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The EU Roaming Regulation  
and its non-compliance  
with Article 95 EC

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# The EU Roaming Regulation and its non-compliance with Article 95 EC

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## A. Introduction\*

About one year ago, the European legislature set a new course for consumer protection in the mobile telephone markets. On 30 June 2007, Regulation No. 717/2007 on roaming on public mobile telephone networks within the Community (Roaming Regulation)<sup>1</sup> entered into effect and, according to the European Commission, marked the beginning of a “new era of mobile communications”<sup>2</sup>.

In a nutshell, the Roaming Regulation governs cross-border mobile voice telephony in the EU. Contrary to the overall downward trend of mobile phone charges in national mobile telephony markets (thanks to increasing competition), prices for international roaming (IR) charges have remained at very high, allegedly unjustified, levels throughout the EU.<sup>3</sup> In order to remedy this “deficiency” and to ensure that travellers within the EU are able to communicate across borders at affordable and transparent prices<sup>4</sup>, the European legislature established maximum price caps for wholesale and retail international roaming charges. It further introduced transparency obligations in its Roaming Regulation (RR).

Since June 2007, prices for retail IR charges have declined by up to 60%, which the European Commission celebrates as a huge success.<sup>5</sup> On the other hand, prices for SMS, MMS, and data roaming services are not regulated by the Roaming Regulation and appear to remain high in relation to national prices and the costs for providing the services.<sup>6</sup> It thus does not come as a surprise that the European Commission recommended to the European Parliament in late September 2008 to extend the Roaming Regulation to include SMS and data roaming services.<sup>7</sup>

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\* Many thanks are due to Ms. Güde Thomas and Ms. Emily Gould.

<sup>1</sup> OJ 2007, L 171/32 of 29 June 2007.

<sup>2</sup> Cf. *European Commission* website, “The roaming regulation”, available on the internet: <[http://ec.europa.eu/information\\_society/activities/roaming/regulation/index\\_en.htm](http://ec.europa.eu/information_society/activities/roaming/regulation/index_en.htm)> (visited on 28 August 2008).

<sup>3</sup> Recital 1 and 16 Roaming Regulation (RR); *European Commission*, Commission staff working paper – Impact assessment of policy options in relation to a commission proposal for a Regulation of the European Parliament and the Council on roaming on public mobile networks within the community, SEC(2006) 925, 12 July 2007, 4, 17; *Berger-Kögler*, MMR 2007, 294 (297); *Lupi/Manenti*, Traffic Management, 21; *Salsas/Koboldt*, Information Economics and Policy 16 (2004), 497 (498). The European Commission operates its own pan-European website on international roaming retail charges: <[http://ec.europa.eu/information\\_society/activities/roaming/tariffs/voice/index\\_en.htm](http://ec.europa.eu/information_society/activities/roaming/tariffs/voice/index_en.htm)> (visited on 28 August 2008). It provides information on the development of retail IR charges throughout the EU since September 2005.

<sup>4</sup> Art. 1(1) RR and Recital 38 RR; *European Commission* website, supra 2.

<sup>5</sup> *European Commission*, “Roaming: Consumer prices now reduced by 60 %”, IP/07/1445, 4 October 2007.

<sup>6</sup> See *European Commission*, “High prices and lack of transparency source of anxiety for data roaming customers”, IP/08/1048, 27 June 2008; *European Commission*, “Texting without borders: Commission plans ending roaming rip-offs for text messages abroad”, IP/08/1144, 15 July 2008; *National IT and Telecom Agency Denmark*, Mobile Data Services Abroad, 6.

<sup>7</sup> For details of the Commission’s proposal see: *European Commission*, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 717/2007 on roaming on public mobile telephone networks within the Community and Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, COM(2008) 580 final, 23.09.2008. According to Art. 11(1) RR, the Commission shall review the

Judged by the Commission's aim to reduce prices for Community-wide roaming services, the Roaming Regulation does certainly succeed. However, even as there is hardly room for criticism on this point, the question remains whether the success of this Article 95 EC-based regulation was paid at the expense of legal clarity, or more bluntly, whether it was indeed rightfully based upon this very article. Article 95 EC grants the European legislature the competence to approximate differences in Member States' laws, should the perceived disparity affect the functioning of the internal market. Interestingly, no one Member State ever had sector-specific provisions governing IR services. Together with the focus of the Roaming Regulation on consumer protection, these concerns call for an accurate analysis of the conditions of Article 95 EC.

Article 95 EC has increasingly attracted scholarly and judicial attention. The field of advertising for certain products in particular is constantly under fire by the European legislature under the auspices of Article 95 EC. For example, the first Tobacco Advertising Directive 98/43/EC<sup>8</sup> comprehensively banned all forms of advertising and sponsorship of tobacco products. The second Tobacco Advertising Directive 2003/33/EC<sup>9</sup> stipulates fewer, but still a relatively large number, of prohibitions on advertising and sponsorship of tobacco products in certain media, and the Health Claims Regulation<sup>10</sup> prohibits advertising for food products that is not explicitly exempted by the regulation. These Community measures were strongly criticized by legal scholars on the basis, inter alia, that they did not meet the conditions of Article 95 EC.<sup>11</sup> Some of this criticism seems to have advanced to the European Court of Justice: on the grounds that it did not comply with the conditions of Article 95 EC, the ECJ annulled the first Tobacco Advertising Directive, which was widely welcomed by academia.<sup>12</sup> The joy, however, did not last long as the ECJ ruled in its judgment on the second Tobacco Advertising Directive that the conditions for recourse to Article 95 EC were satisfied. The ECJ did in fact receive heavy criticism for this judgment.<sup>13</sup> Considering the Court's decision, legal scholars declared that we will be surprised at the extent to which the European legislature will test its new freedom of approximation in the future.<sup>14</sup> One attempt – as will be shown in this article – is the EU Roaming Regulation.

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developments in WIR and RIR charges for data communication services, including SMS and MMS, and shall report to the European Parliament and the Council whether it considers the regulation of these services necessary.

<sup>8</sup> OJ 1998, L 213/9 of 18 July 2001.

<sup>9</sup> OJ 2003, L 152/16 of 20 June 2003.

<sup>10</sup> Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods, OJ 2006, L 404/9 of 30 December 2006.

<sup>11</sup> For the first Tobacco Advertising Directive: *Di Fabio*, AfP 1998, 564 et seq.; *Schneider*, NJW 1998, 576 (577 et seq.); *Seidel*, EuR 2006, 26 (34 et seq.); *Stein*, EuZW 1995, 435 (437); *id.*, EuZW 2000, 337. For the second Tobacco Advertising Directive: *Oppermann*, ZUM 2001, 950; *Schroeder/Lechner*, ZLR 2007, 362 (364, 366); *Seidel*, EuR 2006, 26 (34 et seq.); *Stein*, EuZW 2007, 54 (56). For the Health Claims Regulation: *Geiger*, EuZW 2004, 193.

<sup>12</sup> See e.g. *Dashwood*, CML Rev. 41 (2004), 355 (359 et seq.); *HilffFrahm*, RiW 2001, 128 et seq.; *N.N.*, Editorial Comments, CML Rev. 37 (2000), 1301 (1303); *Stein*, EWS 2001, 12 (17); *Wägenbaur*, EuZW 2000, 701 (702); *Weatherill*, EL Rev. 30 (2005), 23 (27).

<sup>13</sup> See e.g. *Ludwigs*, CML Rev. 44 (2007), 1159 (1176); *Maierhöfer*, JZ 2007, 463 et seq.; *Schroeder/Lechner*, ZLR 2007, 362 (366); *Stein*, EuZW 2007, 54 (56).

<sup>14</sup> *Stein*, EuZW 2007, 54 (56); cf. *Schroeder/Lechner*, ZLR 2007, 362 (368).

After introducing the concept of international roaming and the provisions of the Roaming Regulation (B.I), the Roaming Regulation will be fitted into the context of the 2002 regulatory framework for electronic communications (B.II). The next two subparagraphs survey the wholesale (B.III) and retail (B.IV) sector for IR services on public mobile networks. The question whether Article 95 EC constitutes the appropriate legal basis for the Roaming Regulation will then be closely examined in detail (C). Particular attention will be given to the interpretation of this article by recent ECJ rulings<sup>15</sup>. Following, the doctrine of proportionality and subsidiarity and the requirement to state reasons as laid down in Article 253 EC will be discussed (D).

## B. Background

### I. International Roaming and the Roaming Regulation

International roaming occurs when a traveller is able to use his mobile phone while being outside the geographical coverage of his home network.<sup>16</sup> In the foreign country, the traveller uses the host operator's mobile network (so called "visited network", cf. Article 2(2)(g) RR). He is "roaming" on the visited network when he makes a call, when he receives a call, or when he uses other data communication services like SMS or MMS. International roaming is possible because the traveller's home provider (cf. Article 2(2)(b) RR) for mobile phone services has an agreement with the host network operator that allows its customers to use the foreign network. The host network operator charges a wholesale rate to the traveller's home network operator for providing this service (the so called inter-operator tariff). The home provider then levies a retail charge on the traveller. In the eyes of the European legislature, it was particularly the height of these retail rates that caused a reduction in cross-border use of mobile phones and thus constituted an obstacle to the development of the single European communications market.<sup>17</sup> High wholesale charges and high retail mark-ups, with little pass-through of reductions in wholesale charges to end-users, were blamed for this situation.<sup>18</sup>

Therefore, the Roaming Regulation is meant to ensure that "users of public mobile telephone networks when travelling within the Community do not pay excessive prices for Community-wide roaming services when making or receiving voice calls".<sup>19</sup> The objective of this regulation is to achieve a high level of consumer protection while

<sup>15</sup> See, inter alia, Case C-376/98, *Germany v. Parliament and Council (Tobacco Advertising I)*, [2000] ECR I-8419; Case C-377/98, *Netherlands v. Parliament and Council*, [2001] ECR I-7079; Case C-491/01, *British American Tobacco*, [2002] ECR I-11453; Case C-434/02, *Arnold André*, [2004] ECR I-11825; Case C-210/03, *Swedish Match*, [2004] ECR I-11893; Case C-380/03, *Germany v. Parliament and Council (Tobacco Advertising II)*, [2006] ECR I-11573; Case C-436/03, *Parliament v. Council*, [2006] ECR I-3733; Case C-66/04, *UK v. Parliament and Council*, [2005] ECR I-10553; Joined Cases C-154 & 155/04, *Alliance for Natural Health*, [2005] ECR I-6451; Case C-217/04, *UK v. Parliament and Council*, [2006] ECR I-3771.

<sup>16</sup> The cross-border nature is thus inherent in international roaming.

<sup>17</sup> *European Commission*, supra 3, SEC(2006) 925, 10, 27.

<sup>18</sup> *European Commission*, supra 3, SEC(2006) 925, 4, 42, 48; cf. *European Commission*, European Electronic Communications Regulation and Markets 2005 (11<sup>th</sup> report), COM(2006) 68 final, 8.

<sup>19</sup> Art. 1(1) RR and Recital 38 RR.



at the same time safeguarding competition between mobile network operators and contributing to the smooth functioning of the internal market.<sup>20</sup> In order to accomplish these aims, the Roaming Regulation determines rules on the charges levied by mobile network operators at wholesale level and those levied by home providers at retail level (Article 1(1) sentence 2 RR). It provides for a maximum average per-minute charge at whole-sale level (EUR 0,28 per minute for roaming calls originating<sup>21</sup> on the visited network, see Article 3 RR) and at retail level (EUR 0,46 per minute for any call made and EUR 0,22 for every call received, see Article 4 RR). The maximum IR charges will decrease to designated lower levels in August 2009 (cf. Article 3(2) RR and Article 4(2) RR). Pursuant to Article 4(1) RR, every home provider has to make available and actively offer to all its IR customers at least one tariff that does not exceed the maximum charge stipulated in Article 4(2) RR.<sup>22</sup> This is the so-called “Eurotariff”. It is accompanied by an opt-out measure (cf. Article 4(2) sentence 4 RR), which safeguards the automatic application of the Eurotariff for customers excluding those who actively opt for another tariff. The Eurotariff applies to pre-paid as well as post-paid mobile services contracts (cf. Article 4(3) RR). Home providers that do not maintain their own network, i.e. mobile virtual network operators or resellers of mobile voice telephony services, must equally comply to the Eurotariff regulations (cf. Article 2(2)(b) RR and Recital 30 RR).

Moreover, Article 6 RR sets out measures that enhance the transparency of retail charges. For example, home network operators are obliged to provide their roaming customers with personalised pricing information, free of charge, upon their entering another Member State, either by SMS or voice call. According to Article 13 RR, the regulation expires on 30 June 2010 if its duration is not extended (cf. Article 11(2) RR).

## II. The 2002 regulatory framework for electronic communications

The Roaming Regulation is not the first Community measure that affects the IR sector but rather complements and supports the 2002 regulatory framework for electronic communications (hereafter referred to as the 2002 regulatory framework).<sup>23</sup>

<sup>20</sup> Art. 1(1) RR and Recital 38 RR.

<sup>21</sup> Host mobile network operators generally do not charge home mobile network operators any roaming tariffs for traffic terminated to roaming end-users (e.g. incoming calls). Instead, the home mobile network operator pays a so-called mobile termination rate (these rates are regulated in several Member States) as well as a transit charge to the transit operator who routes the call to the visited network. The host mobile network operator then charges the transit operator a mobile termination rate in return. See *ERG*, ERG common position on the coordinated analysis of the markets for wholesale international roaming, (05) 20Rev1, para. 25, available on the internet: <[http://www.erg.eu.int/documents/docs/index\\_en.htm](http://www.erg.eu.int/documents/docs/index_en.htm)> (visited on 28 August 2008). This explains why Art. 3 RR does not impose a price cap on wholesale international roaming charges for calls received, whereas Art. 4(2) RR does so on retail charges.

<sup>22</sup> On the condition that at least one of the home provider’s tariffs complies with Art. 4 RR, the home provider is free to offer other, even higher tariffs like flat-rates or tariffs which differentiate between prices for peak and off-peak time to its customers. Cf. Recitals 24, 29, and 33 RR.

<sup>23</sup> Recital 4 RR.

The 2002 regulatory framework consists of the Framework Directive<sup>24</sup> and four specific directives (the Access Directive, the Authorisation Directive, the Universal Services Directive, and the Directive on privacy and electronic communications).<sup>25</sup> In all, they aim at the establishment of an internal market for electronic communications by incorporating public transmission networks and services (telecommunications, media, and information technology) into a single regulatory framework.<sup>26</sup> The provision of WIR and RIR services by mobile network operators consists mainly of the conveyance of signals on electronic communications networks and thus falls within the scope of the 2002 regulatory framework.<sup>27</sup>

### 1. Procedure for sector-specific measures as laid down in the Framework Directive

The 2002 regulatory framework sets a procedure for the sector-specific regulation of electronic communications markets that is consistent with competition law principles but applies regulation in an *ex ante* form.<sup>28</sup> It is designed as an interim solution until the telecommunications markets mature, in which case sector-specific regulation may be abandoned, and the markets can be left to regulation solely by the competition law regime (e.g. Articles 81 et seq. EC).<sup>29</sup> According to the 2002 regulatory framework, national regulatory authorities shall be the only competent bodies regulating electronic communications services in an *ex ante* form.<sup>30</sup> Before specific *ex ante* regulation can be imposed, however, a national regulatory authority must carry out a multistage procedure.

<sup>24</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ 2002, L 108/33 of 24 April 2002.

<sup>25</sup> Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), OJ 2002, L 108/7 of 24 April 2002; Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), OJ 2002, L 108/21 of 24 April 2002; Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Services Directive), OJ 2002, L 108/51 of 24 April 2002; Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ 2002, L 201/37 of 31 July 2002.

<sup>26</sup> Recital 3 RR; Art. 1 and Recital 5 Framework Directive; cf. Recital 7 Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services, OJ 2002 L 249/21 of 17 September 2002.

<sup>27</sup> Cf. Art. 2(a) and (c) Framework Directive; Recital 13 Access Directive; *Neitzel*, GPR 2006, 188 (191).

<sup>28</sup> *Buigues*, in: Buigues/Rey (eds.), Economics of antitrust and regulation in telecommunications, 9 (16); *Cawley*, Journal of Network Industries 5 (2004), 3 (5); cf. *European Commission*, Report on the outcome of the Review of the EU regulatory framework for electronic communications networks and services in accordance with Directive 2002/21/EC and Summary of the 2007 Reform Proposals, COM(2007) 696 final, 13 November 2007, 3; *Möschell/Haug*, MMR 2003, 505.

<sup>29</sup> *Franzius*, EuR 2002, 660 (661); *Möschell/Haug*, MMR 2003, 505; *Schütz*, MMR 2003, 518; cf. *Cawley*, Journal of Network Industries 5 (2004), 3 (4); narrower *De Streel*, World Competition 26 (2003), 489 (514) who considers that the 2002 regulatory framework should apply as long as "it can control market power more efficiently than antitrust".

<sup>30</sup> Cf. Art. 3(1) Framework Directive.

