



**GSM Europe Response to the ERG
consultation on Remedies**

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Table of Contents

GSME Response to the ERG consultation on Remedies	3
1 General Comments.....	3
2 Generic Issues	4
2.1 THE NEED FOR APPROPRIATE RIGOUR	4
2.2 CHECK LIST APPROACH	4
2.3 TIMING – APPROPRIATE TIME LINES	5
2.4 THE USE OF COMPETITION LAW	5
2.5 MULTIPLE REMEDIES.....	6
Comments on Specific Issues.....	7
3 Introduction.....	7
4 Chapter 1: Generalization of Competition Problems	7
4.1 BARRIERS TO ENTRY.....	7
4.2 EXCESSIVE PRICING.....	7
4.3 PRICE DISCRIMINATION	8
4.4 CRITERIA FOR INTERVENING	8
5 Chapter 2: Remedies Available.....	8
5.1 TRANSPARENCY.....	8
5.2 NON-DISCRIMINATION.....	8
5.3 ACCOUNTING SEPARATION.....	8
5.4 ACCESS	9
5.5 PRICE CONTROLS AND COST ACCOUNTING	9
5.6 RETAIL OBLIGATIONS	9
6 Chapter 3: Principles to be applied by Regulators in choosing appropriate remedies	9
6.1 INEFFICIENT INVESTMENT	9
6.2 CRITERIA FOR SELECTING REMEDIES	10
6.3 NEED FOR SPECIFICITY IN REMEDIES	10
6.4 INCENTIVES FOR COMPLIANCE.....	10
6.5 EMERGING MARKETS	10
7 Chapter 4: Application of remedies to competition problems.....	11
7.1 CHOICE OF REMEDIES	11
7.2 ACCESS PRICING AND INCENTIVES USING LRIC.....	11
7.3 INCENTIVES TO INVEST	12
7.4 PRICING	12
7.5 BUNDLING TYING.....	12
7.6 SWITCHING COSTS	12
7.7 CALL TERMINATION.....	12
7.8 INTERNATIONAL ROAMING	13
8 IRG PIB (20 November 2003) and Tommaso Valletti paper.....	13
8.1 CONSULTATION PROCESS.....	13
8.2 DEFINITION OF “THE COMPETITIVE LEVEL”	13
8.3 “DISTORTING EFFECTS”	13
8.4 ALTERNATIVE REMEDIES	14
9 Conclusion.....	14

GSME Response to the ERG consultation on Remedies

1 General Comments

GSME welcomes the opportunity to comment on the ERG Remedies document and to take part in the subsequent workshop. The remedies paper attempts to cover a very wide range of issues and GSME believe that it must be considered alongside the IRG PIB¹ on call termination and the paper for the Commission by Tommaso Valletti² on Access to mobile networks.

The application of appropriate remedies when there is proven market failure is in the long term interests of all operators. Deciding on what proportionate remedy is the most adequate for the problem, without causing unintended effects or inhibiting the market from developing in ways that rectify the situation naturally, is the heart of the issue.

The approach taken in the Remedies document does not seem to be in line with the declared “de-regulatory” intent of the New Regulatory Framework (NRF) although pointed out in the remedies document itself (e.g. p.17). Whilst accepting that remedies are only applicable following a finding of dominance and market failure the presumption in the paper is that SMP operators will automatically assert any market power to the maximum level possible, that multiple remedies are required in most cases and there is almost no place for competition law in place of ex-ante regulation. If followed by NRAs this approach is likely to lead to an inevitable move towards regulatory micromanagement of the telecommunications industry.

It is not entirely clear how the document will be used in the future. It would certainly not be appropriate for it to be used as the basis of some kind of “tick list” approach that replaced the required analysis. Before imposing a remedy it has to be ensured that the benefits of intervention and imposing this remedy outweigh the associated costs, especially with regard to market dynamics and incentives for innovation and investment (cost-benefit analysis). Sufficient consideration must be given to the negative impact of applying inappropriate remedies such as discouraging investment and removing incentives to innovate in products, services and prices. The direct costs in complying with measures such as accounting separation and the uncertainty generated with any inconsistent approach to remedies by an NRA should also be assessed.

GSME believe that this paper is seriously flawed in the ways that are described in this response and does not take account of the competitive nature of the mobile market in the EU. Individual regulators must apply the appropriate rigour to analysis of the problem, the adverse effects of that problem and the specific, appropriate and proportionate remedy.

