EUROPEAN
COMMISSION

Brussels, 15.12.2016
C(2016) 8784 final

COMMISSION IMPLEMENTING REGULATION (EU) …/...

of 15.12.2016

laying down detailed rules on the application of fair use policy and on the methodology for assessing the sustainability of the abolition of retail roaming surcharges and on the application to be submitted by a roaming provider for the purposes of that assessment

(Text with EEA relevance)

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union[1], and in particular Article 6d(1) thereof,

After consulting the Body of European Regulators for Electronic Communications (BEREC),

Whereas:

(1) Pursuant to Regulation (EU) No 531/2012, roaming providers should not levy any surcharge additional to the domestic retail price on roaming customers in any Member State, for any regulated roaming call made or received, any regulated roaming SMS message sent or any regulated data roaming service used, including MMS messages, subject to a 'fair use policy'. This provision applies from 15 June 2017, provided that the legislative act to be adopted further to the proposal on the wholesale roaming market referred to in Article 19(2) of that Regulation has become applicable by that date.

(2) Regulation (EU) No 531/2012 provides that in specific and exceptional circumstances a roaming provider may apply to its national regulatory authority for an authorisation to apply a surcharge on its roaming customers. Any such request for authorisation is to be accompanied by all the information necessary to demonstrate that, in the absence of any retail roaming surcharges, the provider is unable to recover its costs of providing regulated retail roaming services, so that the sustainability of its domestic charging model is undermined.

(3) In order to ensure a consistent application across the Union of any policy which aims at preventing abusive or anomalous usage of roaming services ('fair use policy') and of authorisations to apply a surcharge, it is necessary to lay down detailed rules on the application of such fair use policy and on the methodology for assessing the sustainability of the abolition of retail roaming surcharges and on the application to be submitted by a roaming provider for the purposes of that assessment.

(4) According to Regulation (EU) No 531/2012, the objective of a fair use policy is to prevent abusive or anomalous usage by roaming customers of regulated retail roaming services at the applicable domestic price, such as the use of such services for purposes

[1] OJ L 172, 30.6.2012, p. 10.

other than periodic travel, for instance the use of such services on a permanent basis. The implementing measures should ensure that the possibility to apply a roaming fair use policy to pursue this objective is not exploited by roaming providers for other purposes, to the detriment of roaming customers engaged in any form of periodic travel.

(5) With the abolition of retail roaming surcharges in the Union, the same tariff conditions apply for the use of mobile services while roaming abroad in the Union and at home (i.e. in the country of the mobile subscription of the customer). Regulation (EU) No 531/2012 aims at eliminating divergences between domestic prices and those applied to roaming when periodically travelling within the Union, leading to the realisation of "roaming like at home". However, its rules are not meant to enable permanent roaming across the Union, i.e. the situation where a customer in a Member State where domestic mobile prices are higher buys services from operators established in Member States where domestic mobile prices are lower, and in which the customer is neither normally resident nor has any other stable links entailing frequent and substantial presence on its territory, with a view to roam permanently in the former Member State.

(6) Use of regulated retail roaming services at the applicable domestic price on a permanent basis for purposes other than periodic travel would be likely to distort competition, put upward pressure on domestic prices in home markets and put at risk investment incentives in both home and visited markets. On the visited market, visited operators would have to compete directly with domestic service providers of other Member States, where prices, costs, regulatory and competitive conditions may be very different, and on the basis of wholesale roaming conditions set close to cost for the sole purpose of facilitating periodic roaming. For the home operator the permanent use of domestic tariffs while roaming may lead to the denial or restriction of wholesale roaming services by visited operators, or the provision by the home operator of restricted domestic volumes or the application of higher domestic prices, with consequential effects on the home operator's ability to serve its normal domestic clients both at home and abroad.