First, a national regulatory authority defines those markets within the electronic communications sector in which *ex ante* regulation may be warranted (Article 15(3) Framework Directive). During this first step, the “utmost account” shall be taken of the Commission’s recommendation on relevant product and service markets within the electronic communications sector (Article 15(3), (1) Framework Directive). Second, the defined markets are then analysed by the national regulatory authority in accordance with the procedure laid down in Article 16(1) Framework Directive. Based on that analysis, the national regulatory authority determines whether a relevant market is effectively competitive (Article 16(2) Framework Directive). Third, *ex ante* regulatory obligations are permitted solely on the grounds that a national regulatory authority has found a market not to be effectively competitive (Recital 27 and Article 16(2)-(4) Framework Directive). In such a market, specific obligations (as referred to by Article 16(2) Framework Directive) must only be imposed on or maintained for undertakings designated as having significant market power (Article 16(4) Framework Directive).<sup>31</sup>

Additionally, Article 7 Framework Directive grants extensive rights to the European Commission to intervene in the procedure administered by the national regulatory authorities. If a national regulatory authority defines a relevant market which differs from the markets determined by the Commission in its recommendation and if the intended measure would affect trade between Member States, the Commission may exercise a veto right (cf. Article 7(4) Framework Directive).<sup>32</sup> Furthermore, the Commission also has a veto right on a national regulatory authority’s decision whether or not to designate an undertaking as having significant market power (cf. Article 7(4) Framework Directive). Although the Commission is not granted a formal veto over the regulatory remedies imposed on undertakings by national regulatory authorities, Article 7(5) Framework Directive ensures a strong say for the Commission.<sup>33</sup>

In general, the procedure which the 2002 regulatory framework provides must be strictly followed before a Member State can impose *ex ante* regulation in a specific electronic communications sector.<sup>34</sup> It is in the context of this procedure that wholesale IR, after having been singled out as potentially susceptible to *ex ante* regulation, was included in the relevant service markets in the sector of telecommunications regulated by Commission Recommendation 2003/311/EC.<sup>35</sup>

<sup>31</sup> The concept of significant market power is equivalent to the concept of dominance under Art. 82 EC (see Recital 25 Framework Directive).

<sup>32</sup> *Bartosch*, EuZW 2002, 389 (393); *Buigues*, in: Buigues/Rey (eds.), Economics of antitrust and regulation in telecommunications, 9 (23); *De Streef*, World Competition 26 (2003), 489 (493); *Husch/Kemmler/Ohlenburg*, MMR 2003, 139 (140); *Klotz*, MMR 2003, 495 (499); *Thomaschki*, MMR 2003, 500 (501); cf. *Gramlich*, Regulierungsspielräume, 157 (164 et seq.).

<sup>33</sup> *Gramlich*, Regulierungsspielräume, 157 (164 et seq.); cf. *De Streef*, World Competition 26 (2003), 489 (493); *Weisser/Bauer*, MMR 2003, 709 (710). The Commission plans to expand its veto power to the regulatory remedies imposed by national regulatory authorities; see *European Commission*, Proposal for a Directive of the European Parliament and of the Council amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and services, and 2002/20/EC on the authorisation of electronic communications networks and services, COM(2007) 697 final, 13 November 2007, 29.

<sup>34</sup> Cf. Article 3(2) Access Directive.

<sup>35</sup> Commission Recommendation of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with

## 2. Requirements of the Access Directive and the Universal Services Directive

Wholesale markets in the electronic communications sector are specifically governed by the Access Directive.<sup>36</sup> According to its Article 8(2), a national regulatory authority shall impose the exhaustive obligations (insofar as maximum harmonisation<sup>37</sup>), among which are transparency obligations and price control, laid down in Articles 9 to 13 Access Directive on an operator designated as having significant market power on a specific market. In markets without operators with significant market power these obligations shall not be imposed, with certain exceptions (Article 8(3) Access Directive).

For retail markets, the Universal Service Directive applies.<sup>38</sup> Article 17 Universal Service Directive stipulates that a national regulatory authority, after having followed the rules of the procedure set out in the Framework Directive, shall impose appropriate regulatory obligations (cf. Article 17(2) Universal Service Directive) on undertakings identified as having significant market power on a given retail market. However, regulatory controls on retail services are subsidiary to wholesale regulation, i.e. they should only be imposed where wholesale measures in accordance with the Access Directive are deemed insufficient to produce effective competition.<sup>39</sup> If a retail market is considered to be effectively competitive, the national regulatory authority shall not impose retail control mechanisms (Article 17(5) Universal Service Directive).

Chapter IV of the Universal Service Directive covers sector-specific consumer protection measures.<sup>40</sup> It applies to all undertakings that provide public telephone networks or publicly available telephone services, which include those that are not designated as having significant market power on a specific market.<sup>41</sup> For example, Member States shall ensure that transparent information on prices and tariffs is made available to end-users and consumers (Article 21 Universal Service Directive).

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Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services (Commission Recommendation 2003/311/EC), OJ 2003, L 114/45 of 8 May 2003.

<sup>36</sup> *De Streef*, World Competition 26 (2003), 489 (491); *Weisser/Bauer*, MMR 2003, 709 (712); cf. Art. 1(1) Access Directive; *Klotz*, MMR 2003, 495 (498).

<sup>37</sup> Controversial. For maximum harmonisation: *Doll/Rommell/Wehmeier*, MMR 2003, 522 (524); cf. *Bartosch*, EuZW 2002, 389 (394); Recital 14 Access Directive. For minimum harmonisation: *Gramlich*, Regulierungsspielräume, 157 (162); cf. *Husch/Kemmler/Ohlenburg*, MMR 2003, 139 (147). See also *Koenig/Neumann/Senger*, MMR 2006, 365 (et seq.) for Member States' legislative scope when incorporating Articles 9 to 13 Access Directive into national law.

<sup>38</sup> Art. 1(1) Universal Service Directive; *de Streef*, World Competition 26 (2003), 489 (491); *Weisser/Bauer*, MMR 2003, 709 (713); cf. *Klotz*, MMR 2003, 495 (498).

<sup>39</sup> Recital 26 Universal Service Directive; *Bartosch*, EuZW 2002, 389 (396); *de Streef*, Journal of Network Industries 4 (2003), 189 (198); *id.*, World Competition 26 (2003), 489 (509); *Husch/Kemmler/Ohlenburg*, MMR 2003, 139 (144); *Klotz*, in: Säcker (ed.), Berliner Kommentar zum TKG, Einl. II, para. 177; *Schütz*, MMR 2003, 518; *Weisser/Bauer*, MMR 2003, 709 (713); cf. Art. 17(1)(b) Universal Service Directive.

<sup>40</sup> *Husch/Kemmler/Ohlenburg*, MMR 2003, 139 (143).

<sup>41</sup> *Klotz*, in: Säcker (ed.), Berliner Kommentar zum TKG, Einl. II, para. 181.

### 3. *Limited scope for sector-specific ex ante regulation*

In principle, the 2002 regulatory framework only allows and demands a sector-specific *ex ante* regulation if an undertaking is designated as having significant market power on a specific market.<sup>42</sup> If this condition is not fulfilled, national regulatory authorities are generally prohibited from imposing *ex ante* regulation on undertakings active in a specific market, with some exclusive exceptions set out in the 2002 regulatory framework. This regulatory regime emphasises the aim of the 2002 regulatory framework, which is to reduce *ex ante* obligations in a specific sector and to guarantee that Member States will refrain from other *ex ante* regulatory measures. Consequently, in respect of the residual competencies of Member States, Article 2(3) Directive 2002/77/EC<sup>43</sup> states that “Member States shall ensure that no restrictions are imposed or maintained on the provision of electronic communications services over electronic communications networks established by the providers of electronic communications services [...] without prejudice to the provisions of Directives 2002/19/EC, 2002/20/EC, 2002/21/EC and 2002/22/EC.”

### 4. *Residual national competences to regulate the IR sectors*

Particularly with regard to Article 95 EC, the question arises whether Member States actually retain any residual competencies at all to regulate the IR sectors apart from the measures set out in the 2002 regulatory framework.<sup>44</sup> Were it answered in the affirmative, the 2002 regulatory framework would not stipulate a maximum harmonisation for the entire IR sector.

Whether a Directive entails a maximum harmonisation depends on its wording, its aim, and its context.<sup>45</sup> Maximum harmonisation means that a Community measure exhaustively regulates a specific field, thereby eliminating any residual scope for regulation by national legislators.<sup>46</sup> On the other hand, a minimum harmonisation allows

<sup>42</sup> *European Commission*, Report on the outcome of the Review of the EU regulatory framework for electronic communications networks and services in accordance with Directive 2002/21/EC and Summary of the 2007 Reform Proposals, COM(2007) 696 final, 13 November 2007, 3; *Klotz*, MMR 2003, 495 (497); cf. *Doll/Rommel/Wehmeier*, MMR 2003, 522 (525).

<sup>43</sup> Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services, OJ 2002, L 249/21 of 17 September 2002.

<sup>44</sup> For the application of Art. 95 EC in the present case, it is crucial that either national laws governing the IR sectors exist or are likely to arise in the future. The latter requires as a prerequisite that Member States retain residual competencies in the IR sectors. See *infra* C.II. Hence, it must be determined whether Community measures have already fully harmonised the IR sectors. It is of lesser importance to determine whether a specific Community measure has achieved a maximum harmonisation in parts of the IR sectors. The controversial question of to which extent the 2002 regulatory framework or any of the specific directives aim at a maximum harmonisation will therefore be considered only if necessary. For a further analysis of this issue see e.g. *Capito/Elspaß*, K&R 2003, 110 (115); *de Minico* EBLR 2008, 657 (671 et seq.); *Gramlich*, *Regulierungsspielräume*, 157 (162); *Kühling/Neumann*, in: Säcker (ed.), *Berliner Kommentar zum TKG*, § 39, para. 29-32.

<sup>45</sup> *Capito/Elspaß*, K&R 2003, 110 (114); *Herrnfeld*, in: Schwarze (ed.), *EU*, Art. 94, para. 43; *Ludwigs*, *Rechtsangleichung*, 116; *Wagner*, *Mindestharmonisierung*, 45; cf. Case 278/85, *Commission v. Denmark*, [1987] ECR 4069, para. 12.

<sup>46</sup> *Barnard*, *Substantive law of the EU*, 591; *Conrad*, *Mindestharmonisierung*, 79; *Davies*, *Internal market law*, 138; *Dougan*, *CMLR* 37 (2000), 853 (854 et seq.); *Leible*, in: *Streinz* (ed.),

Member States to maintain or introduce more stringent regulatory standards than those prescribed by Community legislation.<sup>47</sup> If the Community measure exhaustively covers the protection of mandatory requirements and the grounds of derogation of the fundamental freedoms explicitly mentioned in the Treaty (e.g. Articles 30 and 46 EC), national legislation must not deviate from the standard specified by the Community measure. In such a case, it is solely the Community legislature that provides the definition of the mandatory requirements and the other grounds of derogation in the Treaty.<sup>48</sup>

*a) No maximum harmonisation of the IR sectors*

Several recitals of the directives constituting the 2002 regulatory framework show that Member States retain residual competencies to protect certain aims in the electronic communications markets. Pursuant to Recital 7 Framework Directive, “the provisions of this Directive and the Specific Directives are without prejudice to the possibility for each Member State to take the necessary measures to ensure the protection of its essential security interests, to safeguard public policy and public security”. Recital 3 Authorisation Directive states that Member States are allowed to enact “restrictions in conformity with Article 46(1) of the Treaty.” Recital 50 Universal Service Directive stipulates that Member States are not prevented “from taking measures justified on grounds set out in Articles 30 and 46 of the Treaty”. Although mandatory requirements are not explicitly named in these recitals, they are generally covered by the Member States’ residual competencies alongside the explicit grounds of derogation in the Treaty.<sup>49</sup>

The (limited) purpose of the 2002 regulatory framework further elucidates why it does not exhaustively determine the standard of protection for mandatory requirements and other grounds of derogation. The framework aims at enhancing competition in the “immature” electronic communications markets and is based on the principle that regulation should be withdrawn from markets that are effectively competitive. Some rare exceptions aside, the Universal Service Directive and the Access Directive only call for *ex ante* regulation in a specific market which lacks effective competition and hosts at least one operator found to have significant market power. The necessity of consumer and/or health protection in a specific sector, however, does not correlate with the circumstance that undertakings with significant market power are operating in this sector. For instance, the question whether mobile phone users should be protected from allegedly dangerous mobile phone radiation is a question independ-

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EUV/EGV, Art. 95 EC, para. 39; *Ludwigs*, Rechtsangleichung, 106; *Streinz*, in: Everling/Roth (eds.), Mindestharmonisierung, 9 (18); *Tietje*, in: Grabitz/Hilf (eds.), EUV/EGV, Vor Art. 94-97 EC, para. 39; *Wagner*, Mindestharmonisierung, 45; cf. ECJ, Case 148/78, *Ratti*, [1979] ECR 1629, para. 26 et seq.; ECJ, Case 278/85, *Commission v. Denmark*, [1987] ECR 4069, para. 12.

<sup>47</sup> *Davies*, Internal market law, 138; *Dougan*, CMLR 37 (2000), 853 (855); *Herrnfeld*, in: Schwarze (ed.), EU, Art. 94, para. 44; *Tietje*, in: Grabitz/Hilf (eds.), EUV/EGV, Vor Art. 94-97 EC, para. 41; *Wagner*, Mindestharmonisierung, 45, 50.

<sup>48</sup> *Conrad*, Mindestharmonisierung, 79; *Streinz*, in: Everling/Roth (eds.), Mindestharmonisierung, 9 (30 et seq.); cf. *Barnard*, Substantive law of the EU, 592; *Dougan*, CMLR 37 (2000), 853 (866); *Herrnfeld*, in: Schwarze (ed.), EU, Art. 95, para. 40.

<sup>49</sup> *Gramlich*, Regulierungsspielräume, 157 (161).

ent of effective competition in the mobile phone markets. Consequently, Member States retain a residual competence for public health measures in the electronic communications sector.<sup>50</sup>

The same holds true for consumer protection measures. *Ex ante* consumer protection legislation may be indicated in a specific sector characterized by information asymmetries or externalities even though none of the operators active in this sector has significant market power. Furthermore, even in sectors with close to perfect competition, specific consumer protection measures may become necessary due to regulatory policies. This is recognized by the 2002 regulatory framework, which regulates end-user interests and rights in Chapter IV of the Universal Service Directive for all undertakings offering publicly available telephone services. The provisions in this chapter grant Member States a relatively wide scope of implementation. They do not prohibit stronger measures<sup>51</sup> and are therefore not exhaustive.

In conclusion, the 2002 regulatory framework gives Member States latitude to address the problems identified in the IR sectors by means of legislative measures, such as consumer protection legislation.<sup>52</sup> Hence, the 2002 regulatory framework does not stipulate a maximum harmonisation for the IR sectors. Besides, at least the Universal Service Directive – contrary to the Access Directive – leaves scope for additional Member States' laws, since it does not exhaustively prescribe the measures that national regulatory authorities are permitted to impose on undertakings designated as having significant market power on a retail market when the conditions of Article 17(1) Universal Service Directive are met.<sup>53</sup> Therefore, there is in fact a possibility that divergent national laws concerning *ex ante* measures for retail markets could occur. In this respect, the Universal Service Directive does not fully harmonise the retail electronic communications markets.<sup>54</sup>

*b) Direct ex ante intervention in competition by national legislation is barred*

These findings, however, do not justify national consumer protection legislation that undermines the aim of the 2002 regulatory framework. The setting of a price cap for WIR or RIR services by a Member State, for example, would directly intervene in competition in the WIR or RIR sector in an *ex ante* form. Such a regulation would interfere with the 2002 regulatory framework which does not allow for additional national legislation directly regulating competition in the electronic communications markets outside the procedure laid down in the Framework Directive. Such a regulation would be at odds with the aim of the 2002 regulatory framework to ensure that

<sup>50</sup> In fact, the 2002 regulatory framework does not comprise measures that directly aim at the protection of public health.

<sup>51</sup> See e.g. Article 20(2) sentence 2 Universal Service Directive “The contract shall specify *at least*”.

<sup>52</sup> Recital 8 RR; *European Commission*, Proposal for a Regulation of the European Parliament and of the Council on roaming on public mobile networks within the Community and amending Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, COM(2006) 382 final, 12 July 2006, 4.

<sup>53</sup> See Art. 17(1) Universal Service Directive „shall impose *appropriate* regulatory obligations“; *Kühling/Neumann*, in: Säcker (ed.), *Berliner Kommentar zum TKG*, § 39, para. 29-32; cf. *Weisser/Bauer*, MMR 2003, 709 (713).

<sup>54</sup> *Kühling/Neumann*, in: Säcker (ed.), *Berliner Kommentar zum TKG*, § 39, para. 29-32.

Member States will refrain from other (additional) *ex ante* regulation in a specific sector in order to regulate competition.<sup>55</sup>

Interestingly, the Roaming Regulation itself departs from the basic principle of the 2002 regulatory framework, according to which *ex ante* regulation can be imposed only on operators found to have significant market power in a relevant market by a national regulatory authority on the basis of a market analysis. Still, the Roaming Regulation does not infringe the 2002 regulatory framework as Article 10 RR amends the Framework Directive, providing that the framework “shall be without prejudice to any specific measure adopted for the regulation of international roaming on public mobile telephone networks within the Community.”

### III. The wholesale sector for IR services on public mobile networks<sup>56</sup>

IR markets can be generally divided into wholesale international roaming (WIR) and retail international roaming (RIR) markets. A WIR market is a market that involves the demand of IR services of, and supply of IR services to, mobile network operators wishing to supply their own end-users.<sup>57</sup> It comprises all mobile network operators in one Member State that offer WIR services to foreign mobile network operators.<sup>58</sup> There is no Community-wide market for WIR services, but each Member State has its own national market. These national markets show distinct characteristics of narrow oligopolies, as there are mostly only a small number (usually three to six) of mobile network operators supplying WIR services.<sup>59</sup>

The demand side of one national WIR market consists of mobile network operators from other Member States whose end customers roam on the visited networks in the national market. Hence, the demand for WIR services originates from the demand

<sup>55</sup> Cf. Recitals 11 and 12 RR.