It is important that any guidance, whatever the final status, helps NRAs to assess problems in the light of the relevant prevailing market conditions. It should not seek to limit the ability of NRAs to come up with flexible solutions at the national level that are consistent with the NRF.

¹ Principles of Implementation and best practice on the application of remedies in the call termination market – IRG 20 November 2003

² Obligation that can be imposed on operators with significant market power under the new regulator framework for electronic communications – September 2003 – Imperial College London

2 Generic Issues

The paper raises a number of generic questions that would apply whatever the specific remedy selected was.

2.1 The need for appropriate Rigour

The NRF defines a process which must be followed before remedies can be selected. It is critical to the selection of appropriate remedies that the required level of analysis is completed before any decisions on remedies can be taken. The consultation describes many of the issues that need to be considered in any analysis but does not give much guidance on the real decision making process to identify the adequate and proportionate remedy for the problem identified. The consultation makes many assertions about the behaviour of operators without adequate supporting evidence, e.g. Ramsey pricing is again dismissed in two lines as too difficult to implement when there is considerable discussion of the problems with LRIC models.

It is not acceptable for regulators to take unjustified shortcuts in the required analysis on the grounds that it may be difficult or time consuming. GSME supports developing consistent guidance for the selection of remedies but to go alongside the required analysis, not instead of it.

2.2 Check list Approach

The paper develops a list of 4 'market constellations' (cases), against which it lists 27 competition problems. Against these lists, the paper identifies which remedies should be applied. The result is a detailed checklist of which remedies should be applied in the specified circumstances.

This approach is flawed for several reasons.

- It is not practicable to attempt to list all the possible market circumstances and behaviours that may arise and the remedies that should go with them.
- It totally neglects the need to run a proportionality test when choosing an adequate remedy.
- It neglects country specific circumstances which may be relevant in assessing a proportionate remedy (e.g. chosen remedies may have different effects in some countries, but not in all European markets depending on the prevailing market and regulatory situation)
- It assumes a mechanistic link between 'market constellations', behaviours and effects.
- It assumes that the proposed remedies apply in a mechanistic way to the competition problems.
- It assumes that the observed behaviour is always a competition problem that needs to be resolved through ex ante regulation.

- The paper gives no consideration to other remedies.

It is of great concern that having gone through the detailed work to produce the new Directives this new, undefined and unreferenced concept of “Market Constellations” has been introduced. The constellation approach as described is not consistent with competition analysis in that three of the four market constellations describe behaviours that may result in competition problems but the fourth, termination, is a market definition. Termination is not an anti competitive behaviour and should not be mapped onto competition problems as if it were. Thus the constellation concept as described does not have the rigour necessary to qualify it as an analysis tool to be used by NRAs.

In place of the list of ‘market constellations’, behaviours, effects and remedies, the paper should provide a more generic description of problems that might arise, the circumstances in which they arise and the consequences, both pro- and anti-competitive that they have. This should be coupled with the advantages and disadvantages of different types of remedies that could be used. In particular such a paper should have provided NRAs with guidance on how to perform a proportionality test in accordance with the Directives. The issue of proportionality is key to producing useful guidance on remedies and the document does not address the question in any useful way.

Any attempt to list and classify the competition problems that are likely to arise is unlikely to be comprehensive. It is not clear what criteria the Commission and NRAs have applied to competition problems for them to appear on the list.

GSME’s further concern with this approach is that it assumes a mechanistic link between ‘market constellations’, behaviours and effects. It is wrong to assume the identified competition problems will always arise in a given ‘market constellation’. NRAs must have reasonable grounds for suspecting that there will be a problem, beyond simply the type of ‘market constellation’.

2.3 Timing – Appropriate time lines

A critical element of the process is the consideration of what is an appropriate amount of time to either wait for a market that is prospectively competitive to become competitive and what is an appropriate time to apply a remedy for. Where markets are showing increasing competitiveness great care should be taken in applying remedies. In applying a remedy to prospectively competitive markets, adequate consideration should be given to the dynamic effects and the net benefit that would be generated had no action been taken. In this context, it is surprising that sunset clauses have not even been considered. Also, in view of the difficulty in making these judgements it is important that NRAs review remedies at regular intervals to test whether the remedy in question is still appropriate.