(7) It is necessary to lay down implementing rules based on clear and generally applicable principles capable of encompassing the many and varied patterns of periodic travel by roaming customers, in order to ensure that fair use policy does not act as a barrier to full enjoyment of "roam like at home" by such customers. For the purpose of a fair use policy to be applied by a roaming provider, a customer should ordinarily be considered to be periodically travelling abroad in the Union when that customer is normally residing in the Member State of the roaming provider or has stable links with that Member State entailing frequent and substantial presence on its territory, and consumes regulated retail roaming services in any other Member State.

(8) Regulation (EU) No 531/2012 provides that any fair use policy has to enable the roaming provider’s customers to consume volumes of regulated retail roaming services at the applicable domestic retail price that are consistent with their respective domestic tariff plans.

(9) This Regulation should be without prejudice to the possibility for roaming providers to offer, and for roaming customers to deliberately choose, an alternative roaming tariff in accordance with Article 6e(3) of Regulation (EU) No 531/2012, which could include contractual usage conditions falling outside a fair use policy established in accordance with this Regulation.

(10) In order to ensure that retail roaming services are not subjected to abusive or anomalous usage unrelated to periodic travel outside the Member State of residence of the customer or with which the customer has stable links entailing frequent and substantial presence on its territory, roaming providers may need to determine the normal place of residence of their roaming customers or the existence of such stable links. Having regard to the forms of proof which are customary in the respective Member States and to the perceived level of risk of abusive or anomalous usage, the roaming provider should be able to specify the reasonable evidence of the place of residence to be provided, under the supervision of the national regulatory authority as to the proportionality of the overall documentary burden and its appropriateness in the national context. Such evidence, as regards individual users, could include a declaration by the customer, presentation of a valid document confirming the customer's Member State of residence, specification of the postal address or the billing address of the customer for other services provided in the Member State of the roaming provider, a declaration by a third-level educational institution of enrolment for full-time courses, proof of registration on local electoral rolls or of payment of local/poll taxes. In the case of business customers, such evidence could include documentation on the place of incorporation or of establishment of the corporate entity, the place of effective performance of its main economic activity, or the principal place where employees identified as using a given SIM card perform their tasks. Stable links with a Member State entailing frequent and substantial presence on its territory can arise from a full-time and durable employment relationship, including that of frontier workers; durable contractual relations entailing a similar degree of physical presence of a self-employed person, participation in full-time recurring courses of study; or from other situations, such as those of posted workers or retired persons, whenever they involve an analogous level of territorial presence.

(11) Roaming providers should limit requests for the submission of evidence of normal residence or other stable links entailing frequent and substantial presence on its territory after the conclusion of a given contract strictly to circumstances in which data that have to be collected for billing purposes appear to provide indications of abusive or anomalous usage unrelated to periodic travel. The evidence requested should only comprise what is strictly necessary and proportionate to confirm the customer's attachment to the Member State of the roaming provider. No documentation requirements should be imposed on customers for asserting compliance with the conditions for fair use policy absent such grounds. In particular, there should be no requirement for recurrent submission of such documentation unrelated to a risk-based assessment of the probability of abusive or anomalous usage.

(12) In order to enable customers to consume volumes of regulated retail roaming services at the applicable domestic retail price that are consistent with their respective domestic tariff plans, the roaming provider should as a general rule not impose a limit on the volumes of mobile services available to the roaming customer other than the domestic limit, when that customer is periodically travelling in the Union. Such domestic limits should include any applicable fair use policy as regards domestic usage of the tariff plan.

(13) 1) Under certain domestic tariff plans, described hereafter as open data bundles, the data consumption may be unlimited or may provide data volumes at a low implicit domestic unit price relative to the regulated maximum wholesale roaming charge referred to in Article 12 of Regulation (EU) 531/2012. In the absence of any exceptional volume safeguard specific to such open data bundles, such tariff plans are