<sup>56</sup> The following description of the WIR sector is mainly based on (a) the European Regulators Group’s (ERG) analysis of the markets for WIR services in 2005, (b) the market analyses of the twelve national regulatory authorities who assessed – on the basis of Commission Recommendation 2003/311/EC – whether *ex ante* regulation was required in their national WIR markets for international roaming on public mobile networks (market 17), and (c) the submissions to the Commission’s two calls for comments on a proposed regulation of international roaming services. For further details see *ERG*, supra 21, (05) 20Rev1 and *ERG*, Consultation report on the common position on wholesale international roaming, ERG (05) 42, available on the internet: <[http://www.erg.eu.int/documents/docs/index\\_en.htm](http://www.erg.eu.int/documents/docs/index_en.htm)> (visited on 28 August 2008). The national regulatory authorities’ market analyses are available on the internet at <<http://circa.europa.eu/Public/irc/info/ecctf/library>> (visited on 28 August 2008). The submissions to the two Commission’s call for comments on a proposed regulation of international roaming services are available on the internet: <[http://ec.europa.eu/information\\_society/activities/roaming/regulation/archives/index\\_en.htm](http://ec.europa.eu/information_society/activities/roaming/regulation/archives/index_en.htm)> (visited on 28 August 2008).

<sup>57</sup> Cf. Recital 6 et seq. Commission Recommendation 2003/311/EC. Most national regulatory authorities believe that the relevant wholesale and retail product markets include voice services as well as SMS, i.e. SMS is regarded as a substitute for mobile voice telephony. Since the existing Roaming Regulation solely regulates cross-border mobile voice telephony, the WIR and RIR market description in this article is limited to this service. Its substitutability with SMS services is not further discussed.

<sup>58</sup> European Commission Decision, Case No Comp/M.4035 – *Telefónica/O2*, para. 17; European Commission Decision, Case No Comp/M.1863 – *Vodafone/BT/Airtel*, para. 17; *Berger-Kögler*, MMR 2007, 294 (296); *ERG*, supra 21, (05) 20Rev1, para. 34 et seq.

<sup>59</sup> *Berger-Kögler*, MMR 2007, 294 (296).



at the retail level and ultimately from end-users' travel patterns.<sup>60</sup> The European Regulators Group describes the demand side of the WIR markets as stagnant or moderately growing.<sup>61</sup> The demanders themselves act as suppliers of WIR services in their national markets. Therefore, the same mobile network operators essentially appear in alternate roles on the supply and demand side of WIR markets.<sup>62</sup>

In order to increase their options when negotiating WIR rates and to ensure their subscribers the widest coverage, most home mobile network operators enter into WIR agreements with the majority or all host mobile network operators in the roamed country.<sup>63</sup> Although the range of IR services offered in one national market can differ between host mobile network operators, most operators offer homogeneous (and thus usually substitutable) IR voice telephony services at wholesale level.<sup>64</sup> Moreover, voice telephony at wholesale level as regulated by the Roaming Regulation is a rather mature product, leaving little room for product differentiation.<sup>65</sup>

### 1. *The effects of traffic direction*

Furthermore, home mobile network operators that entered into WIR agreements with multiple host mobile network operators in one Member State are free to choose between the available visited networks when providing IR services to their customers.<sup>66</sup> Switching between different host mobile operators' networks inside the foreign country is not prohibited by the non-exclusive roaming agreements and is not obstructed by costs or time delay. In fact, owing to technological advancement, host mobile network operators steer a significant proportion of the roaming traffic generated by their end customers onto a certain preferred visited network, should more than one be accessible.<sup>67</sup> Through traffic direction, a home operator is able to reduce or increase the market share of its contracted host network operators which gives it the means to negotiate (volume) discounts on inter-operator tariffs and thereby exert its countervail-

<sup>60</sup> *Salsas/Koboldt*, Information Economics and Policy 16 (2004), 497 (504); cf. European Commission Decision, Case No Comp/M.4035 – *Telefónica/O2*, para. 13.

<sup>61</sup> *ERG*, supra 21, (05) 20Rev1, para. 59. This position was opposed by respondents to the ERG's common position; see *ERG*, supra 56, (05) 42, 17.

<sup>62</sup> *Berger-Kögler*, MMR 2007, 294 (296); *Salsas/Koboldt*, Information Economics and Policy 16 (2004), 497 (504).

<sup>63</sup> European Commission Decision, Case No Comp/M.4035 – *Telefónica/O2*, para. 17; European Commission Decision, Case No Comp/M.2803 – *Telia/Sonera*, para. 17; *ERG*, supra 21, (05) 20Rev1, para. 30 and 33; *Lupi/Manenti*, Traffic Management, 7 (note 12); cf. *Salsas/Koboldt*, Information Economics and Policy 16 (2004), 497 (502 et seq.).

<sup>64</sup> *ERG*, supra 21, (05) 20Rev1, para. 48 and 58; *Berger-Kögler*, MMR 2007, 294 (296). This finding is not uncontested. In *ERG*, supra 56, (05) 42, 6, 12 and 15 to 17, four out of twelve respondents to the ERG's common position explicitly disagreed with the ERG's opinion that wholesale international roaming services are homogeneous. It was asserted that they may differ among the competitors and that mobile network operators compete on more than just price.

<sup>65</sup> *ERG*, supra 21, (05) 20Rev1, para. 57. Again, this viewpoint expressed by the ERG was contested by respondents to the ERG's common position. See *ERG*, supra 56, (05) 42, 17. It must be noted, however, that the responses did not exclusively focus on mobile voice telephony as regulated by the Roaming Regulation but also included SMS and other data services.

<sup>66</sup> *ERG*, supra 21, (05) 20Rev1, para. 30.

<sup>67</sup> European Commission Decision, Case No Comp/M.4035 – *Telefónica/O2*, para. 15 et seq.; *ERG*, supra 21, (05) 20Rev1, para. 31, 33; *Lupi/Manenti*, Traffic Management, 3.

ing buyer power.<sup>68</sup> When traffic direction is not or not effectively used, roaming end-users will be almost randomly distributed on all of the available visited networks.<sup>69</sup>

One function that might limit the effective use of traffic direction techniques is that most handsets offer a manual network selection option. This feature allows subscribers to bypass automatic network selection and to choose which network their handset registers when being abroad.<sup>70</sup> Yet, mobile subscribers have been found to possess little knowledge of this technical feature and even if they do, seldom use it (as they may not be aware of the differences in retail tariffs for each visited network).<sup>71</sup>

IR agreements between mobile network operators are usually bilateral, and discounts on the inter-operator tariffs are commonly given.<sup>72</sup> They largely depend on the amount of IR traffic a mobile network operator generates. Such discounts are generally untransparent for competitors, and although each mobile network operator must apply the same set of inter-operator tariffs to all foreign operators,<sup>73</sup> this non-

<sup>68</sup> *ERG*, supra 21, (05) 20Rev1, para. 43 et seq.; cf. *Lupi/Manenti*, Traffic Management, 4, 13; *Martino*, Communications & Strategies 66 (2007), 137 (141 et seq.). In a scenario in which home mobile network operators are able to direct all their IR traffic onto a certain network in the foreign country, visited mobile network operators would compete for IR traffic by offering discounted inter-operator tariffs. This would drive wholesale charges down to marginal cost. See *Lupi/Manenti*, Traffic Management, 12 et seq.; *Salsas/Koboldt*, Information Economics and Policy 16 (2004), 497 (514). However, as it is nowadays not possible to direct the entire IR traffic onto a certain network, traffic direction techniques have a noticeably lower effect on wholesale charges and do not always guarantee reductions in inter-operator tariffs. See *Lupi/Manenti*, Traffic Management, 13 et seq. for an economic analysis of an imperfect traffic steering scenario.

<sup>69</sup> *ERG*, supra 21, (05) 20Rev1, para. 31; *Lupi/Manenti*, Traffic Management, 12 et seq.; *Martino*, Communications & Strategies 66 (2007), 137 (141).

<sup>70</sup> European Commission Decision, Case No Comp/M.4035 – *Telefónica/O2*, para. 16; *ERG*, supra 56, (05) 42, 11; *Salsas/Koboldt*, Information Economics and Policy 16 (2004), 497 (502); *Sutherland*, Telecommunications Policy 25 (2001), 5 (7).

<sup>71</sup> Cf. *Sutherland*, Telecommunications Policy 25 (2001), 5 (7). According to the consumer survey “Mobile phone usage abroad” (available on the internet: <[http://ficora.fi/attachments/englanti/1156489126198/Files/CurrentFile/Roaming2005\\_eng.pdf](http://ficora.fi/attachments/englanti/1156489126198/Files/CurrentFile/Roaming2005_eng.pdf)> (visited on 28 August 2008)) run by the Finnish communications regulatory authority (FICORA) in 2005, 80% of Finnish roamers do not manually choose the network but use the network that automatically appears on their handsets (*FICORA*, 35). Only 39 % of the Finnish roamers are aware that they can manually select the least expensive network (*FICORA*, 39). According to the joint consumer survey on mobile roaming run by the British communications regulatory authority (OfTel) together with the Irish communications regulatory authority (ODTR) in 2002 (available on the internet: <<http://www.ofcom.org.uk/static/archive/oftel/publications/research/2002/odtr0402.htm>> (visited on 28 August 2008)), 63% of British mobile roamers, 75% of Northern Ireland mobile roamers, and 66% of Irish mobile roamers always use the network that appears on their handset and do not manually select the network (*ODTR/OfTel*, 69).

<sup>72</sup> European Commission Decision, Case No Comp/M.4035 – *Telefónica/O2*, para. 48; *ERG*, supra 21, (05) 20Rev1, para. 33, 50, 68.

<sup>73</sup> European Commission Decision, Case No Comp/M.4035 – *Telefónica/O2*, para. 48; *Lupi/Manenti*, Traffic Management, 5; *Salsas/Koboldt*, Information Economics and Policy 16 (2004), 497 (500). When mobile network operators establish bilateral IR partnership agreements, they employ the Standard Terms for International Roaming Agreement (STIRA) as their standard contract. The STIRA were drafted by the GSM Association and define all the technical and financial conditions under which international roaming services are exchanged between operators. Under its terms, wholesale international roaming services are to be charged on the basis of the operator’s standard inter-operator tariff, which is published by the GSM Association. According to the STIRA, inter-operator tariffs are non-discriminatory, meaning that each mobile network operator must apply the same set of inter-operator tariffs to all foreign mobile network operators. Outside

discriminatory rule does not apply for discounts granted on the inter-operator tariff. Bilateral IR traffic streams are usually non-reciprocal due to differences in the amount of customers each mobile network operator has and because of national differences in end customers' travel patterns. The resulting gap in traffic generation leads to unbalanced payments between operators.

A home mobile network operator which steers traffic onto a certain network may reap lower prices for WIR services as a result. But this is not the only incentive for traffic direction. Strategic cross-border alliances between foreign mobile operators or pan-European groups play an equally important role.<sup>74</sup> The European Regulators Group and several national regulatory authorities discerned that the direction of IR traffic towards alliance or group partners is increasing at the expense of IR traffic towards independent mobile network operators. Interestingly, this finding seems to hold true even if non-alliance or non-group operators offer lower prices. Therefore, it appears that traffic direction amongst alliance or group members is not primarily linked to prices, which indicates a low elasticity of demand.<sup>75</sup> As a result, smaller, independent mobile network operators may not receive (high) discounts when negotiating bilateral WIR agreements with larger mobile network operators as their countervailing buyer power is rather limited. They are neither able to generate a net surplus of outbound IR traffic (due to their small traffic volumes) nor able to attract large amounts of IR traffic as this is steered onto other networks whose operators form part of an alliance or group.<sup>76</sup>

## 2. Other characteristics of the WIR sector

Apart from the low elasticity of demand, high and persistent entry barriers and lack of potential competition are two other characteristics of the WIR sector in the EU.<sup>77</sup> They can be attributed to the following factors: (a) the natural scarcity of available frequencies for mobile networks, (b) the limitation of access to WIR rights to nationally licensed public mobile network operators, (c) the high sunk costs involved in building a new mobile network, and (d) the absence of effective supply-side substitution through other technologies.

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the scope of the STIRA, however, parties to a WIR agreement can negotiate discounts on WIR tariffs and other preferential conditions.

<sup>74</sup> For more information on cross-border alliances and pan-European groups in the mobile telecommunications sector, see European Commission Decision, Case No Comp/M.4035 – *Telefónica/O2*, para. 39 et seq.; *Berger-Kögler*, MMR 2007, 294 (297). See also *Meurling*, Strategic Alliances.

<sup>75</sup> *ERG*, supra 21, (05) 20Rev1, para. 61; cf. European Commission Decision, Case No Comp/M.4035 – *Telefónica/O2*, para. 52 et seq. For deviating opinions voiced by respondents to the ERG's common position, see *ERG*, supra 56, (05) 42, 17.

<sup>76</sup> Cf. European Commission Decision, Case No Comp/M.4035 – *Telefónica/O2*, para. 46 for the latter point.

<sup>77</sup> *ERG*, supra 21, (05) 20Rev1, para. 62 et seq.; *Berger-Kögler*, MMR 2007, 294 (296).

### 3. Excessive prices for WIR services

Taking these economic characteristics of the WIR markets in the Community into account, it appeared to the ERG that there exist strong incentives for common strategies of muted competition or tacit collusive policies.<sup>78</sup> If that were the case, the prices of wholesale international roaming services would be excessive, i.e. higher than those resulting from the working of a perfectly competitive market.<sup>79</sup> Consequently, in its Recommendation 2003/311/EC<sup>80</sup> the Commission requested that the national regulatory authorities analyse their respective wholesale national markets for international roaming on public mobile networks in order to identify whether *ex ante* regulation was warranted in these markets. The national regulatory authorities of twelve Member States<sup>81</sup> finished their analysis before the introduction of the Roaming Regulation, each ascertaining that a regulation was not warranted, albeit acknowledging that prices were still too high with regard to the underlying cost. None of the national regulatory authorities determined strategies of muted competition or tacit collusion, and all concluded that no market player had significant market power individually or jointly with others.

The suspicion that WIR charges were excessive before the Roaming Regulation came into effect can be further backed up by developments in the WIR markets after the European Commission announced its intention to impose an EC Regulation governing IR charges in February 2006<sup>82</sup>. In May 2006, when faced with the imminent regulation, certain members of the cross-border alliance *Freemove* (e.g. T-Mobile, Orange, and Telenor) agreed on a mutual price cap of about 45 cents per minute as of October 2006 and 36 cents per minute as of October 2007 for WIR charges.<sup>83</sup> According to T-Mobile, this amounted to a significant reduction in average WIR charges of up to almost 50%. Likewise, on 8 May 2006 Vodafone announced a reduction in wholesale roaming prices of about 35% on the basis of mutuality.<sup>84</sup> Of course, one cannot positively rule out the possibility that an increase in efficiency in the wake of cost reductions or higher discounts on inter-operator tariffs due to improved traffic steering techniques caused these reductions of wholesale prices. But it does seem

<sup>78</sup> *ERG*, supra 21, (05) 20Rev1, para. 64. This view was also shared by several national regulatory authorities, who analysed their national WIR markets.

<sup>79</sup> *ERG*, supra 21, (05) 20Rev1, para. 64.

<sup>80</sup> The Commission Recommendation 2003/311/EC is based on Article 15(1) Framework Directive, which stipulates that “the Commission shall adopt a recommendation on relevant product and service markets.” According to Annex I (4) of this Directive, one of these markets is “the national market for international roaming services on public mobile telephone networks”.

<sup>81</sup> These Member States were Austria, the Czech Republic, Denmark, Estonia, Finland, Greece, Ireland, Italy, Poland, Slovenia, Spain and Sweden.

<sup>82</sup> Commissioner *Reding*, “Towards a true internal market for electronic communications”, Speech at an ERG’s meeting on 8 February 2006, available on the internet: <<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/69&format=HTML&aged=0&language=EN&guiLanguage=en>> (visited on 28 August 2008).

<sup>83</sup> See *Heise.de*, “Europäische Handynetzbetreiber senken Roaming-Preise”, 1 June 2006, available on the internet: <<http://www.heise.de/mobil/Europaeische-Handynetzbetreiber-senken-Roaming-Preise-/newsticker/meldung/73777>> (visited on 28 August 2008).

<sup>84</sup> *Vodafone.com*, “Vodafone to reduce the cost of European roaming by at least 40% by April 2007”, 8 May 2006, available on the internet: <[http://www.vodafone.com/start/media\\_relations/news/group\\_press\\_releases/2006/press\\_release08\\_05.html](http://www.vodafone.com/start/media_relations/news/group_press_releases/2006/press_release08_05.html)> (visited on 28 August 2008).

unlikely that these should suddenly amount to up to 35% or 50%.<sup>85</sup> Moreover, the close and timely proximity to a probable regulation substantiates the suspicion that price cuts were driven by the threat of regulatory action<sup>86</sup> and that WIR charges were indeed excessive, i.e. they bore no relation to the underlying costs.

