



Press and Information

Court of Justice of the European Communities

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Advocate General's Opinion in Case C-58/08
Vodafone & Others v Secretary of State for Business, Enterprise and
Regulatory Reform

ADVOCATE GENERAL POIARES MADURO CONSIDERS THAT THE ROAMING REGULATION IS VALID

The Community was entitled to impose limits on the prices charged by mobile phone companies for roaming calls in the interests of the internal market.

The Roaming Regulation¹ established maximum prices that can be charged by mobile phone network operators for calls received and made by a user outside their home network. These limits were to apply for a period of three years.

The Regulation was adopted on the basis of Article 95 EC Treaty which allows the Community to adopt legislation to approximate the laws of Member States where there are disparities or potential disparities which would hinder the creation or functioning of the internal market.

Four of Europe's largest mobile phone operators, Vodafone, Telefónica O2, T-Mobile and Orange, challenged the validity of the Roaming Regulation before the High Court of England and Wales. This court then asked the Court of Justice whether the Community had the power to adopt the Regulation on the basis of Article 95 EC and whether in setting maximum prices, the Community legislature had infringed the principles of subsidiarity and/or proportionality.

Firstly Advocate General Miguel Poiares Maduro **confirms that, in his view, the Community was entitled to adopt the Regulation on the basis of Article 95 EC.** The differences in price between calls made within one's own Member State and those made while roaming could reasonably be regarded as discouraging the use of cross-border services such as roaming. Such discouragement of cross-border activities has the potential to impede the establishment of an internal market in which free movement of goods, services and capital is ensured. Indeed, there is no clearer cross-border activity in the mobile telecoms sector than roaming itself. In these circumstances, imposing a price cap on roaming services can legitimately be said to be serving the establishment of the internal market by removing obstacles to cross-border economic activity.

Assessing whether the Regulation conforms to the principle of subsidiarity (that the Community can only act if the same objective cannot be sufficiently achieved by the Member States), the Advocate General first notes that, as regards the prices charged by one operator to another for the use of their network (wholesale rates), it is clear that action at Community-level was required: national regulators having neither the power to regulate prices charged by foreign networks to networks from their Member State, nor the incentive to regulate wholesale prices charged within their territory to foreign networks.

As regards retail prices, charged by the home network to their roaming customer, the issue is somewhat less clear. It could be argued that once wholesale prices had been fixed then retail prices could be regulated by national authorities. However, Advocate General Maduro considers that it was expedient and appropriate for the Community to regulate retail prices. He suggests that, given the Regulation was intended to expire after three years, the transnational nature of roaming and the fact that roaming is of minor concern to national regulators, the Community may be more

¹ Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC (OJ L 171, p. 32)

willing and better placed to address the problem. Had the issue been left to the 27 national regulators it may have taken too long to introduce effective control of retail prices.

As to whether setting maximum limits to the prices charged by the network operators was proportionate, the Advocate General notes that the Community intervened as a last resort; all of the Commission's previous attempts to reduce roaming prices (including competition law investigations, transparency initiatives, regulatory action and political pressure) having failed. He also observes that the Commission found that roaming prices varied widely in ways that could not be explained by underlying costs, with operators making profits of above 200% for calls made while roaming and of 300% or 400% for calls received. Given these excessive charges and the need for timely action, a decision to regulate retail prices was an option reasonably open to the Community.

Furthermore, acknowledging that price controls should always be assessed carefully because of their extreme impact on the market, the Advocate General considers that the limited duration of these price caps, the existence of a sunset clause requiring periodic reassessment, and their aim of correcting a market failure that competition rules had not been able to address, makes them more acceptable. As such the Regulation cannot be said to be disproportionate.

The Advocate General therefore concludes that **the setting of maximum charges for roaming calls does not infringe the principles of subsidiarity or proportionality.**

Consequently, Advocate General Poiares Maduro proposes that the Court confirm the validity of the Roaming Regulation.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of Community law or the validity of a Community act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which the same issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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