more likely than other tariff plans to be subject to organised resale to persons not residing in or having stable links entailing frequent and substantial presence in the Member State of the roaming provider. Moreover, such anomalous or abusive use of open data bundles while roaming may lead to the disappearance of such tariff plans in domestic markets, or to the restriction of roaming with such tariff plans, to the detriment of domestic users, and contrary to the objective of Regulation (EU) No 531/2012. This risk is considerably less acute for voice calls and SMS services as such services are subject to greater physical or temporal constraints, and actual usage patterns have been stable or declining over the last years. This is without prejudice to the right of operators to take measures to tackle highly atypical use patterns of voice or SMS roaming services arising from fraudulent activities. While it is necessary to provide for additional safeguards against such increased risks of abusive usage of regulated retail roaming data services at the applicable domestic retail price under open data bundles, the domestic customer periodically travelling in the Union should nevertheless be able to consume retail volumes of such services equivalent to twice the volumes that can be bought at the wholesale roaming data cap by a monetary amount equal to the overall retail domestic price, excluding VAT, of the mobile services component of the domestic tariff plan for the entire billing period in question. This represents a volume that is consistent with that domestic tariff plan, as it adapts to the domestic retail price of the tariff plan in question, and may therefore be applied in the case of open data bundles, including when bundled with other mobile retail services. The application of a multiplier of two adequately reflects the fact that operators often negotiate wholesale data roaming prices below the applicable caps, and that customers often do not consume the entire data allowance provided under their tariff plan. In this regard, customer transparency will be assured through compliance with the provisions of Regulation (EU) No 531/2012, according to which the roaming provider shall send a notification to the roaming customer when the applicable fair use volume of regulated data roaming services is fully consumed, indicating the surcharge that will be applied to any additional consumption of regulated roaming data services by the roaming customer.

(14) In order to address the risk that pre-paid subscriptions, which do not entail a long-term commitment, are used for permanent roaming purposes only, the roaming provider should be entitled, in the alternative to requiring the provision of evidence of residence or of stable links entailing frequent and substantial presence on the territory of the Member State of that roaming provider to limit the usage of regulated retail roaming data services at the applicable domestic retail price with a pre-paid subscription to the volumes that can be bought at the wholesale roaming data cap by the remaining monetary amount, excluding VAT, available on that pre-paid subscription at the time of the roaming consumption.

(15) The roaming provider should be able to take measures to detect and prevent abusive or anomalous usage of regulated retail roaming services at domestic prices, for purposes other than periodic travel. At the same time, roaming customers should be protected from any measure that may impinge in any manner on their ability to use regulated retail roaming services at domestic prices while periodically travelling abroad in the Union. Measures to detect and prevent abusive or anomalous usage of regulated retail roaming services at domestic prices should be simple and transparent, and should minimise administrative burden for roaming customers as well as excessive and unnecessary alerts. In line with the requirement of residence or stable links entailing frequent and substantial presence in the country of the roaming provider, the indicators substantiating the likelihood of abusive or anomalous usage should be based on

objective indicators linked to traffic patterns showing the lack of prevailing domestic presence of the customer in the country of the roaming provider or of prevailing domestic use of the mobile domestic services. By definition, such objective indicators need to be established over a certain period of time. Such a period of time should be sufficiently long, at least four months, to enable roaming customers to consume retail roaming services at domestic prices while engaging in foreseeable forms of periodic travel in the Union. Indicators of presence in the country of the roaming provider should not be negatively affected by inadvertent roaming in border regions. In this regard, the situation of both inadvertent roamers and of frontier workers should be taken into account by considering that a log-on to the roaming provider's network at any point in a given day indicates a day of domestic presence for the purposes of applying the objective indicators. In line with Regulation (EU) No 531/2012, roaming providers should also provide adequate information in order to empower their customers to actively prevent instances of inadvertent roaming. Presence and consumption outside the Union should not negatively affect the ability of the roaming customer to benefit from roam-like-at-home in the Union, as they cannot be considered as indicators of risk that the customer is availing of roaming at the applicable domestic retail price in the Member State of the roaming provider for purposes other than periodic travel in the Union. In this regard, such presence and consumption should be counted as domestic for the purposes of applying the objective indicators. The roaming provider may also rely on other clear evidence of abusive or anomalous usage of regulated retail roaming services at domestic prices such as a subscription being hardly used in the Member State of the roaming provider but mostly while roaming, or several subscriptions being used by the same customer in sequence while roaming.