2.4 The use of Competition Law

The document does not adequately consider the impact of competition law on the behaviour of operators. The document implies that operators with market power will automatically indulge in a list of actions damaging to market competitiveness and this justifies ex ante remedies. In fact all operators are subject at all times to competition law and the associated penalties of a material breach. Just because the penalty is post the event does not mean that it does not affect the behaviour of operators in the market. The document therefore does not

give sufficient weight to the incentives on players not to exercise market power in ways detrimental to market development.

The paper is also inconsistent with the competition law approach advanced by the new regulatory framework. The competition law approach requires an analysis of the intent and effects of the behaviour in the specific circumstances of the market under investigation. The paper's mechanistic linking of 'market constellations' to behaviours and effects is in danger of removing from the NRAs any responsibility for conducting a proper analysis. It is important to make case by case examination of the problem and not jump to conclusions.

2.5 Multiple Remedies

In most cases the document dismisses the application of single remedies as inadequate. This is in part because of approach taken to the application of competition law. The incentives that competition law gives for players in the market to behave in certain ways, should be taken into account when deciding on what remedies are appropriate. It is not an either/or situation, competition law incentives against the exercise of market power are always present, ex ante regulation should take this into account and not add additional remedies that duplicate the competition law incentives.

The approach adopted by the paper also seems to assume that in each of the four cases that are described in chapter 4, the full range of competition problems will arise. This is too simplistic a conclusion and it is how the paper reaches its conclusion that almost all remedies are required in most cases. So, on page 84, the paper concludes that 'as long as market power at the wholesale level exists, however, the setting of cost oriented access prices appears to be the only possibility to open the retail market to competitors and eliminate the incumbent's excess profits'. Such a strong conclusion is only possible by assuming that all problems will arise in all cases inevitably leading to the application of multiple remedies.

Comments on Specific Issues

This section deals with specific issues raised in the consultation.

3 Introduction

The paper argues that the sufficiency of the ex post application of competition law is answered at the stage of market definition. This approach is flawed because the process of defining a market does not necessarily expose the problems in the market, nor the appropriate solutions. It is necessary for NRAs to demonstrate the necessity of and the costs and benefits associated with, ex ante measures for each market they review and this can only be done once the problem and proposed remedy have been identified. Imposing accounting separation would only be appropriate once the NRA has identified a competition problem likely to be of concern in the future and that competition law would not be sufficient, that accounting separation is adequate and proportionate and that the costs of imposing accounting separation are outweighed by the likely benefits.

4 Chapter 1: Generalization of Competition Problems

4.1 Barriers to entry

Barriers to entry are a complex issue and especially in mobile markets where there already is genuine infrastructure competition. In any industry and especially areas such as telecoms with high investment requirements, there will not be an unlimited number of competitors trying to enter the market. Focussing on economic theory would suggest that most markets would end up with between 3 and 5 players in which case it is not clear whether barriers to entry in mobile markets are always a constraint because markets may not be able to support more than this number of viable operators. Economies of scale and scope and first mover advantages, which of themselves do not constitute a problem, may be more significant than simple barriers to entry.

It is important to identify the source of market power, not solely to identify the least burdensome remedy but to address the underlying cause of any market failure rather than merely the symptoms.

4.2 Excessive pricing

On page 39, the paper defines an excessive price as 'one that exceeds the hypothetical competitive level, i.e. the incurred costs of production (including the cost of capital).' This is not a correct definition of an excessive price. In the European Court of Justice's decision in *United Brands*, the Court held that 'charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied...is an abuse'³. Thus, a price is excessive if it bears no reasonable relation to the economic value of the product.

The definition of an excessive price in the paper (one that is above the cost of production) is only correct if the appropriate counter-factual is the theoretical model of perfectly competitive markets, which is not. The static perfect competition model neglects market dynamics. To foster innovation, new product development and new investment, prices may

³ *United Brands v. Commission*, Case 27/ 76 [1978] ECR 207; [1978] 1 CMLR 429

very well be above the theoretical level of perfectly competitive markets without being excessive.