#### IV. The retail sector for IR services on public mobile networks<sup>87</sup>

Retail IR services refer to the ability of mobile phone subscribers to make and receive calls while roaming abroad. A retail market for IR services would thus involve the supply and demand of end-users for IR services.<sup>88</sup> It is, however, questionable whether RIR services constitute a separate product market as international roaming services at retail level are not purchased independently but form part of a mobile services bundle that mobile network operators offer to their customers. RIR services are not provided as a stand-alone product. Consequently, the Commission considers RIR services as part of the retail mobile telecommunication services market.<sup>89</sup> Still, the view that RIR services do not constitute a separate market under competition law principles does not bar the application of Article 95 EC to approximate national legislation for RIR services. Article 95 EC focuses on legislation in a certain economic sector (e.g. the RIR sector) and does not directly deal with issues of competition law. Thus, for the purposes of this paper, RIR services will be referred to as a separate market in a non-technical sense.

Since end-users are only able to obtain IR services from licensed mobile network operators, and licensing is conducted on a national basis, RIR markets are national in scope.<sup>90</sup> The supply side of each national RIR market is made up of all home providers

<sup>85</sup> This view is also shared by *Berger-Kögler*, MMR 2007, 294 (297).

<sup>86</sup> *European Commission*, supra 3, SEC(2006) 925, 27.

<sup>87</sup> The following description of the RIR sector is mainly based on (a) a Eurobarometer study on international roaming, which was commissioned by the European Commission and carried out between September and October 2006 by *TNS Opinion & Social* among circa 25,000 people in 25 Member States, (b) the submissions to the Commission's two calls for comments on a proposed regulation of international roaming services (see supra 56), and (c) the report given by the European Regulators Group's (ERG) Project Team on International Roaming Tariff Transparency in October 2005. The aim of the ERG's Project Team was, inter alia, to provide an assessment of the degree of transparency of IR tariffs and European consumers' awareness of these IR tariffs. For further details see *ERG*, ERG Project Team on International Roaming Retail Tariff Transparency, October 2005, (05) 43 rev1, available on the internet: <[http://www.erg.eu.int/documents/docs/index\\_en.htm](http://www.erg.eu.int/documents/docs/index_en.htm)> (visited on 28 August 2008) and *TNS Opinion & Social*, Special Eurobarometer 269 / Wave 66.1, March 2007, available on the internet: <[http://ec.europa.eu/information\\_society/activities/roaming/regulation/archives/eurobarometer/index\\_en.htm](http://ec.europa.eu/information_society/activities/roaming/regulation/archives/eurobarometer/index_en.htm)> (visited on 28 August 2008).

<sup>88</sup> Cf. Recitals 6 and 7 Commission Recommendation 2003/311/EC.

<sup>89</sup> European Commission Decision, Case No Comp/M.4035 – *Telefónica/O2*, para. 24; European Commission Decision, Case No Comp/M.3920 – *France Télécom/Amena*, para. 18; cf. Recital 7 RR.

<sup>90</sup> European Commission Decision, Case No Comp/M.4035 – *Telefónica/O2*, para. 25; cf. European Commission Decision, Case No Comp/M.4809 – *France Télécom/MEP/One*, para. 9 et seq.; European Commission Decision, Case No IV/M.1430 – *Vodafone/Airtouch*, para. 16; *ERG*, ERG response to the European Commission's second phase public consultation on a proposal for a Regulation (EC) of the European Parliament and of the Council on mobile roaming services in the single market, 11 May 2006, 9 (note 5), 11, available on the internet:

(cf. Article 2(2)(b) RR) that offer IR services to their end customers. The demand side of each national RIR market consists of domestic end-users that demand IR services.

### 1. *Low charges for national mobile telephony vs. high RIR charges*

After the Commission announced its plan to regulate retail charges for RIR services in February 2006, retail prices – similar to WIR tariffs – declined.<sup>91</sup> This sign of existing competition, however, did not suffice for the Commission to stop its willingness to reduce RIR tariffs by regulation. Contrary to the RIR sector, a relatively strong price competition over national mobile telephony charges exists in the national retail mobile telephony markets without the threat of a retail price regulation. Hence, the question arises as to what distinguishes these markets from the RIR sector. A view to the demand side can clarify this issue. One important circumstance is that the demanders for retail national mobile telephony services usually know the tariffs charged by their home providers. In contrast to this, a Community-wide poll by *TNS Opinion & Social*<sup>92</sup> shows that the majority of international roaming customers is not aware of the costs incurred for making and receiving voice calls while being abroad. The majority of respondents to the survey who use their mobile phones abroad (63%) use their mobile phones less often when travelling abroad than at home.<sup>93</sup> 81% of them declared that the roaming costs are too high.<sup>94</sup> 60% of all the respondents (78% of the respondents who actually use their mobile phone abroad) opined that the costs charged for voice telephony abroad are higher than prices of mobile phone calls at home.<sup>95</sup> However, only 35% of the respondents who possess a mobile phone thought that they have a good idea of the price they are charged when making or receiving voice calls abroad.<sup>96</sup>

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<[http://ec.europa.eu/information\\_society/activities/roaming/regulation/archives/index\\_en.htm](http://ec.europa.eu/information_society/activities/roaming/regulation/archives/index_en.htm)> (visited on 28 August 2008); *Salsas/Koboldt*, Information Economics and Policy 16 (2004), 497 (500 et seq.). Although end-users are able to subscribe to a mobile network operator in another Member State and then to roam permanently in their home country, the additional costs for permanent international roaming compared to national tariffs render this option unattractive. It is thus not a substitute for subscribing to a home provider of RIR services.

<sup>91</sup> See *European Commission* website, “Tariffs: roaming around Europe”, available on the internet: <[http://ec.europa.eu/information\\_society/activities/roaming/tariffs/voice/index\\_en.htm](http://ec.europa.eu/information_society/activities/roaming/tariffs/voice/index_en.htm)> (visited on 28 August 2008) for the development of RIR charges between September 2005 and July 2008; *European Commission*, supra 3, SEC(2006) 925, 28.

<sup>92</sup> *TNS Opinion & Social*, supra 87.

<sup>93</sup> *TNS Opinion & Social*, supra 87, 19 et seq.

<sup>94</sup> *TNS Opinion & Social*, supra 87, 21. Amongst the respondents who do not use their mobile phone abroad, 51% named excessive costs of communications as the main reason for this; see *TNS Opinion & Social*, supra 87, 23.

<sup>95</sup> *TNS Opinion & Social*, supra 87, 24.

<sup>96</sup> *TNS Opinion & Social*, supra 87, 32.

Other consumer surveys<sup>97</sup> run by national regulatory authorities produced very similar results to those in the *TNS Opinion & Social* survey and in particular revealed that there is a very low consumer awareness of the height of RIR charges.<sup>98</sup> For example, a 2005 survey amongst Finnish mobile customers showed that 90% of the respondents do not contemplate at all RIR prices when choosing their home provider.<sup>99</sup> This low consumer awareness of RIR pricing suggests that retail demand for IR services across Europe is relatively price inelastic.<sup>100</sup> RIR charges have no or very little impact on the choice of the home provider among the great majority of mobile subscribers.

These findings can be explained as follows. A typical mobile phone subscriber regularly uses mobile phone services inside the geographical coverage of his home provider's network, i.e. inside his home country in most cases. Compared to the length of the stay in his home country, he rarely travels abroad (e.g. for vacation). If he wishes to subscribe to a home provider and is offered a choice between homogenous product bundles for retail mobile phone services from different providers, he chooses the tariff package which suits his preferences best. Given that he rarely travels abroad and generates relatively little IR traffic but rather a lot of national traffic, the customer's choice of a home provider is based on low national tariffs rather than on low IR ones.<sup>101</sup> This also explains why mobile phone subscribers are usually aware of the national tariffs that their home provider charges them.

In April 2006, average RIR charges across the EU were roughly four times higher than domestic tariffs and the operator's average margins for calls originated while roaming were well above 200%.<sup>102</sup> These numbers put forward a strong case that RIR markets were indeed inefficient.

## 2. *Little incentive for mobile network operators to reduce RIR tariffs*

Due to the low price elasticity of retail demand for IR services, consumers exert only slight retail pressure on mobile network operators to seek lower WIR prices. An increase in wholesale prices can be passed on to the retail level with relatively little

<sup>97</sup> See the consumer surveys run by *FICORA*, supra 71, by *ODTR/Ofitel*, supra 71, and by the Irish Commission for communications regulation (ComReg), ComReg Trends Report – Q3 2005 – ComReg Doc. 05/86b, 18 November 2005, available on the internet: <[http://www.comstat.ie/publications/market\\_information.539.0.100011.0.p.html](http://www.comstat.ie/publications/market_information.539.0.100011.0.p.html)> (visited on 28 August 2008). A survey amongst national regulatory authorities in the telecommunication sector, run by the IRG Mobile Markets Working Group in 2004, also showed that consumer awareness of IR charges was generally low; cf. *ERG*, supra 87, (05) 43 rev1, 7 et seq. for a more detailed analysis of this survey.

<sup>98</sup> This result is shared by *Berger-Kögler*, MMR 2007, 294 (298 et seq.); *Bolkestein/Gerken*, „Protektionismus und Regulierungswut“, Handelsblatt Nr. 58, 22 March 2007, 6; *ERG*, supra 87, (05) 43 rev1, 3, 11 and 18.

<sup>99</sup> *FICORA*, supra 71, 18.

<sup>100</sup> Cf. *Lupil/Manenti*, Traffic Management, 8; *Salsas/Koboldt*, Information Economics and Policy 16 (2004), 497 (501). Interestingly, surveys have shown that not only residential, but also business customers, who travel frequently and who account for a great share of IR traffic, are relatively insensitive to the height of RIR prices.

<sup>101</sup> *ERG*, supra 56, (05) 42, 5.

<sup>102</sup> *European Commission*, supra 3, SEC(2006) 925, 6, 21; cf. also *Lupil/Manenti*, Traffic Management, 3.

impact on retail demand and as a result price elasticity at the wholesale level is also rather low. Even though price competition (through discounting) has been increasing in the WIR markets owing to the evolution of traffic steering techniques, mobile network operators still have little incentive to pass savings made at wholesale level on to the consumer at retail level.<sup>103</sup> In fact, operators often charge the same RIR tariff irrespective of the network on which their customers are roaming. Furthermore, lower RIR prices for one mobile operator's own customers will not directly result in greater gains at wholesale level as the demand at wholesale level (the volume of incoming IR traffic) is driven by retail demand of foreign mobile operator's customers.<sup>104</sup>

### 3. *Low level of retail tariff transparency*

In August 2005, a community-wide survey on IR retail tariff transparency was carried out by the ERG's Project Group. It found that although mobile network operators provided information on IR charges on their websites, it was certainly not comprehensive, i.e. it did not cover all relevant charges for IR services.<sup>105</sup> The degree of information accessible through customer call centres appeared to be even less informative than through the websites.<sup>106</sup> Overall, it became apparent to the Project Group that there existed huge differences in how detailed and extensive the information on international roaming tariffs for the various services was. This outcome suggests that tariff comparison by consumers is difficult, even though almost all of the surveyed 45 mobile network operators (except for three) did provide information on charges for calling home or to the visited country and on charges for receiving calls on the visited network on their websites. The fact that a majority of consumers are nonetheless unaware of the height of RIR charges suggests that they independently choose not to inform themselves about RIR charges or carry out price comparisons. Moreover, since some of the necessary information is comparatively hard to obtain, the opportunity costs to get hold of this information clearly outweigh the (low) consumer preferences for lower IR charges.

It was asserted by the European Commission that making information on international roaming tariffs more accessible, comparable, understandable, and user friendly would make consumers more sensitive to the prices charged, would increase the comparability of retail offers, and would allow customers to make the most appropriate

<sup>103</sup> *Berger-Kögler*, MMR 2007, 294 (299). In fact, the Commission believes that price reductions at wholesale level have not been passed through to consumers at retail level. See *European Commission*, Second Phase Public Consultation on a Proposal for a Regulation (EC) of the European Parliament and of the Council on mobile roaming services in the Single Market, 3 April 2006, 4 and *European Commission*, supra 3, SEC(2006) 925, 24.

<sup>104</sup> The effects of lower RIR tariffs on the wholesale level may be indirect if one assumes that lower RIR tariffs increase demand on the retail level and thus put the mobile network operator in a better position to negotiate volume discounts for WIR services. This assumption however, may also be rebutted owing to the low price elasticity on the retail level.

<sup>105</sup> For more detailed information see *ERG*, supra 87, (05) 43 rev1, 8 et seq. The survey, run by the Mobile Markets Working Group in 2004, referred to in note 97, revealed that the most common approach to transmitting information on IR charges to customers was through the mobile network operators' websites.

<sup>106</sup> Cf. *ERG*, supra 87, (05) 43 rev1, 10.



choice. If retail tariff transparency were increased, consumers might look for the best bargain in RIR rates and thereby would increase competitive pressure on prices. Thus, sufficient transparency would intensify competition among operators and improve the efficiency of the market.<sup>107</sup>

Although it can barely be contested that increased transparency of RIR charges will improve consumer awareness, a high level of transparency alone would hardly alter the underlying notion that consumers place a high preference on low national rates and a relatively slight preference on low RIR charges. Low consumer preferences for RIR tariffs, however, indicate low price elasticity on the retail level. Hence, increased transparency might only lead to a relatively small rise in competitive pressure on RIR prices. In contrast, a price cap on RIR rates would not be subject to these doubts.

To summarize, before the Roaming Regulation came into force, the retail sector for IR services could be characterized by a low consumer awareness of RIR charges, which was caused by two factors: (a) a low retail tariff transparency<sup>108</sup> and (b) a low consumer preference for low RIR tariffs.

## V. Economic distortions existed in the WIR and RIR sector

It follows from the analyses of the WIR and RIR sector that the allocation of IR services by the market processes was not efficient as prices did not tend towards the underlying costs.<sup>109</sup> The conditions on the IR markets did not create economic efficiency, and the economic distortions that could be discerned were appreciable and not only indirect or remote. One may thus conclude that the IR markets have failed.<sup>110</sup>

### C. Is Article 95 EC the proper legal basis for the Roaming Regulation?

The Community legislature makes recourse to Article 95 EC as a legal basis for its Roaming Regulation.<sup>111</sup> This article stipulates a competence for the approximation of Member States' laws. Its object is the establishment and functioning of the internal market as set out in Article 14 EC, and pursuant to Article 95(3) EC, a high level of consumer protection should be guaranteed when introducing new legislation under

<sup>107</sup> *ERG*, supra 87, (05) 43 rev1, 11; cf. *Berger-Kögler*, MMR 2007, 294 (299).

<sup>108</sup> *European Commission*, supra 3, SEC(2006) 925, 17; *ERG*, supra 87, (05) 43 rev1, 11 et seq. and 18 et seq.; *Berger-Kögler*, MMR 2007, 294 (298 et seq.); cf. *TNS Opinion & Social*, supra 87, 3.

<sup>109</sup> Underlying costs include marginal costs and fixed costs. Fixed costs need to be recovered through mark-ups on marginal costs, which entails the problem of how these mark-ups should be designed to efficiently recover fixed costs across all mobile services (keyword: Ramsey prices). For further information on this issue see *Haucap*, *Mobile telephone regulation*, 2 et seq.; *Vickers*, *Oxford Review of Economic Policy* 13 (1997), 15 (16 et seq.).

<sup>110</sup> *Cawley*, *Journal of Network Industries* 5 (2004), 3 (20). This proposition presupposes that one accepts the theme of market failure, which is indeed the view shared by mainstream economists. For a heterodox opinion against market failure see e.g. *MacKenzie*, *Market failure myth*.

<sup>111</sup> See the first sentence of the Preamble to the Roaming Regulation.

the internal market competence. Yet, Article 95 EC itself does not incorporate a competence for consumer protection measures.<sup>112</sup>

The compliance with this relation between the internal market objective and consumer protection is crucial when considering Community measures under Article 95 EC. It is of particular importance for the Roaming Regulation, whose primary purpose is to ensure that end-users do not pay excessive prices for community-wide roaming, which is in short consumer protection.<sup>113</sup> This circumstance alone, however, does not render recourse to Article 95 EC inadmissible, inasmuch as it does not depend on whether the centre of gravity of a Community measure is the promotion of the internal market or consumer protection.<sup>114</sup> What matters is solely that the Community measure fulfils the conditions for the application of Article 95 EC.<sup>115</sup> This implies that the approximation of the Member States' laws must entail an improvement of the internal market which is not only incidental or ancillary.<sup>116</sup> If the conditions of Article 95 EC are met, recourse to Article 95 EC is not precluded even if consumer protection stands out as a decisive factor for the adoption of the harmonising measure.<sup>117</sup>

## I. Adaptation of harmonisation measures under Article 95 EC

Since the 2002 regulatory framework already regulates electronic communications markets and thus IR markets as well, the Roaming Regulation is not the first Community measure which aims at the approximation of laws in the IR sector. It rather intensifies the degree of approximation already achieved by earlier Community legislation. For such a secondary harmonising measure, Article 95(1) EC grants the Community the competence to amend existing Community legislation in order to further

<sup>112</sup> *Howells/Wilhelmsson*, EL Rev. 28 (2003), 370 (376 et seq.); *Maierhöfer*, JZ 2007, 463 (465); *Stein*, EuZW 2007, 54 (55); *Weatherill*, Constitutional issues, in: Vogenauer/Weatherill (eds.), Harmonisation of European contract law, 89 (103).