(16) In accordance with the provisions of Regulation (EU) No 531/2012 safeguarding transparency in the use of roaming services and in line with the rules on contracts in the electronic communications sector, contractual clauses providing for a fair use policy should be clearly communicated to customers before they become applicable. Fair use policies applied by a roaming provider in accordance with this Regulation should be notified by the roaming provider to the national regulatory authority.

(17) Processing of traffic and location data is subject to the provisions of Directive 2002/58/EC. In particular, Article 6 enables the roaming provider to process traffic data necessary for the purposes of subscriber billing or interconnection payments. The application of measures by the roaming provider to detect and prevent abusive or anomalous usage of regulated retail roaming services at domestic prices should not lead to the storage and automated processing of personally identifiable customer data, including location and traffic data, that is unrelated or disproportionate to the purpose of detecting and preventing abusive or anomalous usage.

(18) In particular, the roaming provider should be able to detect and prevent that, in violation of contract conditions at wholesale or retail level, third parties exploit the 'roam-like-at-home traffic' for price arbitrage in order to gain an economic advantage through sales to customers which do not normally reside or have other stable links with the Member State of the roaming provider. Where the operator establishes, with objective and substantiated evidence, such a systematic abusive activity, the operator should notify to the national regulatory authority the evidence characterising the systematic abuse and the measures taken to ensure compliance with all conditions of the underlying contract no later than when the measure is taken.

(19) In specific cases, where the operator has substantiated evidence of a given roaming customer's usage patterns showing a likelihood of abusive or anomalous consumption of regulated retail roaming services at domestic price levels for purposes other than periodic travelling, despite the documentary evidence of residence or other stable links provided by that customer, it should first alert the customer to the risk of triggering roaming surcharges. The objective criteria which would serve as indicators substantiating the likelihood of abusive or anomalous usage should be spelled out in detail in advance in the contract.

(20) The possibility for the roaming provider to apply surcharges is without prejudice to any proportionate measures that can be taken, in accordance with national law in compliance with Union law, in case the customer has actively provided inaccurate information, in order to ensure compliance with all conditions of the underlying contract.

(21) Roaming providers which apply a fair use policy should put in place transparent, simple and efficient procedures to address complaints of customers relating to the application of that policy. Pursuant to Article 17(2) of Regulation (EU) No 531/2012, roaming customers should in any event have access to the competent out-of-court dispute resolution body, which shall settle fairly and promptly unresolved disputes between customers and roaming providers arising from the application of fair use policy in accordance with Article 34 of Directive 2002/22/EC[2].

(22) In accordance with Regulation (EU) No 531/2012, the national regulatory authorities have to strictly monitor and supervise the application of the fair use policy in order to ensure that any fair use policy applied by domestic providers does not impair the availability of 'roam-like-at-home' for the customer. If the national regulatory authority finds that a breach of the obligations set out in the Roaming Regulation has occurred, the national authority has the power to require the immediate cessation of such a breach.

(23) This Regulation should be without prejudice to existing rights and obligations under Union law, or under national law in compliance with Union law. This includes in particular the right of end users to avail themselves of mobile electronic communications networks and services in any Member State irrespective of their nationality or place of residence in the Union; any national rules requiring proof of identity or other documentary evidence in order to acquire a SIM card or otherwise subscribe to such networks or services; any national measures regarding continuity of service or of pre-paid credit with a given number or SIM card; and the right of providers of electronic communications services to apply adequate measures in compliance with national law in order to combat fraud.

