this reason, the relevant market for wholesale international roaming is national.

Single dominance assessment

O2 does not consider that any operator enjoys single dominance in any of the countries in which O2 operates.

As noted above, wholesale roaming services are highly homogeneous and substitutable. This means that O2 is never an 'essential trading partner' where

² There is no minimum purchasing obligation, so operators are under no obligation to send roaming traffic to operators with whom they have an agreement.



wholesale roaming is concerned. Other operators are equally capable of meeting foreign operators' roaming requirements, in all the member states in which O2 operates. Accordingly, O2 cannot act to an appreciable extent independently of its competitors, customers or consumers in wholesale roaming markets.

Joint dominance assessment

None of the wholesale roaming markets in which O2 operates is conducive to tacit co-ordination.

The Common Position Paper correctly notes that it is not possible to decide whether a market is conducive to joint dominance by mechanistically applying the criteria listed in Article 14, paragraph 2 of the Framework Directive as a 'check list'. Rather, it is necessary to consider the characteristics of that market as a whole. Instead of doing this, however, the paper does, in fact, mechanistically consider each of the criteria on the list.

As set out by the Court of First Instance in *Airtours v Commission*³, three conditions are necessary for a finding of collective dominance:

" - first, each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy ... There must, therefore, be sufficient market transparency for all members of the dominant oligopoly to be aware, sufficiently precisely and quickly, of the way in which the other members' market conduct is evolving;

- second, the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market ... [F]or a situation of collective dominance to be viable, there must be adequate deterrents to ensure that there is a long-term incentive in not departing from the common policy, which means that each member of the dominant oligopoly must be aware that highly competitive action on its part designed to increase its market share would provoke identical action from the others, so that it would derive no benefit from its initiative;

*- third, ... the foreseeable reaction of current and future competitors, as well as consumers, would not jeopardise the results expected from the common policy."*⁴

Where wholesale roaming is concerned, it is not possible to satisfy the first necessary condition for a finding of collective dominance – that of sufficient market transparency – let alone any of the others.

O2's wholesale roaming charges comprise its published IOT plus any individually negotiated discount. Although the IOT is published, the discount is highly commercially confidential. O2 does not disclose the level of the discounts it offers, and cannot know what discounts its competitors are offering.

³ Case T-342/99, *Airtours v Commission of the European Communities*, 6 June 2002.
⁴ Para 62.



Accordingly, O2 and its competitors are not in a position to adopt any 'common policy'. Clearly, it is impossible for operators tacitly to co-ordinate their roaming rates if they do not have visibility of those rates.

Final considerations

Retail roaming prices

The Common Position Paper comments at paragraph 68 that although discounts at the wholesale level have begun to be generally implemented, *"so far it has not been brought to evidence that savings are passed on to end users"*. This is stated to be a 'general and preliminary conclusion'. As the ERG admits that it has not conducted any analysis of retail markets, the basis for this preliminary conclusion is unclear.

At least in the countries in which O2 operates, O2 does not agree that retail prices are unaffected by wholesale price reductions. Of course, O2 is unable to comment on the level of retail prices in other countries.

As is acknowledged in the Common Position Paper, wholesale competition is driving down wholesale roaming charges. The extent to which these cost savings are passed on to consumers through lower retail prices will depend upon the level of retail competition. In competitive markets, undertakings cannot simply 'pocket' cost savings. The normal process of competition means that savings are competed away and passed on to consumers generally in the form of lower prices.

The competitive pressure on retail roaming prices can be seen clearly from the roaming packages being offered by mobile operators. For example, Vodafone's "Passport" offer, launched in May this year enables Vodafone customers to make and receive calls while roaming at domestic rates, plus a connection fee. Vodafone state that the price of a five minute call home by a German subscriber travelling in the Netherlands could fall from €4.45 to €0.75.

Similarly, O2 competes vigorously on price for roaming customers. Recent initiatives have included the preferential rates offered by O2 Germany and O2 Ireland for customers using an O2 or Starmap Alliance partner network. To give just a few examples, this has brought down end user prices for O2 Germany customers by up to 30% in Spain, 31% in Italy, 20% in Hungary, and 33% in Austria. Retail mobile markets are national, so the effect on retail prices will depend upon the level of retail competition in the national market concerned. O2 believes that the markets in which it operates (the UK, Germany and Ireland) are all competitive, so cost savings by O2 at the wholesale level will necessarily result in lower retail prices. In all these countries customers have a choice, and will switch away from O2 if its prices are uncompetitive.

Competitive pressure

The paper also states at paragraph 68 that, although traffic directing can be used to exert competitive pressure, *"so far it is unclear whether this is actually happening in a meaningful manner"*.

Again, O2 disagrees with this assessment. O2 considers that there is a large body of evidence to show that traffic directing is being used to exert competitive pressure on



wholesale prices. Indeed there is no other explanation for the prevalence of IOT discounting agreements which, as noted by the Common Position Paper at paragraph 68, have now been “generally implemented”.

Conclusion

For the reasons explained in this paper, O2 considers that the wholesale roaming markets in all the countries in which it operates are competitive. Accordingly, O2 sees no basis for the ERG’s conclusion at paragraph 72 that “*a number of competition problems appear ... to be present on the relevant market*”. O2 sees no need for regulation in this market.

As has been noted, any asymmetric regulation of wholesale roaming markets risks causing severe competitive distortions. In particular, price regulation would be likely to act to the detriment of consumers in the countries where it is imposed. This is partly because the regulated operator may suffer a reduction in roaming revenues, which would reduce its ability to provide lower retail prices for its domestic customers. It is also because the regulated operator’s bargaining power when attempting to negotiate lower wholesale roaming tariffs from other operators would be curtailed.

Given the competitive nature of wholesale roaming markets, and the risks involved in imposing regulation, O2 urges the ERG to refrain from seeking to regulate this market.