4.3 Price discrimination

The definition of price discrimination (two or more goods sold at prices which are at different ratios to costs of production) is also not correct. Article 82(2)(c) of the EC Treaty describes price discrimination in more general terms as '*applying dissimilar conditions to equivalent transactions with other trading parties*', and the circumstances in which price discrimination may be an abuse have been carefully considered by the courts in several cases. If the new regulatory framework is to follow a competition law approach, it would be preferable to follow definitions that have been established under competition law.

4.4 Criteria for intervening

On page 39 the paper argues that where market power exists welfare will usually fall short of its maximum value under competition and this might justify regulatory intervention. If the counter-factual that NRAs intend to apply is the maximum theoretical welfare that exists under competition and any welfare short of that justifies intervention, then intervention will always be justified in telecommunications markets – and nearly every other market - regardless of how competitive they are. This is not the same as the competition law approach advocated by the NRF but one of intervention justified on variance from a theoretical optimal position.

5 Chapter 2: Remedies Available

5.1 Transparency

At page 47 the paper argues that article 9 of the Access Directive 'implies a natural linkage between any access or interconnection obligation and a transparency requirement'. At page 48 it goes further, to say 'it is logical to assume and indeed the presentation of the transparency obligation seems to suggest that it is really an accompanying obligation with and to other obligations in order to make the overall remedy more effective'. In fact there may be circumstances in which transparency alone would be a sufficient remedy. Indeed, transparency is foreseen in the Directives as a possible remedy.

5.2 Non-discrimination

The document takes an impractical approach to non-discrimination arguing that 'differences in terms and conditions, even where transactions are not exactly the same, should be justified so that anti-competitive discrimination can be prohibited'. This blanket approach seems to imply that operators with SMP must be able to justify all price differences and implies a presumption of guilt until proven innocent. This goes way beyond established competition law, which recognises that some price differences are permitted. The main issue is that it would stifle pricing innovation, harm competition and ultimately act to the detriment of consumers.

5.3 Accounting separation

In section 2.2.3 the paper envisages using the accounting separation obligation to facilitate 'ongoing monitoring of market situations rather than for the specific purpose of the market analysis'. The implied level of monitoring is not consistent with the NRF, since ex ante obligations must be targeted at a specific problem, accounting separation should not be used as a further source of data to monitor the market. This approach would lead to totally inappropriate micro management of the market. .

Of course, one of the key disadvantages of accounting separation, but one the paper does not mention, is the set up and subsequent ongoing cost to the SMP operator of compliance, which

can be very significant. This is a good example of why a cost benefit analysis must be undertaken.

5.4 Access

Section 2.2.4 argues that access is 'rarely...a stand alone remedy'. Again this is a further example of the combinatorial remedies argument which is not adequately justified. Following the logic of the paper, to be effective it must be combined with transparency, non-discrimination, accounting separation and price controls.

5.5 Price controls and cost accounting

The paper argues that it may be necessary to have a full justification of an operator's prices.

It then explains that the NRA is unrestricted in its choice of cost model, except for article 8 of the Framework Directive and general competition law. The model should be relevant to the economic situation being analysed and as a matter of good regulatory practice an NRA should be consistent in its use of cost models so as not to create unnecessary uncertainty.

Once again, the paper should give some consideration to the compliance costs when considering the disadvantages of this very interventionist and far reaching remedy, in particular in markets not previously subject to ex ante regulatory measures.

5.6 Retail obligations

The paper notes that 'as a general rule' regulatory controls should only be imposed on retail services when wholesale measures or measures regarding carrier selection or pre-selection would be insufficient. GSME's understanding is that this is not just a general rule but a legal requirement under Article 17 of the Universal Services Directive, which says,

'1. Member States shall ensure that, where:

(a) as a result of a market analysis carried out in accordance with Article 16(3) a national regulatory authority determines that a given retail market identified in accordance with Article 15 of Directive 2002/21/EC (Framework Directive) is not effectively competitive, and

(b) the national regulatory authority concludes that obligations imposed under Directive 2002/19/EC (Access Directive), or Article 19 of this Directive would not result in the achievement of the objectives set out in Article 8 of Directive 2002/21/EC (Framework Directive),

national regulatory authorities shall impose appropriate regulatory obligations on undertakings identified as having significant market power on a given retail market in accordance with Article 14 of Directive 2002/21/EC (Framework Directive).'

It is, therefore, necessary for an NRA to conclude that wholesale measures would be insufficient before applying this type of remedy.