(24) As roaming usage patterns vary over the course of a year, applications for authorisation to apply a roaming surcharge filed by a roaming provider pursuant to Article 6c(2) of Regulation (EU) No 531/2012 in order to ensure the sustainability of its domestic charging model should be assessed on the basis of traffic data covering at least 12 months. In order to calculate the volume of traffic over the year, the roaming provider should be allowed to show traffic projections. These projections should be

[2] 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 Service Directive), OJ L 108, 24.04.2002, p.51, as amended by Directive 2009/136/EC, OJ L 337, 18.12.2009, p 11.

based on actual data such as actual roaming usage data, extrapolations of actual domestic usage to roaming usage, extrapolations of actual roaming usage of a significant subset of roaming customers using ‘roam-like-at-home’ tariff plans to all roaming customers under the 'roam-like-at-home' rules, in accordance with Article 6a of Regulation (EU) No 531/2012. When reviewing the applications for a sustainability derogation by different applicants, national regulatory authorities should ensure that the assumptions used by each of these to derive projected volumes are consistent, after taking due account of relevant differences in commercial positioning and customer bases.

(25) Any cost and revenue data supporting the application for authorisations to apply a roaming surcharge filed by a roaming provider pursuant to Article 6c(2) of Regulation (EU) No 531/2012 in order to ensure the sustainability of its domestic charging model should be based on financial accounts which may be adjusted to traffic volume projections. Deviations from cost projections based on financial accounts should be allowed only if supported by proof of financial commitments already entered into at the time of the application.

(26) A harmonised methodology should be provided for determining the costs and revenues of providing regulated retail roaming services, with a view to ensuring consistent assessment of applications for authorisation to apply a surcharge filed by a roaming provider pursuant to Article 6c(2) of Regulation (EU) No 531/2012 in order to ensure the sustainability of its domestic charging model.

(27) The provision of regulated retail roaming services entails two general categories of costs: the cost of purchasing wholesale roaming access from visited networks for unbalanced traffic, and other roaming-specific costs. In accordance with Regulation (EU) No 531/2012, the cost of purchasing wholesale roaming access from visited networks for unbalanced traffic is covered by the effective wholesale roaming charges applied to the volumes by which the roaming provider’s outbound roaming traffic exceeds its inbound roaming traffic. In the case of roaming providers that, domestically, purchase wholesale access from another roaming provider (such as Mobile Virtual Network Operators), the cost of wholesale roaming access for the former may be higher than for the latter, when the domestic host network operator charges the roaming provider purchasing domestic wholesale access a higher wholesale roaming access price than that secured from visited network operators for itself and/or the provision of related services. Such high wholesale roaming access cost may make roaming providers purchasing domestic wholesale access more likely to seek an authorisation to apply a roaming surcharge and national regulatory authorities should have due regard to this aspect when reviewing such applications.

(28) Other roaming-specific costs of providing regulated retail roaming services are common to the provision of roaming services within the Union and in non-EU countries and some are also common to both wholesale and retail provision of roaming services. For the purposes of an application for authorisation to apply a roaming surcharge filed by a roaming provider pursuant to Article 6c(2) of Regulation (EU) No 531/2012 in order to ensure the sustainability of its domestic charging model, those common costs should be allocated to the provision of retail roaming services within the Union and, in the case of those common to retail and wholesale provision of roaming services, in accordance with the general ratio of inbound and outbound roaming revenues.

(29) The costs of providing regulated retail roaming services could also be calculated as including a proportion of joint and common costs incurred for the provision of mobile retail services in general, provided that the calculation reflects the ratio used for the allocation to such services of revenues from the provision of all other mobile retail services.

(30) In determining the revenues from the provision of regulated retail roaming services, the application for authorisation to apply a surcharge filed by a roaming provider pursuant to Article 6c(2) of Regulation (EU) No 531/2012 in order to ensure the sustainability of its domestic charging model should take full account of all retail revenues directly billed for the provision of mobile retail services originated in a visited Member State, such as revenues for traffic in excess of volumes under any fair use policy or from alternative regulated roaming services, as well as any other per-unit charge or other payment triggered by the use of mobile retail services in a visited Member State.

