



ERG COMMON POSITION ON THE COORDINATED ANALYSIS OF THE MARKETS FOR WHOLESALE INTERNATIONAL ROAMING

Comments submitted by Orange SA

INTRODUCTION

Orange SA welcomes the opportunity to comment on the European Regulators Group's Common Position on the coordinated analysis of the markets for wholesale international roaming (the Common Position). We support the co-ordinated approach undertaken by the European Regulators Group (ERG) and welcome its determination to provide consistent and harmonised guidance to NRAs, within the context of the definition and assessment of the conditions of effective competition in the national wholesale market for international roaming services on public mobile networks (WIR).

Orange strongly believes that national wholesale markets for international roaming services on public mobile networks are increasingly competitive. As correctly noted by the ERG (para.10), this competitive trend is the result of the "structural and technological developments these markets have been recently experiencing".

The recent development of increasingly efficient traffic direction techniques has been central to the evolution of the market. Mobile operators (the home operators) have greater control of the traffic they send abroad and therefore benefit from a stronger buyer power when purchasing wholesale roaming from foreign operators (the visited networks). Essentially, the home operators' control of its traffic enables it to negotiate volume-based IOT¹ discounts from visited networks. Such structural changes have lead operators to establish pan-European alliances. These ongoing developments are radically modifying the roaming markets' competitive landscape.

Orange is fully prepared to cooperate in the analysis of the national wholesale market for international roaming services on public mobile networks and explain our understanding of the market evolution. We have operations in several European countries and are a member of Freemove, one of the major pan-European alliance. We are therefore at the forefront of the competitive market developments outlined above and particularly well placed to comment on these issues.

The comments set out in this submission follow the structure of the Common Position document.

¹ The IOT (inter-operator tariff) represents the wholesale international roaming charge paid by the home network to the visited network.

I. MARKET DEFINITION

The Common Position highlights the different components of the relevant market definition. Orange broadly agrees with the ERG assessment with regard to the definition of the wholesale international roaming market.

Firstly, as the Commission has defined the market as being “national market of international roaming”, we share the view of the ERG that wholesale international roaming only encompasses inbound roaming traffic. Outbound roaming should be excluded from the market analysis.

Secondly, we also agree that only originated roamed calls are relevant within the context of the definition of the national wholesale market for international roaming services on public mobile networks.

Thirdly, Orange subscribes to the view that voice, SMS, and other narrowband data services should be included in the wholesale roaming market definition. It is also our view that 3G voice should be included within this same market definition. However, Orange submits that the development and the maturity of the services part of the relevant market should be carefully considered before imposing any regulatory obligations to the mobile operators.

Finally, Orange subscribes to the ERG’s assessment (para.32) that “the combination of non-exclusive roaming agreements and the ability to direct traffic should enable MNOs to switch between networks supplying WIR services in response to changes in IOTs and associated discounts”. Thus, visited networks are substitutable and the wholesale international roaming market encompasses all the mobile operators in a given country.

II. SMP ASSESSMENT FROM A SINGLE DOMINANCE POINT OF VIEW

Once the relevant product and geographical markets are defined, the national regulatory authorities will have to assess whether firms operating in the market are individually or collectively dominant (i.e. possess significant market power).

Orange acknowledges the findings of the ERG (para.40) that “the data collected show that in a majority of cases there has been fluctuations in market shares especially in the most recent years. [...]. The absence of persistent high market share and/or fluctuations in market shares between providers of WIR services may be indicative of a lack of market power in the relevant market”.

It is our opinion that the lack of dominance in the WIR market is further confirmed by the existence of a powerful countervailing buyer power in the market. Indeed, as provided in Art. 14 of the Framework Directive, *‘an undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors customers and ultimately consumers’*. We submit that mobile operators cannot afford to behave to an appreciable extent independently of their competitors, customers and consumers. We strongly believe that the increasing use of traffic direction techniques (as mentioned in paragraph 45 of the Common Position) and the capacity of home operators to switch suppliers demonstrate the existence of powerful countervailing buyer power in the WIR market. As rightly assessed by the ERG (para.47), the dynamics of alliance membership further restrict the ability of a mobile operator to behave to an appreciable extent independently of competitors, customers and consumers.

III. SMP ASSESSMENT FROM A JOINT DOMINANCE POINT OF VIEW

With regard to joint dominance, Orange is of the opinion that the competitive trends within the wholesale international roaming markets are not conducive to the emergence of a situation of tacit collusion. We strongly believe that neither the market characteristics nor the market dynamics are conducive to joint dominance.

MARKET CHARACTERISTICS

Orange does not share ERG's view (para.64) that "as a first view and without prejudice for the actual market analyses findings by NRAs, the aforementioned [market] features are expectedly conducive to a supra competitive market outcome, in the sense that they relate to the presence, in a tight, closed market, of very similar firms and outputs. In such a situation firms would have a strong incentive to adopt a common strategy of muted competition or even an overtly collusive policy." Orange strongly disagrees with this statement for two main reasons.