6 Chapter 3: Principles to be applied by Regulators in choosing appropriate remedies

6.1 Inefficient investment

In the third principle in section 3.2, the paper argues that NRAs should be 'mindful of the possibility of inefficient investment'. Arguably, where networks display large economies of scale, it is always more efficient, from a static perspective, to have a single network that can exploit all of the economies rather than duplicate networks. However, this ignores the dynamic benefits of having competing network operators.

6.2 Criteria for selecting remedies

The wording under 3.2.1 that requires NRAs to 'apply the available remedy (or series of remedies) that most clearly addresses the core of the problem' is unclear. NRAs should, wherever possible, apply remedies that address the cause of the market failure and the adverse effects of that market failure. The following paragraph (page 59) introduces the concept of the "best deal for consumers" as a primary objective. No criteria is given for what the "best deal for consumers" represents either in welfare terms, economic benefits, social benefits, environmental impact, long term or short term. GSME do not believe that it is helpful to introduce new unspecified and potentially broad criteria into a document designed to bring clarity and guidance.

6.3 Need for specificity in remedies

Having introduced a broad and unspecified criteria on page 59, on page 60 the paper argues that remedies expressed in general terms may give rise to uncertainty and 'this may work to the advantage of the SMP player who has incentives to exploit such uncertainty'. Whilst this may be possible in some circumstances, when devising remedies NRAs should also be mindful that uncertainty may be exploited by any player seeking to use regulation to harm another operator's business or impose costs on it. In a recent interview Stephen Carter, the Chief Executive of the UK's NRA, OFCOM, and a former managing director of the cable company NTL, said, 'First, don't waste our time with time-wasting complaints. Because I know people do it. How do I know? Because I used to do it myself'⁴.

Remedies should always be as specific as possible to maximise the predictability of regulation and lack of specificity should lead regulators to question whether they are taking appropriate action.

6.4 Incentives for compliance

Section 3.2.5 explains how remedies should give strong incentives for compliance. However the following paragraphs give a description of the penalties that NRAs should use to enforce compliance. A penalty is not a very good incentive. An incentive should motivate the SMP operator to comply because there is some benefit in doing so, and not just the benefit of avoiding a penalty. That approach ignores the need to sustain a climate conducive to ongoing investment in the industry. When devising remedies the commercial opportunities for operators to do more than simply comply should be considered.

6.5 Emerging markets

The issue of emerging markets is a difficult one but Section 3.3 on emerging markets fails to adequately explain the reasons why these markets should not be regulated. It is not simply about preserving incentives to invest, although this is essential. It is also about not intervening in markets when it is difficult to predict how they will develop, and not intervening when a problem arises that may only be transitory. Furthermore, preserving incentives to invest is not just about emerging markets; it is something that is necessary in all markets. The section is correct to identify that abusive conduct 'will normally be dealt with under standard competition law'. It is important in a discussion on remedies to recall that the NRF presumes that standard competition law is sufficient in most cases and that ex ante regulation should be the exception.

Section 3.3.3 seems to be concerned not with the definition of an emerging market but with when such a market becomes susceptible to ex ante regulation. This again seems to follow

⁴ Financial Times, 16 December 2003.

the erroneous idea that a natural progression takes place in markets towards ex ante economic regulation. There will of course be many emerging markets that never become susceptible to ex ante regulation even after they cease to be emerging. The paper seems to take the approach that some emerging markets may be susceptible to ex ante regulation and indeed NRAs may need to intervene. Since this contradicts the approach described in the NRF, the paper ought to describe the circumstances in which such intervention is warranted.

7 Chapter 4: Application of remedies to competition problems

Chapter 4 starts by explaining the processes that NRAs must follow in their market analyses. It explains that 'the first stage involves a check of the 3 criteria as outlined above'. We assume this to refer to the three criteria for assessing whether a market is susceptible to ex ante regulation. The wording should be improved to make it clearer that these are the criteria to which the paper is referring.

7.1 Choice of remedies

On page 75 the paper proposes that an NRA should 'choose a remedy by which it is possible to – directly or indirectly – address the “strategic variable” of the SMP undertaking'. The use of the term 'strategic variable' is totally unclear. NRAs should, wherever possible, apply remedies that address the cause of the market failure and the adverse effects of that market failure. This is what the paper should say.