<sup>113</sup> *Neitzel*, GPR 2006, 188 (189); *Connect2Roam*, Study „Roaming data services“, 24 June 2008, 19, available on the internet: <[http://ec.europa.eu/information\\_society/activities/roaming/docs/study\\_data\\_roaming.pdf](http://ec.europa.eu/information_society/activities/roaming/docs/study_data_roaming.pdf)> (visited on 28 August 2008). See Art. 1(1) RR and Recital 38 RR. Cf. also Recitals 14 and 16 RR; *European Commission*, supra 52, COM(2006) 382 final, 4 et seq.; *European Commission*, SEC(2006) 925, 4, 10, 27, 54 et seq.

<sup>114</sup> Cf. *AG Fennelly*, Opinion, *Tobacco Advertising I*, supra 15, para. 66; *Bock*, Rechtsangleichung, 239; *Ludwigs*, CML Rev. 44 (2007), 1159 (1172); *Möstl*, EuR 2002, 318 (327); *Tietje*, in: Grabitz/Hilf (eds.), EUV/EGV, Art. 95 EC, para. 58, 60; a differing opinion: *Herrnfeld*, in Schwarze (ed.), EU-Kommentar, Art. 95 EC, para. 12, 15; *Stein*, EWS 2001, 12 (15).

<sup>115</sup> *Tobacco Advertising II*, supra 15, para 96; *AG Fennelly*, Opinion, *Tobacco Advertising I*, supra 15, para. 66; *Bock*, Rechtsangleichung, 239; *Ludwigs*, CML Rev. 44 (2007), 1159 (1172 et seq.); *Selmayr/Kamann/Ahlers*, EWS 2003, 49 (51); *Tietje*, in: Grabitz/Hilf (eds.), EUV/EGV, Art. 95 EC, para. 58, 60; cf. *Nolte*, NJW 2000, 1144 (1147).

<sup>116</sup> *Netherlands v. Parliament and Council*, supra 15, para. 28; ECJ, Case C-209/97, *Commission v. Council*, [1999] ECR I-8067, para. 35; *Dougan*, CML Rev. 37 (2000), 853 (882); *Ludwigs*, Rechtsangleichung, 325; *Tietje*, in: Grabitz/Hilf (eds.), EUV/EGV, Art. 95 EC, para. 62; cf. *Barnard*, Substantive law of the EU, 583.

<sup>117</sup> See *Tobacco Advertising I*, supra 15, para. 88; *British American Tobacco*, supra 15, para. 62, 75; *Arnold André*, supra 15, para. 32; *Swedish Match*, supra 15, para. 31; *Tobacco Advertising II*, supra 15, para. 39; *Alliance for Natural Health*, supra 15, para. 30 (all judgments with regard to public health protection).

enhance the establishment and functioning of the internal market.<sup>118</sup> This adaptation competence applies regardless of whether the original Community measure entailed minimum or maximum harmonisation of a specific economic sector. As Article 95(1) EC remains to constitute the legal basis, the adaptation measure must subjectively and in fact comply with the internal market objective by eliminating obstacles to trade or distortions of competition.<sup>119</sup>

Depending on the degree of harmonisation already achieved, different conditions must be fulfilled. If the first Community approximation measure did not entail a maximum harmonisation, it remains possible that divergent national laws in a specific economic sector exist or are likely to emerge in the future. Hence, the adaptation measure must fulfil the “general” conditions of Article 95 EC.<sup>120</sup> On the other hand, if the former Community measure led to a maximum harmonisation, the possibility of differences between national laws is *a priori* excluded. In order to allow recourse to Article 95(1) EC as a legal basis in such a case, the secondary measure must fulfil two conditions. First, a hypothetical test must show that the adaptation measure would have met the conditions of Article 95 EC, if it had been adopted as the first harmonising measure in the specific area.<sup>121</sup> Second, the adaptation measure can only be adopted if (a) the condition of “new development based on scientific facts” in the sense of Article 95(3) EC is met or if (b) there exist other regulatory policy aspects, which the Community legislature may consider when exercising its discretion.<sup>122</sup>

It was already demonstrated that the 2002 regulatory framework did not entail a maximum harmonisation for the WIR and RIR sector and thus left Member States residual competencies to regulate in these economic fields. Therefore, the Roaming Regulation must meet the “general” conditions of Article 95 EC.

But even assuming a maximum harmonisation, a hypothetical test of the conditions of Article 95 EC at the time when the 2002 regulatory framework went into effect would not produce results which differ relevantly from the results of such a test at the time when the Roaming Regulation was enacted. In 2002, no sector-specific national rules existed for IR services, and the Community legislature was already aware of the issue of high IR tariffs at that time<sup>123</sup>. Furthermore, the 2002 regulatory

<sup>118</sup> *British American Tobacco*, supra 15, para. 77 et seq.; *AG Geelhoed*, Opinion, *British American Tobacco*, supra 15, para. 124; *Bock*, Rechtsangleichung, 161; *Herrnfeld*, in Schwarze (ed.), EU-Kommentar, Art. 95 EC, para. 23; *Kahl*, in: Calliess/Ruffert (eds.), EUV/EGV<sup>3</sup>, Art. 95 EC, para. 12; *Schroeder*, EuZW 2001, 489 (491 et seq.); *Tietje*, in: Grabitz/Hilf (eds.), EUV/EGV, Art. 95 EC, para. 44.

<sup>119</sup> *Bock*, Rechtsangleichung, 161; *Kahl*, in: Calliess/Ruffert (eds.), EUV/EGV<sup>3</sup>, Art. 95 EC, para. 12; *Kamann*, ZEuS 2001, 23 (39 et seq.); *Tietje*, in: Grabitz/Hilf (eds.), EUV/EGV, Art. 95 EC, para. 45.

<sup>120</sup> *Tietje*, in: Grabitz/Hilf (eds.), EUV/EGV, Art. 95 EC, para. 45; cf. *Bock*, Rechtsangleichung, 161 et seq.; *Kahl*, in: Calliess/Ruffert (eds.), EUV/EGV<sup>3</sup>, Art. 95 EC, para. 12.

<sup>121</sup> *Bock*, Rechtsangleichung, 164; *Kamann*, ZEuS 2001, 23 (39 et seq.); *Koenig/Kühling*, EWS 2002, 12 (17); *Tietje*, in: Grabitz/Hilf (eds.), EUV/EGV, Art. 95 EC, para. 45.

<sup>122</sup> *British American Tobacco*, supra 15, para. 79 et seq.; *Bock*, Rechtsangleichung, 162 et seq.; *Ludwigs*, Rechtsangleichung, 234 et seq.; *Tietje*, in: Grabitz/Hilf (eds.), EUV/EGV, Art. 95 EC, para. 45; cf. *Koenig/Kühling*, EWS 2002, 12 (18); narrower: *Schroeder*, EuZW 2001, 489 (491 et seq.).

<sup>123</sup> *European Commission*, Working Document on the initial findings of the sector inquiry into mobile roaming charges, 13 December 2000, available on the internet: <[http://ec.europa.eu/comm/competition/antitrust/others/sector\\_inquiries/roaming/working\\_document\\_on\\_initial\\_results.pdf](http://ec.europa.eu/comm/competition/antitrust/others/sector_inquiries/roaming/working_document_on_initial_results.pdf)> (visited on 28 August 2008).

framework has proved inapt to enhance competition in the IR sectors and to address the high level of RIR charges (see Recitals 4 to 9 RR). This inaptness of the first harmonising measure to effectively regulate the IR sectors has subsequently led to a change of the European legislator's regulatory policy considerations and to a departure from the *ex ante* regime set out in the 2002 regulatory framework to a sector-specific regulation. This (new) policy complies with the discretion granted to the Community legislature.

## II. Provisions laid down by law in Member States<sup>124</sup>

In order to allow the Roaming Regulation to be based on Article 95 EC, certain conditions have to be met. First and foremost, Article 95 EC requires that the Community measure in question serves the approximation of the provisions laid down by law, regulation or administrative action in Member States. The wording ("*laid down*") expressly necessitates existing provisions in Member States. If no provisions exist, there is nothing to approximate. Moreover, a Community-wide regulatory gap cannot have as its object "the establishment and functioning of the internal market" within the meaning of Article 95 EC.

It is nonetheless settled European case law<sup>125</sup> and a widely held view among legal scholars<sup>126</sup> that recourse to Article 95 EC as a legal basis is admissible even though no legislation for a specific area in any Member State is in place at all,<sup>127</sup> if the aim of the Community measure is "to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws. However, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them."<sup>128</sup> Given that a Community-wide regulatory gap is indeed apt to impede the internal market objective just as well as differences in Member States' laws, it would

<sup>124</sup> Article 95 EC requires "provisions laid down by law, regulation or administrative action in Member States". For reasons of simplicity, this requirement will be referred to as "provisions laid down by law in Member States".

<sup>125</sup> See in particular *British American Tobacco*, supra 15, para. 61, 69 and 75; cf. ECJ, Case C-350/92, *Spain v. Council*, [1995] ECR I-1985, para. 35; *Netherlands v. Parliament and Council*, supra 15, para. 15; *Tobacco Advertising I*, supra 15, para. 86; *Netherlands v. Parliament and Council*, supra 15, para. 15; *Arnold André*, supra 15, para. 31; *Swedish Match*, supra 15, para. 30; *Tobacco Advertising II*, supra 15, para. 38; *Alliance for Natural Health*, supra 15, para. 29.

<sup>126</sup> *Bock*, Rechtsangleichung, 137 et seq.; *Herrnfeld*, in Schwarze (ed.), EU-Kommentar, Art. 95 EC, para. 22; *Kahl*, in: Calliess/Ruffert (eds.), EUV/EGV<sup>3</sup>, Art. 95 EC, para. 11; *Leible*, in: Streinz (ed.), EUV/EGV, Art. 95 EC, para. 17; *Ludwigs*, Rechtsangleichung, 94 et seq.; *Oppermann*, Europarecht<sup>3</sup>, § 18 para. 13; *Pipkorn/Barderhewer-Rating/Taschner*, in: von der Groeben/Schwarze (eds.), EUV/EGV<sup>6</sup>, Art. 95 EC, para. 44; *Tietje*, in: Grabitz/Hilf (eds.), EUV/EGV, Art. 95 EC, para. 32. For a rather critical assessment of a preventive approximation see *Seidel*, EuR 2006, 26 et seq.

<sup>127</sup> This was the case in *British American Tobacco*, supra 15. At the time of the introduction of Directive 2001/37/EC on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products (OJ 2001, L 194/26 of 18 July 2001), no one Member State had provisions establishing maximum carbon monoxide yields for cigarettes. Yet, Art. 3 Directive 2001/37/EC stipulates such yields for cigarettes. The ECJ held in *British American Tobacco*, supra 15, para. 61, 69, 75 and 97 that Article 95 EC constituted the appropriate legal basis for this Directive, which includes its Art. 3.

<sup>128</sup> *Tobacco Advertising I*, supra 15, para. 86. See also the references in notes 125 and 126.

be rather formalistic to insist on waiting until one Member state does pass some law in the economic sector in question.<sup>129</sup> In such a case, a preventive approximation measure would avert distortions of the internal market caused by likely future Member States' laws from the outset. Thus, even a preventive approximation is admissible under Article 95 EC, despite its contrary wording.

Before the Roaming Regulation was introduced, no one Member State had implemented any provisions governing the wholesale or retail international roaming sector.<sup>130</sup> For European mobile network operators in particular there existed no legal restrictions regulating wholesale and retail international roaming charges. A Community-wide regulatory gap was therefore present and the case of preventive approximation under Article 95 EC seemed possible. Yet, bearing in mind the heading of Title VI of the EC Treaty and its Chapter Three "Approximation of Laws", the requirement of "provisions laid down by law, regulation or administrative action in Member States" cannot be abandoned altogether.<sup>131</sup> First, such a view would render this requirement completely meaningless. Second, the legislative history of Article 95 EC shows that the European Commission had initially proposed a legal basis for the adoption of all legal acts that serve to realise the internal market.<sup>132</sup> However, this proposal was not adopted into the Treaty, and the European legislature's competences were limited to the approximation of Member States' laws instead. Thus, it does not vest in the Community legislature a general power to regulate the internal market.<sup>133</sup>

### 1. *Future national legislation must be likely*

In order to both abide by the wording of Article 95 EC and at the same time recognize in principle the necessity of preventive approximation, the latter is only admissible under Article 95 EC when national rules are likely to emerge in the future.<sup>134</sup> As this involves the prediction of uncertain future developments, the Community legislature must be granted a margin of discretion. The mere abstract risk or a mere assertion, however, that national laws might possibly be established in the future would

<sup>129</sup> *Bock*, Rechtsangleichung, 137; *Kahl*, in: Calliess/Ruffert (eds.), EUV/EGV<sup>3</sup>, Art. 94 EC, para. 9 i.c.w. Art. 95 EC, para. 10; *Ludwigs*, Rechtsangleichung, 94 et seq.

<sup>130</sup> *Bolkestein/Gerken*, „Protektionismus und Regulierungswut“, Handelsblatt Nr. 58, 22 March 2007, 6; *CEP*, Roaming, 1.

<sup>131</sup> This view, however, seems to be held by *Drasch*, ZEuP 1998, 123 (136 et seq.).

<sup>132</sup> A reprint of the Commission's proposal can be found in *Ehlermann*, CMLR 24 (1987), 361 (405).

<sup>133</sup> Although the ECJ itself remarks that it does not "vest in the Community legislature a general power to regulate the internal market" in *Tobacco Advertising I*, supra 15, para. 83 (see also *British American Tobacco*, supra 15, para. 179), the context of this phrase is different from the one referred to here. The ECJ does not refer with this phrase to the requirement of existing provisions laid down by law in Member States but to the condition that Art. 95 EC only grants a certain competence for the purpose of improving the establishment and functioning of the internal market. Approximation measures which do not improve but rather impede the internal market or which do not affect the internal market objective at all must not be based on Art. 95 EC.

<sup>134</sup> *Bock*, Rechtsangleichung, 138; *Kahl*, in: Calliess/Ruffert (eds.), EUV/EGV<sup>3</sup>, Art. 94 EC, para. 9 i.c.w. Art. 95 EC para. 10; *Ludwigs*, Rechtsangleichung, 95; *Tietje*, in: Grabitz/Hilf (eds.), EUV/EGV, Art. 95 EC, para. 32. The ECJ has not yet made an explicit reference to the likelihood of emerging disparate national laws but stated that in a case of preventive approximation, the emergence of obstacles to trade resulting from multifarious development of national laws "must be likely". See the ECJ's judgments referred to in note 125.

exceed this margin.<sup>135</sup> This is particularly true if one takes into account that according to the ECJ, the “mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom” is in itself not sufficient to justify the choice of Article 95 EC as a legal basis, as it would render judicial review nugatory.<sup>136</sup>

What exactly can be considered as “likely” is in general a matter of debate and in detail a matter of the individual case. In broad terms, the criterion of likelihood is met when at least one Member State shows a specific behaviour that suggests with a certain probability that national laws concerning the relevant economic sector will be enacted in the near future. Such a specific behaviour is apparent, for example, if national plans to regulate an economic sector are already in the formal legislative stage or if a draft law is already in existence.<sup>137</sup> It is much less apparent when Member States merely announce that they will enact national legislation in the future. Although it is doubted whether the latter action already amounts to the standard of likelihood,<sup>138</sup> the Community legislator’s discretion is not overstepped when it is obvious that Member States will not remain idle because new developments in the economic sector in question call for urgent regulation.<sup>139</sup>

But even if sector-specific regulation at a national level seems pressing in order to respond to new developments, it needs to be emphasized that an existing and specific action of at least one Member State, i.e. an indication of its willingness to regulate the economic field in the future, must be present. If this prerequisite were abandoned, the very last connection to the wording of Article 95 EC would be severed. The effects of a Community-wide regulatory gap would then be the only reason for legal action. But such a supplementary development of the law is not justified. First, such a development would be at odds with the deliberate decision not to include a general internal market competence into the Treaty, but instead to base the application of Article 95 EC on the existence of divergent national laws. Second, Title VI, Chapter Three of the Treaty specifies provisions for the “approximation of laws”. Moreover, the assumption of an urgent need for regulation alone, even if seemingly supportable, cannot be properly distinguished from the mere abstract risk of national laws emerging in the future. It does therefore not meet the criterion of likelihood.

## 2. *An “increasing public awareness” and the criterion of likelihood*

The ECJ, however, does not adhere to this standard as it does not appear to deem necessary explicit indications of (planned) national measures in the economic sector in

<sup>135</sup> *Bock*, Rechtsangleichung, 138; *Seidel*, EuR 2006, 26 (28).

<sup>136</sup> *Tobacco Advertising I*, supra 15, para. 84; cf. *British American Tobacco*, supra 15, para. 60; *Arnold André*, supra 15, para. 30; *Swedish Match*, supra 15, para. 29; *Tobacco Advertising II*, supra 15, para. 37; *Alliance for Natural Health*, supra 15, para. 28.

<sup>137</sup> *Bock*, Rechtsangleichung, 138; *Tietje*, in: Grabitz/Hilf (eds.), EUV/EGV, Art. 95 EC, para. 32; *von Danwitz*, in: Dausen, EU-Wirtschaftsrecht, B. II, para. 97.

<sup>138</sup> *Koenig/Kühling*, EWS 2000, 12 (17); *von Danwitz*, in: Dausen, EU-Wirtschaftsrecht, B. II, para. 97; a differing opinion: *Tietje*, in: Grabitz/Hilf (eds.), EUV/EGV, Art. 95 EC, para. 32.