(31) As regulated retail roaming services are provided under applicable domestic conditions, they should be seen as generating some of the revenue from fixed periodic charges for the provision of domestic mobile retail services. They should therefore be taken into account when assessing the application for authorisation to apply a roaming surcharge filed by a roaming provider pursuant to Article 6c(2) of Regulation (EU) No 531/2012 in order to ensure the sustainability of its domestic charging model in accordance with the methodology set out in this Regulation. For that purpose revenues from each mobile retail service should be allocated on the basis of a key reflecting the ratio between traffic of various mobile services, as weighted in accordance with the ratio between per-unit average wholesale roaming charges.

(32) To be regarded as having the effect of undermining the sustainability of the operator's domestic charging model, any roaming retail net margin resulting from the deduction of the costs of providing regulated retail roaming services from the corresponding revenues should be negative at least by an amount that generates a risk of an appreciable effect on domestic price developments. In particular, to be regarded as giving rise to such a risk, the negative roaming retail net margin should represent at least an appreciable proportion of overall earnings, before interest tax depreciation and amortisation, from the provision of other mobile services.

(33) Even where the roaming retail net margin represents an appreciable proportion of the overall margin for the provision of other mobile services, specific circumstances, such as the level of competition in the domestic market, or the specific characteristics of the applicant could still rule out a risk of an appreciable effect on domestic price developments.

(34) In its application for authorisation to apply a roaming surcharge filed by a roaming provider pursuant to Article 6c(2) of Regulation (EU) No 531/ 2012 in order to ensure the sustainability of its domestic charging model, the roaming provider should estimate the losses due to the provision of 'roam-like-at-home' and the corresponding arrangements for applying the surcharge needed to recoup these, having regard to applicable maximum wholesale charges.

(35) It should be possible for the national regulatory authorities to grant an authorisation to apply a roaming surcharge on the first day of application of abolition of retail roaming surcharges in the Union in accordance with in Regulation (EU) No 531/2012. For that purpose, exchanges between the roaming provider considering such an application and

the national regulatory authority, as well as the provision of information and relevant documentation in this regard, may be envisaged before that date.

(36) In accordance with Regulation (EU) No 531/2012, the authorisation to apply a roaming surcharge should be granted by a national regulatory authority for a period of 12 months. In order to renew that authorisation, the roaming provider should update the information and submit it to the national regulatory authority every 12 months in line with Article 6c(2) of Regulation (EU) No 531/2012.

(37) In view of national regulatory authorities' obligations to supervise strictly the application of fair use policy and the measures on the sustainability of the abolition of retail roaming surcharges, as well as to report annually to the Commission on the application of the relevant provisions, this Regulation should specify the minimum information that they should gather and transmit to the Commission to enable it to monitor its application.

(38) Pursuant to Regulation (EU) No 531/2012, the Commission is to periodically review this implementing act in the light of market developments.

(39) The Communications Committee has not delivered an opinion.

(40) This Regulation respects fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union. Accordingly, this Regulation should be interpreted and applied in accordance with those rights and principles, in particular the right to respect for private and family life, the right to protection of personal data, the freedom of expression and the freedom to conduct a business. Any processing of personal data under this Regulation should respect fundamental rights, including the right to respect for private and family life and the right to protection of personal data under Articles 7 and 8 of the Charter of Fundamental Rights of the European Union and must be in compliance with Directive 95/46/EC[3], Directive 2002/58/EC[4] and Regulation (EU) No 2016/679[5]. In particular, service providers must ensure that any processing of personal data under this Regulation must be necessary and proportionate in order to achieve the relevant purpose.

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[3] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p. 31.

[4] 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 L 201, 31.07.2002, p. 37, as amended by Directive 2006/24/EC, OJ L 105, 13.4.2006, p. 54 and Directive 2009/136/EC, OJ L 337, 18.12.2009, p. 11.

[5] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1.

HAS ADOPTED THIS REGULATION:

Section I
General provisions

Article 1
Subject matter and scope

1. This Regulation lays down detailed rules to ensure the consistent implementation of a fair use policy that roaming providers may apply to the consumption of regulated retail roaming services provided at the applicable domestic retail price in accordance with Article 6b of Regulation (EU) No 531/2012.