The paper notes that NRAs are frequently unable to “actually observe a certain competition problem Rather, the appearance of a particular competition problem without regulation will have to be anticipated, which is the rationale for regulation to be deployed.” It is not clear from the paper how strong an NRA's suspicions should be that a problem will arise for it to be 'anticipated'. An NRA must have reasonable grounds for believing that a problem should arise before applying remedies to address it. The paper could usefully describe what those reasonable grounds could be. The proposal to “identify the incentives ...to engage in anti-competitive or exploitative behaviour” is clearly useful as a test although NRAs must look at the costs and benefits of imposing remedies as well as the balance of incentives including potential competition law penalties.

7.2 Access pricing and incentives using LRIC

In the discussion on the appropriate access price in section 4.2.2.2, page 82, the paper acknowledges that LRIC prices 'may fail to provide the right make-or-buy incentives to the entrant and stifle investment incentives of the incumbent'. The paper however does not explore this point in any detail, focusing instead on the dangers of setting prices that are too high. It is now widely acknowledged that LRIC prices can harm investment incentives. Ovum's study⁵ for the Commission on 'barriers to competition in the supply of electronic communications networks and services' explains, at page 159, Measure 2, that 'for new technology wholesale products, a premium price is needed which takes account of investment in failed new projects, technology improvements and uncertainties in demand'.

The paper again dismisses Ramsey pricing as “practically unfeasible” having had a lengthy discussion of the problems surrounding the LRIC approach. The practical difficulties of collecting data to enable the use of Ramsey pricing are often exaggerated and may in fact be less than that required to build a robust LRIC model. GSME believes that it is not yet possible to dismiss Ramsey pricing in the way that the paper does.

⁵ Barriers to competition in the supply of electronic communications networks and services. A final report to the European Commission, Ovum, November 2003.

It is important that any models are appropriate to the markets in which they are applied. Any model should be validated with input from the relevant operators and not simply taken off the shelf as a “standard” model. NRAs need to be mindful that when models are used to set remedies that they can at best only provide a guide to costs and can never capture the full complexities of networks and associated costs.

7.3 Incentives to invest

GSME welcome this section in its attempt to address a primary issue for operators that we believe has received less attention from NRAs than it should. In this section the paper refers on page 87 to a ‘ladder of investment’ and argues that remedies should be designed to facilitate new entrant’s movement along this the ladder. This is an increasingly discussed concept amongst regulators but to GSME’s knowledge there is no evidence, from anywhere in the world that this idea works. The fundamental danger with this concept is that it places regulators in the position of assessing the commercial incentives of everyone in the market and then taking some form of action to manage it in what they see a positive direction. The investment motivations of companies and this applies equally to new entrants and to established operators (their investors invest in companies not micro markets), are complex and will tend to seek competitive advantage. As discussed earlier all players may consider using regulation to their advantage and the ladder or stepping stone argument is an incentive for players to maximise a current position by arguing that incentives to move to the next stage are inadequate, with no intention whatsoever to move to a different position in the market. Regulators are not well placed to make the commercial judgements that this concept requires.

By doing so the paper puts a lot of emphasis on a largely untried concept. There can be dramatic unintended detrimental economic effects if NRAs apply experimental concepts to markets.

7.4 Pricing

Section 4.2.4 argues that price discrimination, cross-subsidisation and predatory pricing all lead to a margin squeeze. This is not necessarily the case. It is possible to envisage these practices being used by a vertically integrated SMP operator in a way (anti-competitive or otherwise) that does not give rise to a margin squeeze.

7.5 Bundling Tying

Section 4.3.2 proposes that ‘SMP undertakings might be obliged to report new bundles to the NRA, which will then judge on a case-by-case basis whether the bundle is likely to have anti-competitive effects’. The approach of requiring undertakings to submit their prices to the NRA for approval is extremely interventionist and amounts to micro-management. In the mobile industry, such an approach would likely lead to a stifling of competition, of retail innovation and to a distortion of previously competitive price structures. It would, ultimately, be detrimental to consumers.

7.6 Switching costs

Section 4.4.1.1 explains the detrimental aspects of switching costs. There are of course also pro-competitive aspects to switching costs that the paper ignores. They intensify competition for new customers in the early phases of market development.