<sup>139</sup> *Bock*, Rechtsangleichung, 138 et seq.; *Boeck*, Rechtssetzungskompetenzen, 61; cf. *Eiden*, in: Bleckmann (ed.), Europarecht, para. 2106; *Ludwigs*, Rechtsangleichung, 95.

question. In its *British American Tobacco* judgment it declared that “having regard to the fact that the public is increasingly conscious of the dangers to health posed by consuming tobacco products, it is likely that obstacles to the free movement of those products would arise by reason of the adoption by the Member States of new rules reflecting that development”.<sup>140</sup> In its *Tobacco Advertising II* judgment it held likewise that “given the increasing public awareness of the harm caused to health by the consumption of tobacco products, it was likely that new barriers to trade or to the freedom to provide services were going to emerge as a result of the adoption of new rules reflecting that development.”<sup>141</sup>

Although the ECJ’s considerations in both judgments focused on the likelihood of trade barriers emerging, the question remains whether an increasing public awareness of certain developments in a specific economic sector alone does render likely regulatory actions by Member States. In fact, such a view would be quite some cause of concern: Would we still live in an open market economy with free competition (see Article 4(1) EC) if as little as an increase in public awareness led to state regulation? To allege such an automatism would indeed be jumping to conclusions, while the deduction that national legislation follows from an increasing public awareness does not convince. Two examples may illustrate this position. First, considering the current increase in agricultural product prices and the scarcity of agricultural products like milk in some Member States, and having in mind the recent Germany-centred strike of milk farmers, the public is certainly sensitive to high milk prices. It is nevertheless unlikely that Member States would introduce a price regulation for milk. Second, contemplating the everlasting public debate about the height of income tax, it would be unreasonable to assume that Member States will set a maximum price cap to income taxes which pleases the general public, i.e. reduce the level of income taxes solely because a public debate calls for it.<sup>142</sup> Furthermore, an increasing public awareness alone does not signify the specific behaviour of a Member State which was shown to be an essential precondition for the criterion of likelihood. Consequently, although an increasing public awareness of developments in a specific field might strengthen the likelihood of specific national measures responding to this growing awareness, this argument alone is insufficient to allow recourse to the internal market competence.

### 3. *Likelihood of national legislation concerning IR tariffs*

Despite the high degree of harmonisation of the 2002 regulatory framework, Member States had retained limited, residual competences to address the high level of IR charges.<sup>143</sup> Was it then plausible to assume that Member States would have regulated international roaming at a national level? According to the European legislature, the answer is a clear Yes. Recital 9 RR states that “there is pressure for Member States to take measures to address the level of international roaming charges”. Nonetheless,

<sup>140</sup> *British American Tobacco*, supra 15, para. 67.

<sup>141</sup> *Tobacco Advertising II*, supra 15, para. 61.

<sup>142</sup> Fortunately, Art. 95(2) EC prevents against such an argument as it rules out harmonisation regarding direct taxes.

<sup>143</sup> See supra B.II.4.a).

the Community legislature itself admits that any such measures would have been ineffective, since wholesale providers are situated in Member States other than that of the consumers using those services, which means that no one national regulatory authority or Member State has powers in relation to both wholesale and retail price components.<sup>144</sup> But if national measures aimed at reducing IR tariffs had been ineffective in any case, why then would a Member State have wished to enact such ineffective measures in first place? Was it not a rather erroneous assumption that Member States would have established ineffective laws?

*a) National legislation concerning WIR tariffs*

Three arguments indicate that it was indeed unlikely for Member States to have enacted national laws affecting WIR tariffs.

First, a direct regulation of prices for WIR services (e.g. a price cap) would have been inconsistent with the 2002 regulatory framework.<sup>145</sup> At wholesale level, other (consumer protection) measures addressing the high level of IR charges which do not directly intervene in competition are moreover hard to imagine.

Second, after an analysis of their national WIR markets, the national regulatory authorities of twelve Member States concluded that a sector-specific regulation of these markets was not warranted.<sup>146</sup> Even the European Commission declared that “regulatory authorities at national level have indicated that the problem cannot be addressed using existing regulatory tools, considering its cross-border dimension, and have called on the Commission to propose a single market solution.”<sup>147</sup>

Third, while a Member State can regulate those mobile network operators who are active in its own country, its hands are tied as far as tariffs charged by mobile network operators in other countries are concerned. Its national regulation has no influence on the tariffs that domestic mobile network operators are charged by foreign mobile network operators.<sup>148</sup> Hence, a national regulation addressing the high level of WIR tariffs would limit the profits for domestic mobile network operators in favour of lower charges for international roaming customers and foreign mobile network operators. It would ultimately benefit other Member States’ consumers to the detriment of domestic mobile network operators’ profits,<sup>149</sup> and would leave the Member States’ own consumers unaffected. Thus, it was reasonable to assume that Member States would have refrained from regulating WIR tariffs at a national level.

<sup>144</sup> Recital 8 RR; *European Commission*, supra 52, COM(2006) 382 final, 4; *European Commission*, supra 3, SEC(2006) 925, 10, 25; *European Commission*, supra 103, Second Phase Public Consultation, 3.

<sup>145</sup> See supra B.II.4.b).

<sup>146</sup> See supra B.III.3.

<sup>147</sup> *European Commission*, supra 3, SEC(2006) 925, 10, 25.

<sup>148</sup> *Cawley*, *Journal of Network Industries* 5 (2004), 3 (20); cf. Recital 8 RR.

<sup>149</sup> *Berger-Kögler*, *MMR* 2007, 294 (295); *Bolkestein/Gerken*, „Protektionismus und Regulierungswut“, *Handelsblatt* Nr. 58, 22 March 2007, 6; *Lupil/Manenti*, *Traffic Management*, 17; cf. *Lescop*, *Communications & Strategies* 66 (2007), 159 (161).



b) *National legislation concerning RIR tariffs*

As far as RIR tariffs are concerned, a direct *ex ante* regulation of competition at the RIR level (e.g. a price cap) would have infringed the conditions of the 2002 regulatory framework. Other indirect national (consumer protection) measures addressing the height of RIR rates that domestic mobile network operators are allowed to charge to its subscribers would have benefited a Member State's domestic consumers. For the RIR sector, therefore, national regulation would not have been ineffective at first sight.

Yet, retail prices for IR services consist of two main components: (a) the WIR tariff that a domestic mobile network operator has to pay to a foreign mobile network operator when its mobile phone subscribers use their mobile phone abroad and (b) the retail mark-up. Given that a Member State can only regulate the second component and has no jurisdiction to regulate the first one, a legislative measure targeted on a reduction of RIR tariffs without a concurrent fall of WIR costs decreases – *ceteris paribus* – the competitive edge of a Member State's domestic mobile network operators. On the other hand, it favours foreign domestic mobile network operators, which are not subject to such a regulation. Furthermore, it entails the danger that the RIR rate will reach a level close to or even lower than that of (unregulated) WIR tariffs charged by foreign mobile network operators. This may eventually render it inefficient for a domestic mobile network operator to offer RIR services for certain foreign countries to its customers. Additionally, the ERG, consisting of the national regulatory authorities of all Member States, rejects a prescriptive retail price cap and advises national regulatory authorities not to dictate consumer preferences.<sup>150</sup> Since a Member State on its own cannot effectively control RIR charges without causing market disruptions at other levels, the assumption that a Member State would have done so in the future was unlikely.

For retail as well as wholesale IR tariffs this picture does not change even if one applies the questionable criterion of an “increasing public awareness”, which in itself is insufficient to activate the case of a preventive approximation under Article 95 EC. Although the public was sensitive to high IR charges, other circumstances in the RIR and WIR sector rendered it likely that Member States would have remained idle in the future. In fact, no one Member State ever indicated or announced a plan for regulating IR tariffs.

As a result, the conditions that must be fulfilled for a preventive approximation are not met.<sup>151</sup> The Community legislature's assertion in Recital 9 RR and the mere

<sup>150</sup> ERG, ERG response to the European Commission's call for input on its proposed EC Regulation in the international roaming market, 22 March 2006, para. 3.10-3.11, available on the internet: <[http://ec.europa.eu/information\\_society/activities/roaming/regulation/archives/index\\_en.htm](http://ec.europa.eu/information_society/activities/roaming/regulation/archives/index_en.htm)> (visited on 28 August 2008): “ERG also notes that retail services are sold as a bundle and that, therefore, such benefits may accrue to other elements of the retail bundle and not necessarily wholly or mainly to retail roaming services. As a general rule, NRAs should not seek to dictate consumer preferences as to the form in which those benefits are enjoyed.”

<sup>151</sup> Even if Member States retained no residual competence to enact sector-specific legislation affecting IR tariffs (cf. *supra* C.I), the result would not effectively differ. When the 2002 regulatory framework came into force, no national laws governing IR services existed, and it was also implausible to assume that Member States were going to regulate IR tariffs thereafter, owing to the cross-border dimension of international roaming.

abstract risk that national laws addressing the high level of IR tariffs might have emerged in the future do not suffice. Consequently, Articles 3 and 4 RR cannot be based on Article 95 EC and lack an appropriate legal basis.

#### 4. *Likelihood of national legislation concerning RIR tariff transparency*

With regard to national measures aimed at enhancing RIR tariff transparency, the situation appears to be different at first glance. The RIR sector was characterized by a low consumer awareness of RIR charges and a low tariff transparency. National measures that would have enjoined certain transparency obligations on domestic mobile network operators would have contributed to the reduction of these two deficiencies. Since the extra costs imposed on domestic mobile network operators for transparency measures appear rather negligible compared to the improvement of domestic consumer protection, one might consider it likely that at least one Member State would have established a regulation of RIR tariff transparency in the near future. Having said that, no one Member State showed specific behaviour suggesting its willingness to do so.<sup>152</sup> Absent such a connecting factor for the criterion of likelihood of emerging national laws, Article 6 RR does not meet the conditions for a preventive approximation under Article 95 EC and lacks an appropriate legal basis, too.

### III. The establishment and functioning of the internal market

According to the wording of Article 95 EC, the provisions of the Member States must have “as their object the establishment and functioning of the internal market.” This wording, however, is misleading. It is not the law of the Member States but the Community’s approximation measure which must have as its aim the internal market objective.<sup>153</sup> This internal market objective comprises the elimination of obstacles to the free movement of goods and the freedom to provide services as well as the removal of distortions of competition.<sup>154</sup>

Following the ECJ’s recent case law on Article 95 EC,<sup>155</sup> the analysis of the internal market objective as embodied in Article 95 EC can be divided into four steps. First, it must be ascertained whether disparities between Member States’ national laws exist with regard to the economic sector intended for harmonisation. Second, these disparities must impede the establishment and functioning of the internal market.<sup>156</sup>

<sup>152</sup> Consequently, the European legislature was unable to provide examples of such specific behaviour in the recitals to the Roaming Regulation and other pre-legislative documents.

<sup>153</sup> *Kahl*, in: Calliess/Ruffert (eds.), EUV/EGV<sup>3</sup>, Art. 95 EC, para. 11; *Pipkorn/Barderhewer-Rating/Taschner*, in: von der Groeben/Schwarze (eds.), EUV/EGV<sup>6</sup>, Art. 95 EC, para. 21; cf. *Herrnfeld*, in Schwarze (ed.), EU-Kommentar, Art. 95 EC, para. 4.

<sup>154</sup> *Tobacco Advertising I*, supra 15, para. 95; *British American Tobacco*, supra 15, para. 60, 179; *Tobacco Advertising II*, supra 15, para. 69; cf. ECJ, Case C-300/89, *Commission v. Council (Titanium Dioxide)*, [1991] ECR I-2867, para. 14 et seq.

<sup>155</sup> See note 15 and in particular *Tobacco Advertising II*, supra 15, para. 51 (first step), para. 52 (second step), para. 80 (third step), and para. 69 (fourth step).

<sup>156</sup> *Tobacco Advertising II*, supra 15, para. 37, 51 et seq; cf. *Arnold André*, supra 15, para. 30; *Swedish Match*, supra 15, para. 29; *Alliance for Natural Health*, supra 15, para. 28.

Third, the contested Community measure must (subjectively) be intended to improve the conditions for the establishment and functioning of the internal market.<sup>157</sup> Fourth, the Community measure must in fact (objectively) have the very same object,<sup>158</sup> genuinely contributing (a) to the elimination of obstacles to the free movement of goods or to the freedom to provide services, or (b) to the removal of distortions of competition.<sup>159</sup>

The last two steps in particular show that Article 95 EC only gives a competence for the purpose of improving the internal market. It does therefore not vest “in the Community legislature a general power to regulate the internal market” under Article 95 EC,<sup>160</sup> i.e. it is insufficient if the Community measure is neutral to or impairs the internal market objective.<sup>161</sup> The ECJ derives this limited scope of Article 95 EC by a comprehensive analysis of Articles 3(1)(c), 14, and 5 EC.<sup>162</sup>

### 1. *Disparities between national rules that impede the internal market (first & second step)*

In the case of a preventive approximation, the ECJ has laid down that “recourse to Article 95 EC as a legal basis is possible if the aim is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws. However, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them.”<sup>163</sup>

When the Roaming Regulation was introduced, national legislation concerning the WIR and RIR sector was neither in existence nor likely to emerge in the future. This result automatically rules out the probability of (future) disparities between national rules and the probability of a (future) multifarious development of national laws. As a consequence, the necessary causal chain<sup>164</sup> between (likely) disparities between national laws and the impediment to the internal market objective cannot be established. Therefore, any further analysis of the second step is obsolete. Article 95 EC is not a valid legal basis for Articles 3, 4, and 6 RR.

<sup>157</sup> *Tobacco Advertising I*, supra 15, para. 83; *British American Tobacco*, supra 15, para. 60; *Tobacco Advertising II*, supra 15, para. 80.

<sup>158</sup> *Tobacco Advertising I*, supra 15, para. 84 et seq.; *British American Tobacco*, supra 15, para. 60; ECJ, Case C-436/03, *Parliament v. Council*, supra 15, para. 38; *Tobacco Advertising II*, supra 15, para. 69.

<sup>159</sup> See note 154.

<sup>160</sup> *Tobacco Advertising I*, supra 15, para. 83; see as well *British American Tobacco*, supra 15, para. 179.

<sup>161</sup> *Crosby*, E.L. Rev. 27 (2002), 177 (186); *Di Fabio*, AfP 1998, 564 (567); *Hilff/Frahm*, RiW 2001, 128 (131); *Jarass*, AöR 121 (1996), 173 (178); *Kahl*, in: Calliess/Ruffert (eds.), EUV/EGV<sup>3</sup>, Art. 95 EC, para. 18; *Ludwigs*, Rechtsangleichung, 186; a differing opinion: *Caspar*, EuZW 2000, 237 (239 et seq.). The effect of the Community measure on the internal market has to be judged comprehensively, taking into account all relevant circumstances; see *Kahl*, in: Calliess/Ruffert (eds.), EUV/EGV<sup>3</sup>, Art. 95 EC, para. 16; cf. *Tobacco Advertising I*, supra 15, para. 100.

<sup>162</sup> *Tobacco Advertising I*, supra 15, para. 82 et seq.

<sup>163</sup> See note 128.

<sup>164</sup> The impediment to the internal market objective must stem from disparities between national rules. See *Bock*, Rechtsangleichung, 128; cf. *Netherlands v. Parliament and Council*, supra 15, para. 20; *British American Tobacco*, supra 15, para. 67; *Tobacco Advertising II*, supra 15, para. 61.

But let us now – for the moment – assume the unlikely, i.e. that national provisions governing IR services were likely to emerge in the future. Would it then have been probable to further assume that these national laws would have been disparate and that their disparity would have impaired the internal market objective? Again, according to the European Commission, national IR legislation “would create divergent results across the European Union.”<sup>165</sup> Yet, given the lack of formal legislative procedures in Member States and of concrete announcements to regulate IR services at a national level, the prediction of future disparities between national laws hardly amounts to more than a guess. However, upon reconsideration, the assumption that out of 27 Member States with 27 autonomous legal systems disparities between national IR laws might emerge in future is not as unlikely as it seems and could thus have been vindicated, too.

*a) A broad legislative discretion in case of preventive approximation*

A mere finding of disparities between national rules, however, is insufficient to justify having recourse to Article 95 EC.<sup>166</sup> These existing or future disparities must further be likely to impede the establishment and functioning of the internal market (second step), i.e. create distortions of competition or obstacles to the free movement of goods or to the freedom to provide services. Examining the second step often involves complex economical assessments, particularly if the Community legislature refers to distortions of competition in a specific economic sector. The Community legislature thus enjoys a legislative discretion when asserting the existence of obstacles to the internal market objective.<sup>167</sup> This discretion must be even wider in case the Community legislature can only predict the effect of future disparities between national laws on the internal market.<sup>168</sup>

In its case law, the ECJ sets an extremely low threshold for the assessment of whether obstacles to the internal market objective are likely to arise in the future, and thereby grants the Community a wide legislative discretion. For example, it held that “in view of the trend in national legislation towards ever greater restrictions on advertising of tobacco products [...] it is probable that obstacles to the free movement of press products will arise in the future.”<sup>169</sup> In two following decisions it ruled that owing to an increasing public consciousness or awareness of the danger to health posed by consuming tobacco products, it is “likely that new barriers to trade or to the freedom to provide services were going to emerge as a result of the adoption of new rules reflecting that development.”<sup>170</sup> In these judgments the ECJ did not elaborate any fur-

<sup>165</sup> *European Commission*, supra 52, COM(2006) 382 final, 4; *European Commission*, supra 3, SEC(2006) 925, 25.