Firstly, we disagree with the ERG assessment that wholesale international roaming market consists in offering voice and SMS services, which are mature products as Orange does not believe that wholesale international roaming is a mature market. If mobile voice and SMS may be considered mature products in a domestic context, wholesale roaming services offered to home networks are still evolving. The implementation of pre-pay customers roaming enablers or the provision of virtual home environment services (e.g. short codes) are amongst those WIR services that are currently being rolled-out. In that sense, Orange provides that the WIR is not a mature market.

Secondly, Orange does not share the ERG view (para.61) that "it appears that, as of today, within groups and alliances, traffic direction may not be so far directly linked to a given pricing policy, which could be interpreted as a low sensitivity of wholesale demand to price. However NRAs need then to examine whether this form of traffic direction among groups or alliance members is the result of a wholesale roaming price policy or is due to other strategies pursued by groups/alliances". As far as alliances are concerned, it is Orange opinion that mobile operators have the ability (through traffic direction techniques) and the incentive to purchase wholesale roaming services from the visited networks offering the best commercial conditions in order to gain a competitive advantage over their domestic competitors. Indeed, the terms and conditions offered by visited networks will condition the ability of the home operator to offer better services at a better price to its end customers.

Finally, Orange strongly believes that roaming products are not entirely homogeneous (in particular, we would like to draw the attention of the ERG on the variety of data services on offer and on the range of technologies used by mobile operators) and that the demand for roaming services is growing (the penetration of roaming services being still relatively low, especially in the new Member States where we expect a rapid growth of roaming traffic).

MARKET DYNAMICS

Orange believes that the WIR market dynamics is not conducive to joint dominance. Demonstrating the existence of collusive market dynamics amount to fulfilling the criteria set by the Airtours judgement.²

- Firstly, there should be sufficient market transparency. This transparency enables the market players to be aware of the conduct of their competitors and consequently allows them to adopt the same policy.
- Secondly, joint dominance should be sustainable over time. This condition implies the existence of a retaliatory mechanism in the market.
- Finally, existing and potential competitors, as well as customers, should not be able to jeopardise the expected results of a common policy in the market.

Orange agrees with the ERG assessment that wholesale international roaming markets are not transparent anymore. Indeed, nowadays, a large number of the wholesale transactions are dealt through bilateral IOT discounts. As a consequence, visited networks do not know the actual IOT charged by their competitors. Ultimately, the total lack of pricing transparency makes it impossible for competing visited networks to tacitly agree on a long term common strategic focal point.

As regards the existence of deterrent mechanisms to secure unity within the oligopoly, the analysis should be threefold: (a) the members must be able to detect a deviation, (b) retaliation must be quick and sufficiently effective, and (c) retaliation must not harm the retaliators too much. Orange provides that, by definition, being unable to tacitly agree on a focal point, competing visited networks cannot detect any deviation. Conversely, visited networks have a clear incentive to deviate from any alleged collusive outcome and to compete for an increase of their roaming traffic.

Finally, Orange believes that existing and potential competitors, as well as customers, would jeopardise the expected results of a common policy. Hence, we provide that any tacit collusion would be disrupted by competing visited networks offering better wholesale terms and conditions and by the customers on the wholesale market (given their ability to direct their roaming traffic toward any visited network).

Orange subscribes to the view of the ERG (para.67) that "taking into account the recent development of wholesale discount agreements and the emergence of roaming alliances, it appears that as far as wholesale roaming services and relative prices are concerned, transparency might not be as sufficient as to enable firms to monitor the behaviour of their competitors in the relevant market, and the alliance/group factor could foster a stronger loyalty among MNOs which could possibly be argued to constrain the scope for an eventual retaliation."

Therefore, Orange strongly believes that the dynamics of the market is not compatible with the establishment of tacit collusion amongst operators. At national level, each operator is competing in order to maximize its revenues from incoming roaming traffic.

² Case T-342/99 Airtours v Commission of 6 June 2002.

CONCLUSION

Although the WIR markets have evolved, efficient traffic direction techniques and alliances have only recently been put in place. End-customers are increasingly benefiting from the impact of these wholesale market developments (e.g. through bundles of minutes and promotional offers). However, we disagree that the level of roaming retail tariffs could ever be compared with tariffs on the domestic mobile market given the added value international roaming offers; most notably in terms of near-universal reachability.

Orange submits that WIR markets are becoming increasingly competitive and that any regulatory intervention could distort and impede the ongoing competitive developments. Therefore, Orange is of the opinion that the NRAs should forbear from regulating WIR markets at this stage.