7.7 Call Termination

Section 4.5 on call termination seems to be solely about call termination on mobile networks. It refers only to the situations of M2M (mobile to mobile call termination) and F2M (fixed to

mobile call termination). However, to the extent that there is a problem, it is a general one that applies to all networks that terminate calls. The paper does not explain why the current call termination prices cause welfare losses or amount to inefficiencies which should be addressed by regulatory intervention.

Section 4.5.1 argues that 'tacit collusion is a competition problem pertaining to M2M'. It is not clear whether this is pure assertion or whether the authors of the paper have specific instances in mind.

7.8 International Roaming

The context for text box 3 on international mobile roaming is not at all clear. In a paper dealing with remedies it is odd to find a description of the operation of the market for wholesale international roaming. In addition, this is a market which no NRA has yet analysed but the paper already suggests price controls, cost accounting and accounting separation may be appropriate. Again, the paper should adopt a more general approach that describes the sort of problems that may arise and the remedies that can address them, rather than seeking to provide a checklist of remedies or indeed answers to apply in each market.

8 IRG PIB (20 November 2003) and Tommaso Valletti paper

8.1 Consultation process

GSME will take this opportunity to make some brief comments on the NRAs' proposed remedies in mobile call termination as set out by the Independent Regulators Group (IRG), Principles of implementation and best practice (PIB) published by the IRG on 20 November 2003. GSME is disappointed that these two highly related documents seem to be being dealt with in an inconsistent and uncoordinated fashion.

8.2 Definition of "the competitive level"

First, the PIB is disappointing in that it repeats many of the unsubstantiated assertions that we have seen before without providing new analysis or seeking to move the discussion forward. For example, the PIB repeatedly refers to the 'competitive level' of call termination charges. It then defines the competitive level as being the cost (including cost of capital) of providing call termination. This would, of course, only be the competitive level of call termination charges if the provision of termination would be a perfectly competitive market. This is the wrong benchmark to apply to these charges because the fundamental economics of operating a mobile network mean the model of perfect competition is inappropriate. In particular, economies of scale and scope mean that there are substantial joint and common costs that need to be recovered. On the demand side there are interdependencies that mean the price set for one service affects the demand for other service. These factors mean that cost based pricing is neither appropriate from the supply side nor from the demand side perspective.

8.3 "Distorting effects"

The PIB asserts 'distorting effects' that are unsubstantiated. An example of this is the assertion that 'high MT charges and low on-net charges can cause competition distortion [in] the (sub) market for virtual private networks (VPN) for non residential customers'. GSME is not aware of an example of such a practice being found to be anti-competitive.

A further example of an alleged distorting effect that is unsubstantiated is the claim that 'high MT charges might foreclose the mobile market'. There is no evidence that service providers or mobile virtual network operators (MVNOs) have been foreclosed by the level of termination charges, nor is it apparent under what circumstances such foreclosure might be possible.

8.4 Alternative remedies

In considering the appropriate remedies, the PIB asserts that the objective of any remedy is to reduce charges to cost over a reasonable period of years. In view of this objective, the PIB concludes that price controls are appropriate. This is an overly simplistic approach and does not take account of the changing nature of the markets under consideration whose definition is likely to change with the increasing level of substitution. The PIB contains no consideration of other possible objectives or ways of achieving those objectives. This is in complete contrast to the study undertaken by Dr Tommaso Valletti for the Commission, which considered a total of nine remedies including 'yardstick' regulation, receiving party pays, multiple SIM cards, arbitrageurs, bilateral and reciprocal agreements, price transparency, voicemail and bill and keep, as well as price controls. It is disappointing that the NRAs seem to have largely ignored Dr Valletti's study in producing the PIB.

9 Conclusion

GSME is supportive of a consistent approach to the selection and application of remedies within the New Regulatory Framework. There is clearly behind this document a sensible motivation to enable NRAs and the Commission to operate effectively without drowning in analysis or needlessly duplicating work. Unfortunately we do not feel that the current document helps in this respect. It is seriously flawed in the ways that are described in this response and does not take account of the competitive nature of the mobile market in the EU. Regulators must apply the appropriate rigour to analysis of the problem, the adverse effects of that problem and the specific appropriate and proportionate remedy; there is no easy way out. It may be more helpful to produce a shorter paper that focuses on the issues of proportionality and cost benefit analysis which are key to producing consistent and appropriate results in each Member State and avoid the introduction of new concepts and definitions.