<sup>166</sup> *Arnold André*, supra 15, para. 30; *Swedish Match*, supra 15, para. 29; *Alliance for Natural Health*, supra 15, para. 28; *Tobacco Advertising II*, supra 15, para. 37.

<sup>167</sup> *Bock*, Rechtsangleichung, 114.

<sup>168</sup> *Bock*, Rechtsangleichung, 139 et seq.

<sup>169</sup> *Tobacco Advertising I*, supra 15, para. 97.

<sup>170</sup> *Tobacco Advertising II*, supra 15, para. 61; see also *British American Tobacco*, supra 15, para. 67.

ther on its contentions, which in itself gives room for criticism.<sup>171</sup> On the other hand, these judgments exemplified the ECJ's reluctance to engage in a real review of the likelihood of future obstacles to the internal market. The Court rather adopted the assertions brought forward by the Community legislature. Yet, the reasoning that it follows from an increasing public awareness of a certain development in an economic sector to assertions that (a) Member States will enact disparate national rules reflecting that development and (b) these disparities will likely (and not only possibly) cause obstacles to the internal market, must be regarded as unsubstantiated, possessing low argumentative merit.<sup>172</sup> Instead of simply speaking of a wide legislative discretion, the ECJ seemed to hide itself behind a façade of dubious arguments.

*b) The Roaming Regulation does not meet the conditions of the second step*

Apart from this criticism of the ECJ's reasoning, the broad margin of discretion as identified in the ECJ's remarks might lead to the opinion that a mere assertion of a risk of emerging future obstacles to the internal market already meets the conditions of the second step. But if that were the case, judicial review of the likelihood of future obstacles to the internal market objective would be nugatory – judged by the ECJ's own standard<sup>173</sup>. This virtual impossibility of judicial verification is particularly noticeable in the case of the Roaming Regulation. Here, national laws governing IR services did not exist, disparities between such laws did therefore not exist either, and obstacles to the internal market resulting from such laws could consequently not exist in the least. This very situation demands that the Community legislature predicts three different probabilities, for each of which judicial review must be possible. However, the sole provided circumstance that can be subjected to judicial verification is the Commission's assertion that "there is pressure for Member States to take measures to address the level of IR charges" (see Recital 9 RR) and that any such measures would give rise to divergent results across the Community. Cobbled together with an increasing public awareness for high RIR tariffs, the emergence of obstacles to the internal market is then proclaimed as likely.

But judicial review would turn out a farce if the Community legislature's mere assertions already qualified as meeting the conditions of the second step. For apart from these assertions, no other evidence supports the presumptions that future disparities between national laws governing IR services were (a) probable to arise and (b) likely to create future obstacles to the establishment and functioning of the internal market. This holds true even if one takes into account that the prognosis of future obstacles to the internal market involves complex economic assessments, and even if one is therefore willing to grant the Community a relatively wide legislative discretion. Thus, even assuming the unlikely, i.e. that national provisions governing IR services were

<sup>171</sup> Admittedly, the ECJ gave further arguments for the likelihood that obstacles to trade may arise due to new rules in the economic sectors in question in both judgments and did not solely base its finding on an increasing public awareness.

<sup>172</sup> Given the wording of Article 95 EC, the low standard set out by the ECJ in both judgments is alarming. Very critically *Stein*, EuZW 2007, 54 (55 et seq.). *Ludwigs*, CML Rev. 44 (2007), 1159 (1168 et seq.) rightly calls the ECJ's approach "questionable" and insufficient.

<sup>173</sup> See *Tobacco Advertising I*, supra 15, para. 84.

likely to emerge in the future, the Roaming Regulation cannot be based on the internal market competence.

2. *The subjective purpose of the Community measure to improve the internal market (third step)*

In the third step, by examining the recitals in the preamble to the Community measure and the wording of its provisions, the ECJ determines whether the Community measure is intended to improve the internal market.<sup>174</sup> Recital 1 RR postulates that IR markets are not fully competitive. Recital 4 RR states that the 2002 regulatory framework fails to ensure the smooth functioning of the internal market for roaming services and that the Roaming Regulation is an appropriate means of correcting this situation by regulating the price of roaming services. Recital 11 refers to the Roaming Regulation implicitly as a “means of achieving a high level of consumer protection whilst improving the conditions for the functioning of the internal market”. Recitals 16 and 38 lay down the objectives of the Roaming Regulation, namely “to establish a common approach to ensure that users of public mobile telephone networks when travelling within the Community do not pay excessive prices for Community-wide roaming services when making or receiving voice calls, thereby achieving a high level of consumer protection while safeguarding competition between mobile operators”. These objectives are reiterated in Article 1(1) RR, which further adds that the Regulation contributes to the smooth functioning of the internal market.

To sum up, Recital 1 RR implies that distortions of competition exist in the IR markets. The further remarks on safeguarding competition both in the recitals and in Article 1(1) RR indicate that the Community legislature considers its price regulation for IR services as a means to contribute to the removal of distortions of competition in the IR markets and, thus, to improve the internal market (see Recital 11 RR). Therefore, the Roaming Regulation is subjectively intended to improve the functioning of the internal market.

Again, as has been criticized before, nothing in the recitals or elsewhere in the Roaming Regulation suggests how future disparities between national rules might distort competition. Yet, the mere assertion that the Roaming Regulation is intended to remove those distortions and thereby improves the internal market objective is sufficient for the third step.

3. *The Community measure’s objective aim (fourth step)*

Furthermore, the Roaming Regulation must in fact have the object of improving the conditions of the internal market by eliminating obstacles to the free movement of goods or to the freedom to provide services or by removing appreciable<sup>175</sup> distortions of competition.

<sup>174</sup> Cf. *Tobacco Advertising I*, supra 15, para. 90 et seq.; *Tobacco Advertising II*, supra 15, para. 62 et seq., 80 et seq.

<sup>175</sup> *Tobacco Advertising I*, supra 15, para. 106 et seq.; *Bock*, Rechtsangleichung, 122; *Kahl*, in: Calliess/Ruffert (eds.), *EUV/EGV*<sup>3</sup>, Art. 95 EC, para. 15; *Pipkorn/Barderhewer-Rating/Taschner*, in: von

Since the Roaming Regulation does neither implicitly nor explicitly refer to obstacles to the exercise of the free movement of goods or to the freedom to provide services, the focus of the assessment of this step will be on the removal of appreciable distortions of competition.<sup>176</sup>

*a) The Roaming Regulation does in fact improve market conditions*

It was shown above that neither the wholesale nor the retail sector for IR services is fully competitive. Hence, appreciable economic distortions can be acknowledged in both economic sectors.

*(1) The effects of price caps on competition in the IR sectors*

Before the Roaming Regulation came into force, charges for IR services across Europe were considerably higher than after its introduction. Since the price cap regime of the Roaming Regulation still guarantees a profit margin to operators<sup>177</sup>, profits must have been considerably higher when tariffs for IR services were at their original, unregulated level. This, of course, is not doubted by the European legislature (cf. Recital 1 RR). The higher the margin of profit, however, the greater is the range for every market player to lower prices. If the margin of profit declines, and the regulated tariff approaches marginal cost, there will be relatively little scope for price competition left. In sum, the Roaming Regulation restricts price competition and, in this respect, fails to improve market conditions.

Yet, this is not the whole truth as far as price competition is concerned, as it also holds true that the higher the margin of profit, the lower the incentive to reduce marginal costs. If the price cap is considerably lower than the actual average price on the market, as was the case with IR services, the profit margin plummets. In order to make higher profits, a mobile network operator must reduce its marginal costs. Of course, the margin of profit would be even higher in free IR markets without a price cap when a mobile network operator is able to reduce its marginal costs heavily. But the incentive thereto is not as compelling as in a situation in which a price cap limits the profits for all competitors to such a level that an undertaking is actually forced to reduce its costs in order to gain an advantage over competitors. A price cap therefore stimulates a cutback in costs more effectively than a free market situation would, in

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der Groeben/Schwarze (eds.), EUV/EGV<sup>6</sup>, Art. 95 EC, para. 17; *Selmayr/Kamann/Ahlers*, EWS 2003, 49 (54 et seq.); *Tietje*, in: Grabitz/Hilf (eds.), EUV/EGV, Art. 95 EC, para. 35; cf. *Titanium Dioxide*, supra 154, para. 23.

<sup>176</sup> Before the ECJ's *Tobacco Advertising II* judgment, it was controversial amongst scholars whether these two conditions were to be applied alternatively or cumulatively. See e.g. *Ludwigs*, CML Rev. 44 (2007), 1159 (1166); *Leible*, in: Streinz (ed.), EUV/EGV, Art. 95 EC, para. 19; *Selmayr/Kamann/Ahlers*, EWS 2003, 49 (55 et seq.). In *Tobacco Advertising II*, supra 15, para. 67 the ECJ clarified that "when the existence of obstacles to trade has been established, it is not necessary also to prove distortions of competition". Presumably, when distortions of competition have been established, it is not necessary to prove the other element as well. This view is shared by *Ludwigs*, CML Rev. 44 (2007), 1159 (1166) and *Schroeder/Lechner*, ZLR 2007, 362 (365).

<sup>177</sup> This is at least asserted by the European legislator in Recitals 18, 19, 22 and 23 RR.

which the profit margin is excessively high.<sup>178</sup> It can therefore improve market efficiency.

Moreover, a price cap on WIR tariffs can benefit smaller mobile network operators or those independent of large mobile network alliances and groups when competing with their national rivals.<sup>179</sup> Smaller operators who cannot generate high traffic volumes are unable to exert the necessary countervailing buyer power to negotiate high volume discounts on WIR tariffs. As a consequence, they may not be in a position to offer retail prices that can compete with those of alliance or group members and it is possible that they are even squeezed out of the market. A price cap for WIR tariffs prevents such a development to a certain extent and thus brings about more competition in the WIR markets.<sup>180</sup>

Another benefit of the Roaming Regulation is that a price cap for RIR tariffs can strengthen the demand side, i.e. the demand of business and consumer end-users for RIR services. Surveys have indicated that travellers would use their mobile phones more often for roaming if prices for RIR services were lower.<sup>181</sup> If the demand for RIR services rose, a mobile network operator would thereby be able to steer a greater volume of traffic onto his preferred network, which would improve his bargaining position in contract negotiations for WIR services. In the end, price competition on the wholesale level would intensify.

## (2) *The effects of Article 6 RR on competition in the IR sectors*

As far as the low retail tariff transparency is concerned, Article 6 RR removes the lack of adequate information for end-users. This may sensitize consumers to the prices charged while also increasing the comparability of retail offers, and therefore allow customers to choose the home provider which offers the best RIR tariff structure. Hence, price competition among mobile network operators is likely to intensify. Furthermore, the low retail tariff transparency in RIR markets is one out of two reasons for a low consumer awareness of RIR charges, which ultimately renders demand for RIR services relatively price inelastic. Increasing the consumer awareness of RIR tariffs by enhancing tariff transparency can therefore positively affect the elasticity of demand for RIR services.

<sup>178</sup> Cf. *Berg/Foreman*, *Industrial and Corporate Change* 4 (1995), 671 (672); *Braeutigam/Panzar*, *American Economic Review* 83 (1993), 191 (193).

<sup>179</sup> *ERG*, supra 90, 33.

<sup>180</sup> A price cap for WIR tariffs may also have a negative effect on smaller and independent operators. Among alliance or group members, incentives exist to keep the IR traffic inside the alliance or group. In order to entice IR traffic away from alliance or group members, independent operators must offer lower tariffs than their competitors. A price cap for WIR tariffs, however, restricts price competition and lowers the scope of price reductions (in absolute terms) that independent operators are able to offer. Nevertheless, assessing the impact of a price cap for WIR tariffs for smaller and independent operators involves complex economical analyses. The European Commission has provided an Impact Assessment, estimating the economic consequences of the Roaming Regulation, in which the introduction of a price cap for WIR tariffs was shown to be overall most beneficial (also for smaller and independent operators).

<sup>181</sup> In the *TNS Opinion & Social* poll, supra 87, 27, 59% of mobile phone users (74% of mobile phone users who actually use their mobile phone abroad) declared that they would use their mobile phone more often abroad if RIR prices were lower.



This latter argument is, however, somehow flawed as it was shown that the low consumer awareness and the low elasticity of demand can also be attributed to low end-user preferences for RIR tariffs when choosing a home provider for mobile telephony services. Nonetheless, this counterargument does not nullify the positive effect of Article 6 RR on market conditions for two reasons. First, a Community measure that has as its aim the improvement of the internal market is not compelled to fully remove all impediments to it. Since it is sufficient if the measure objectively reduces some of the impediments, this standard is met even if the effect of Article 6 RR on the elasticity of demand for RIR services would be comparatively small. Second, it involves complex technical and economical assessments to clarify the effect of transparency improvement measures on competition in the RIR and WIR sector. When the Community legislator has to assess such complex developments, it should be generally granted a wide legislative discretion.<sup>182</sup> Eventually, it cannot be refuted that Article 6 RR may indeed improve the elasticity of demand for RIR services and, as a consequence, also enhance competition in the RIR and WIR sector. Therefore, the Community legislature does neither manifestly err nor exceed the bounds of its discretion when asserting such a relation and its assessment must be accepted.<sup>183</sup>

In conclusion, it is supportable to assume that the Roaming Regulation objectively enhances market efficiency and market conditions by removing appreciable (economic) distortions of competition in the WIR and RIR sector.<sup>184</sup>

*b) Distortions in the IR sectors did not stem from divergent national laws*

Irrespective of this conclusion, all the characteristics of the RIR and WIR sector, e.g. the constantly high tariffs for RIR and WIR services, have developed in markets free of sector-specific national IR legislation. All the features that in their combination have caused high charges for IR services, i.e. an oligopolistic market structure, high entry barriers and lack of potential competition in WIR markets due to the scarcity of available frequencies and high sunk costs, the behaviour of alliance or group members, a low elasticity of demand for RIR services owing to low consumer preferences for RIR tariffs as well as low retail tariff transparency, cannot be attributed to existing or likely, future disparities between Member States' laws. Although the Roaming Regulation removes economic distortions of competition in the IR sector, these distortions did not stem from a multifarious development in Member States' laws.

Even if one links one of the IR sector peculiarities to disparate national telecommunication laws (e.g. the limited assignment of frequencies by national regulatory

<sup>182</sup> Cf. *AG Fennelly*, Opinion, *Tobacco Advertising I*, supra 15, para. 98, 113; *Bock*, Rechtsangleichung, 136. See more details infra C.III.3.e).

<sup>183</sup> This conclusion also applies to the general assumption that the Roaming Regulation objectively enhances market conditions. The European Commission has substantiated this view in its Impact assessment, supra 3, SEC(2006) 925. Considering that the Community legislator enjoys a wide margin of discretion when assessing complex technical and economical future developments in the IR sectors, the Court would not substitute its judgment for that of the legislator as long as the Community measure does neither manifestly err nor exceed the bounds of its discretion.

<sup>184</sup> *Lupi/Manenti*, Traffic Management, 4, 22. See for a price cap regulation in general *Braeutigam/Panzar*, *American Economic Review* 83 (1993), 191 (197): "Price cap regulation is probably most effective as a transitory step on the path toward total deregulation and full competition."

authorities<sup>185</sup>), which do not specifically regulate international roaming, altering these peculiarities by sector-specific IR regulation instead of eliminating the original disparities between national telecommunication laws is not permissible under Article 95 EC. Such an approach would leave the existing disparities unregulated and would complement the law instead of approximating it.<sup>186</sup>

c) *Relation between impediments to the internal market and its improvement*

For the examination of the fourth step, a relation between the impediments to the internal market objective and its improvement needs to be established. This relation is that the Community legislature is only allowed to improve the internal market under Article 95 EC insofar as its impediments stem from disparities between national rules.<sup>187</sup> The impediments to the internal market arising from disparities between national rules (second step) must correspond with the impediments to the internal market which the Community measure objectively aims to improve (fourth step). Both are two sides of the same coin. Concerning appreciable distortions of competition in a situation of preventive approximation, the Community measure must reduce those appreciable distortions of competition that are likely to arise from future differences in Member States' laws. If the Community legislature detects actual impediments to the functioning of the internal market that stem from the behaviour of market actors or other unregulated market factors and not from (likely) differences in national laws, it must not tackle these impediments with measures based on Article 95 EC. If recourse to Article 95 EC were allowed in such a case, the examination of the second step would be rendered dispensable. Legislative action in such a case would not approximate (future) disparities between Member States' laws but would be a measure which is based on policy considerations instead of market integration<sup>188</sup> and which falls outside the scope of Article 95 EC.

In its recent decisions on Article 95 EC, the ECJ did not explicitly state that the obstacles to the internal market objective which the Community measure aims to remove must stem from disparities between national rules.<sup>189</sup> Even so, it does emphasize

<sup>185</sup> Cf. Recital 12 Commission Recommendation 2003/311/EC. For the allocation and assignment of frequencies in Germany see *Kurth*, Frequenzregulierung, in: Klumpp et al. (eds.), *Medien, Ordnung und Innovation*, 15 et seq. See also Art. 9 Framework Directive and Art. 5 et seq. Authorisation Directive.

<sup>186</sup> Cf. ECJ, Case 436/03, *Parliament v. Council*, supra 15, para. 44; *AG Kokott*, Opinion C-217/04, *UK v. Parliament and Council*, supra 15, para. 22; *Herrnfeld*, in Schwarze (ed.), EU-Kommentar, Art. 95 EC, para. 23, 37; *Tietje*, in: Grabitz/Hilf (eds.), EUV/EGV, Art. 95 EC, para. 52.

<sup>187</sup> *Bock*, Rechtsangleichung, 129 et seq.; cf. *Titanium Dioxide*, supra 154, para. 15; *Netherlands v. Parliament and Council*, supra 15, para. 20; *Pipkorn/Bardenhewer-Rating/Taschner*, in: von der Groeben/Schwarze (eds.), EUV/EGV<sup>6</sup>, Art. 95 EC, para. 36; see also *Bernard*, CML Rev. 33 (1996), 633 (636 et seq.).

<sup>188</sup> *Bock*, Rechtsangleichung, 129 et seq.; cf. *Bernard*, CML Rev. 33 (1996), 633 (636 et seq.).

<sup>189</sup> When the ECJ states that it does not "vest in the Community legislature a general power to regulate the internal market" in *Tobacco Advertising I*, supra 15, para. 83 (see also *British American Tobacco*, supra 15, para. 179), it means that Article 95 EC incorporates only a limited competence for the purpose of improving the conditions for the establishment and functioning of the internal market. It is insufficient if the Community measure is neutral to or impairs the internal market objective. With its remark, the ECJ does however not appear to refer to the condition that the obstacles to the internal market objective must stem from disparities between national rules.

that in order to qualify as improving the conditions for the functioning of the internal market, the Community measure in question must eliminate obstacles to the free movement of goods or to the freedom to provide services or remove distortions of competition. It can thus be inferred that without removing obstacles or eliminating distortions, a Community measure cannot be based on the internal market competence. Yet, it is true that this finding does not link the obstacles and distortions to disparities between national laws. But the ECJ has further held that (a) the introduction of a new type of property right<sup>190</sup> distinct from the existing property rights in the Member States and (b) the creation of a new form of cooperative society in addition to the national forms<sup>191</sup> cannot be based on Article 95 EC.<sup>192</sup> Such Community legislation would leave “unchanged the different national laws already in existence” and would not “approximate the laws of the Member States” applicable in the economic sector.<sup>193</sup> Instead of replacing national laws and their disparities, such legislation would merely complement the existing national laws. The findings of the court in these cases resemble the case of the Roaming Regulation, in which the Community measure aims at improving market conditions in an economic sector by reducing obstacles which do not stem from (likely) disparities between national laws in this sector. Such an approach also leaves unchanged different national laws and, thus, does not approximate but rather supplements the law.

In sum, the necessary correspondence between the impediments to the internal market objective in steps two and four has the following consequences for the Roaming Regulation: since all the existing (economic) distortions of competition in the IR sectors have evolved in the absence of any sector-specific national legislation, they can not be tackled under the auspices of Article 95 EC.

#### d) *The interpretation of distortions of competition*

It follows that when determining appreciable distortions of competition, the focus must foremost be on the assessment of (likely) legal barriers. Distortions of competition under Article 95 EC must always relate to sector-specific national legislation.<sup>194</sup> Otherwise, e.g. if a sole economic benchmark were chosen for the fourth step, the necessary relation with the second step could not be established. Distortions of competition in this sense can be characterized as those circumstances<sup>195</sup> which are caused

<sup>190</sup> See *Netherlands v. Parliament and Council*, supra 15, para. 24 et seq.

<sup>191</sup> See ECJ, Case 436/03, *Parliament v. Council*, supra 15, para. 44.

<sup>192</sup> *Kahl*, in: Calliess/Ruffert (eds.), EUV/EGV<sup>3</sup>, Art. 95 EC, para. 10; *Herrnfeld*, in Schwarze (ed.), EU-Kommentar, Art. 95 EC, para. 23, 37; *Ludwigs*, Rechtsangleichung, 229; *Tietje*, in: Grabitz/Hilf (eds.), EUV/EGV, Art. 95 EC, para. 52.

<sup>193</sup> ECJ, Case 436/03, *Parliament v. Council*, supra 15, para. 44.

<sup>194</sup> In detail *Bock*, Rechtsangleichung, 104 et seq. For the underlying economic aspects see *Müller*, Systemwettbewerb, chapter 4.

<sup>195</sup> The ECJ, in *Titanium Dioxide*, supra 154, para. 12, acknowledges differences in production costs as such circumstances. It held that “the directive conduces [...] to the establishment of greater uniformity of production conditions and therefore of conditions of competition, since the national rules [...] which the directive seeks to harmonize have an impact on production costs in the titanium dioxide industry.” Other circumstances are e.g. national laws which impair market access. See *Bock*, Rechtsangleichung, 104 et seq.

by disparities between national laws in a specific economic sector and which benefit or adversely affect this specific economic sector in one or more Member States.<sup>196</sup> Only this application of a legal benchmark guarantees that distortions of competition stem from disparities between Member States' laws and that the conditions of Article 95 EC will not be construed too broadly. It does therefore not satisfy the examination of the fourth step that the Roaming Regulation was found to improve efficiency and economic conditions in the IR sectors.

*e) The Community legislator enjoys a broad margin of discretion*

The question whether the Community measure does in fact improve the internal market objective resembles the question that must be asked when determining whether the Community measure complies with the first step of the principle of proportionality for a measure based on Article 95 EC. A measure complies with this first step if it is in fact appropriate for attaining the objective pursued (which must be the improvement of the internal market for a measure based on Article 95 EC). As far as the doctrine of proportionality is concerned, the ECJ grants the Community legislator a broad margin of discretion, particularly in a field which involves complex economical or technical assessments.<sup>197</sup> The Court does not substitute its judgment of the measure's appropriateness for that of the legislator. It does not intervene in these legislative choices, examining rather whether the Community legislature has overstepped the bounds of its discretion. Consequently, a similar discretion should be granted to the Community legislature when determining whether the measure in question does in fact improve the internal market.<sup>198</sup>

Nonetheless, it must be possible for the Community judicature to engage in judicial review of the fourth step and to examine whether the Community legislature did adhere to the bounds of its discretion. For this reason, the Community legislator must demonstrate plausibly and in a substantiated way that the Community measure meets the conditions of the fourth step.<sup>199</sup> If it fails to do so, the conditions of Article 95 EC are not met.

*f) The Roaming Regulation fails to meet the conditions of the fourth step*

Now, the Roaming Regulation's deficiencies become once more visible as nothing in the Regulation, not a single recital or provision, indicates how it does in fact reduce probable, appreciable distortions of competition in the IR sectors which stem from likely disparities between national laws. The same holds true for other pre-legislative

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<sup>196</sup> Bock, Rechtsangleichung, 114; see *Langeheine/Tietje*, in: Grabitz/Hilf (eds.), EUV/EGV, Art. 96 EC, para.12; *Pipkorn/Bardenhewer-Rating/Taschner*, in: von der Groeben/Schwarze (eds.), EUV/EGV<sup>6</sup>, Art. 96 EC, para. 13.

<sup>197</sup> See *infra* D.I.

<sup>198</sup> *AG Fennelly*, Opinion, *Tobacco Advertising I*, *supra* 15, para. 98, 113; Bock, Rechtsangleichung, 136.

<sup>199</sup> Bock, Rechtsangleichung, 136; *Müller-Graff*, Verdichtung des Binnenmarktrechts, in: Hatje (ed.), Binnenmarktrecht als Daueraufgabe, 7 (60); cf. *Koenig/Kühling*, EWS 2002, 12 (17).

documents.<sup>200</sup> Although the European Commission asserted that the Roaming Regulation improves the internal market objective,<sup>201</sup> this contention alone does not substantiate why the Roaming Regulation, particularly Articles 3, 4, and 6 RR, is indeed appropriate to do so. The mere assertion does not give the Community judicature any clue for engaging in judicial review of whether the Community legislature adhered to the bounds of its discretion.

Moreover, it was shown (see supra C.II.3) that it was unlikely that national laws affecting IR tariffs would emerge in the future. Without (likely) disparities between national laws and without probable distortions of competition which stem from these disparities, however, the Roaming Regulation cannot meet the conditions of the fourth step. As a result, Articles 3, 4, and 6 RR cannot be based on Article 95 EC.

#### **IV. Conclusion: Article 95 EC is not the proper legal basis for the Roaming Regulation**

It is easily comprehensible that excessive RIR tariffs were a thorn in the Commission's side, and the fact that national approaches to regulate IR charges would have remained ineffective owing to the cross-border character of international roaming made the situation even more frustrating for the European Commission. Its endeavour to protect consumers by the setting of price caps and the enforcement of transparency measures was thus consistent. But Article 95 EC does not grant the Community legislature a competence for consumer protection.

Furthermore, the excessive prices for RIR and WIR services were based on market forces, not on (likely) sector-specific state regulation. The allegedly disagreeable result of the play of free market forces does however not justify an approximation of laws under Article 95 EC. It can therefore not be predicted whether and in what form the Roaming Regulation contributes to the approximation of laws. It rather seems that the Community legislature misused its internal market competence as a pretence for enhancing consumer protection and as a means to enforce its desired economic policy in the IR sectors.<sup>202</sup> In conclusion, Article 95 EC is not an appropriate legal basis for the Roaming Regulation. The correct choice would have been Article 308 EC.

#### **D. Other reasons why the Roaming Regulation is incompatible with EC law**

Apart from its non-compliance with Article 95 EC, the Roaming Regulation may be subject to criticism on other legal grounds as well. It must be in accordance with the principles of proportionality (D.I) and subsidiarity (D.II) as laid down in Article 5 EC. It must further comply with the requirement to state reasons laid down in Article 253 EC (D.III).

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<sup>200</sup> *European Commission*, supra 103; *European Commission*, supra 52, COM(2006) 382 final; *European Commission*, supra 3, SEC(2006) 925.

<sup>201</sup> Cf. *European Commission*, supra 3, SEC(2006) 925, 25.

<sup>202</sup> *CEP*, Roaming, 2.

## I. The principle of proportionality

Community measures based on Article 95 EC must be proportionate.<sup>203</sup> The principle of proportionality requires that measures implemented through Community provisions should be (a) appropriate for attaining the objective pursued and (b) must not go beyond what is necessary to achieve it.<sup>204</sup> With regard to judicial review of these two conditions, the Community legislature is granted “a broad discretion” in areas that “entail political, economic and social choices on its part, and in which it is called upon to undertake complex assessments.” “The legality of a measure adopted in that sphere can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions are seeking to pursue.”<sup>205</sup>

First of all, the objective pursued by the Community measure must be legitimate, i.e. it must correspond with the aim that the legal basis provides. Notwithstanding that other aims like consumer protection (see Article 95(3) EC) can be followed as well, the objective pursued under Article 95 EC must (also) be the improvement of the conditions for the establishment and functioning of the internal market by facilitating free movement or equalising conditions of competition in a specific sector. In this respect, the Roaming Regulation does not fulfil the requirements of Article 95 EC. Additionally, the Community legislature did not provide any convincing reason or evidence (because there are none) for how the Roaming Regulation was supposed to reduce likely distortions of competition in the IR sectors that stem from likely disparities between national laws governing IR services. It follows that the Community legislature manifestly exceeded the bounds of its discretion regarding its assessment of the benefits of the Roaming Regulation for the internal market objective under Article 95 EC. The measures set out in the Roaming Regulation are inappropriate for attaining the internal market objective and accordingly violate the principle of proportionality laid down in Article 5(3) EC.

## II. The principle of subsidiarity

It is controversial whether the principle of subsidiarity, enshrined in Article 5(2) EC, applies in the event of the Community making use of Article 95 EC.<sup>206</sup> The ECJ

<sup>203</sup> *British American Tobacco*, supra 15, para. 122 et seq.; *Arnold André*, supra 15, para. 34; *Swedish Match*, supra 15, para. 33; *Tobacco Advertising II*, supra 15, para. 41; *Alliance for Natural Health*, supra 15, para. 32.

<sup>204</sup> See, inter alia, ECJ, Case 137/85, *Maizena and Others*, [1987] ECR 4587, para. 15; ECJ, Case C-339/92, *ADM Ölmühlen*, [1993] ECR I-6473, para. 15; ECJ, Case C-210/00, *Käserer Champignon Hofmeister*, [2002] ECR I-6453, para. 59; *British American Tobacco*, supra 15, para. 122; *Arnold André*, supra 15, para. 45; *Tobacco Advertising II*, supra 15, para. 144.

<sup>205</sup> *Tobacco Advertising II*, supra 15, para. 145. See as well ECJ, Case C-84/94, *United Kingdom v. Council*, [1996] ECR I-5755, para. 58; ECJ, Case C-233/94, *Germany v. Parliament and Council*, [1997] ECR I-2405, para. 55 et seq.; ECJ, Case C-157/96, *National Farmers' Union and Others*, [1998] ECR I-2211, para. 61; *British American Tobacco*, supra 15, para. 123; *Arnold André*, supra 15, para. 46; *Swedish Match*, supra 15, para. 48. Against such a low standard of review: *Herr*, EuZW 2005, 171 (173).

<sup>206</sup> Negating: *Tietje*, in: Grabitz/Hilf (eds.), EUV/EGV, Vor Art. 94-97 EC, para. 58 et seq. (with further references). Affirming: *British American Tobacco*, supra 15, para. 177, 179; *Alliance for*

affirms this view. For the question whether the Roaming Regulation was adopted in accordance with the principle of subsidiarity, one must assess whether the objective of the Roaming Regulation could have been achieved better at Community than at national level.

Albeit the Roaming Regulation does not improve the internal market objective as referred to in Article 95 EC, its objective nonetheless calls for action at Community level. Due to the cross-border nature of IR services, action by Member States alone would not effectively reduce RIR tariffs and would not be sufficient to improve the functioning of the WIR and RIR sector.<sup>207</sup> Therefore, the Roaming Regulation complies with the principle of subsidiarity.

### III. Breach of the duty to state reasons (Article 253 EC)

For Community legislation based on Article 95 EC, the procedure of Article 251 EC applies. Article 253 EC requires that regulations adopted under this procedure must state the reasons on which they are based. The ECJ has defined this requirement as follows: “Although the statement of reasons required by Article 253 EC must show clearly and unequivocally the reasoning of the Community authority which adopted the contested measure, so as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to exercise its power of review, it is not required to go into every relevant point of fact and law. Furthermore, the question whether a statement of reasons satisfies the requirements must be assessed with reference not only to the wording of the measure but also to its context and to the whole body of legal rules governing the matter in question. If the contested measure clearly discloses the overall objective pursued by the Community institution concerned, it would be excessive to require a specific statement of reasons for each of the technical choices made by the institution.”<sup>208</sup>

It has already been emphasized<sup>209</sup> that neither the wording of the Roaming Regulation nor its context show how the Roaming Regulation is supposed to fulfil the conditions of Article 95 EC in this case of preventive approximation. The mere unsubstantiated assertion that it is apt to do so does not give the Court the necessary information to exercise its power of judicial verification. Therefore, the Roaming Regulation infringes the requirement to state reasons laid down in Article 253 EC.

### E. Outlook

It was demonstrated in this article that the Roaming Regulation breaches Community law on various grounds. Its extension to SMS and other data services, as pro-

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*Natural Health*, supra 15, para. 103; *Barnard*, *Substantive law of the EU*, 583; *Kahl*, in: Calliess/Ruffert (eds.), *EUV/EGV*<sup>3</sup>, Art. 95 EC, para. 19; *Selmayr/Kamann/Ahlers*, *EWS* 2003, 49 (58).

<sup>207</sup> See in detail supra C.II.3.

<sup>208</sup> *Tobacco Advertising II*, supra 15, para. 107 et seq. See also *British American Tobacco*, supra 15, para. 165 et seq.; *Arnold André*, supra 15, para. 61 et seq.; *Swedish Match*, supra 15, para. 63 et seq.; *Alliance for Natural Health*, supra 15, para. 133 et seq.

<sup>209</sup> See supra C.III.3.f) and C.IV.

posed by the Commission, would deepen its non-compliance with Article 95 EC and must therefore be rejected.

The examination of the conditions of Article 95 EC for the Roaming Regulation further evidenced that the case of preventive approximation under Article 95 EC requires clear(er) boundaries. In early 2006, *Seidel* contributed to defining the limits of preventive approximation and expected the ECJ to constrain or even exclude the Community legislature's competence for preventive approximation under Article 95 EC.<sup>210</sup> This anticipation has so far proved wrong.<sup>211</sup> So has the hope that the ECJ's decision in *Tobacco Advertising I* marked the beginning of an era of stricter competence monitoring.<sup>212</sup> The Roaming Regulation case<sup>213</sup> thus constitutes a new chance for the ECJ to clarify the limits of the internal market competence.

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<sup>210</sup> *Seidel*, EuR 2006, 26 (45).

<sup>211</sup> Cf. *Tobacco Advertising II*, supra 15, para. 44 et seq., 61; Case C-217/04, *UK v. Parliament and Council*, supra 15, para. 59-62. On the other hand, see *AG Kokott*, Opinion, Case C-217/04, *UK v. Parliament and Council*, supra 15, para. 34: "[...] it is not predictable whether and in what form ENISA will contribute to the approximation of laws."

<sup>212</sup> *N.N.*, Editorial Comments, CML Rev. 37 (2000), 1301 (1304 et seq.).

<sup>213</sup> The UK High Court of Justice has referred questions concerning the legal basis of the Roaming Regulation as well as its compliance with the principles of proportionality and subsidiarity to the European Court of Justice on 13.02.2008; see ECJ Case C-58/08.



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