2. It also lays down detailed rules on:

   (a) roaming providers' applications for authorisation to apply a roaming surcharge filed pursuant to Article 6c(2) of Regulation (EU) No 531/2012 in order to ensure the sustainability of their domestic charging model;

   (b) the methodology to be applied by national regulatory authorities in assessing whether the roaming provider has established that it is unable to recover its costs of providing regulated roaming services, with the effect that the sustainability of its domestic charging model would be undermined.

Article 2
Definitions

1. For the purposes of this Regulation, the definitions in Regulation (EU) No 531/2012 apply.

2. The following definitions also apply:

   (a) 'stable links' with a Member State means presence on the territory of the Member State arising from a full-time and durable employment relationship, including that of frontier workers; from durable contractual relations entailing a similar degree of physical presence of a self-employed person; from participation in full-time recurring courses of study; or from other situations, such as those of posted workers or retired persons, whenever they involve an analogous level of territorial presence;

   (b) 'mobile retail services' means public mobile communications services provided to end-users, including voice, SMS and data services;

   (c) 'open data bundle' means a tariff plan for the provision of one or more mobile retail services which does not limit the volume of mobile data retail services included against the payment of a fixed periodic fee, or for which the domestic unit price of mobile data retail services, derived by dividing the overall domestic retail price, excluding VAT, for mobile services corresponding to the entire billing period by the total volume of mobile data retail services available domestically, is lower than the regulated maximum wholesale roaming charge referred to in Article 12 of Regulation (EU) No 531/2012;

   (d) 'pre-paid tariff plan' means a tariff plan under which mobile retail services are provided upon deduction of credit made available by the customer to the

provider on a per-unit basis, in advance of consumption, and from which a customer may withdraw without penalty upon exhaustion or expiry of credit;

(e) 'visited Member State' means a Member State other than that of the roaming customer's domestic provider;

(f) 'mobile services margin' means earnings, before interest tax depreciation and amortisation, from the sale of mobile services other than retail roaming services provided within the Union, thereby excluding costs and revenues from retail roaming services;

(g) 'group' means a parent undertaking and all its subsidiary undertakings subject to its control within the meaning of Council Regulation (EC) No 139/2004[6].

Section II
Fair use policy

Article 3
Basic principle

1. A roaming provider shall provide regulated retail roaming services at domestic price to its roaming customers who are normally resident in or have stable links entailing a frequent and substantial presence in the Member State of that roaming provider while they are periodically travelling in the Union.

2. Any fair use policy applied by a roaming provider in order to prevent abusive or anomalous usage of regulated retail roaming services shall be subject to the conditions set out in Articles 4 and 5 and shall ensure that all such roaming customers have access to regulated retail roaming services at domestic price during such periodic travel in the Union under the same conditions as if such services were consumed domestically.

Article 4
Fair use

1. For the purposes of any fair use policy the roaming provider may request from its roaming customers to provide proof of normal residence in the Member State of the roaming provider or of other stable links with that Member State entailing a frequent and substantial presence on its territory.

2. Without prejudice to any applicable domestic volume limit, in the case of an open data bundle, the roaming customer shall be able to consume when periodically travelling in the Union a volume of data roaming retail services at the domestic retail price equivalent to at least twice the volume obtained by dividing the overall domestic retail price of that open data bundle, excluding VAT, corresponding to the entire billing period by the regulated maximum wholesale roaming charge referred to in Article 12 of Regulation (EU) No 531/2012.

   In the event of bundled sale of mobile retail services with other services or terminals, the overall domestic retail price of a data bundle shall be determined, for the purposes

[6] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1)

of Article 2(2)(c) and of this paragraph, by taking into account the price applied to the separate sale of the mobile retail services component of the bundle, excluding VAT, if available, or the price for the sale of such services with the same characteristics on a stand-alone basis.

3. In the case of pre-paid tariff plans, as an alternative to the fair use policy requirement in paragraph 1, the roaming provider may limit the consumption of data roaming retail services within the Union at the domestic retail price to volumes equivalent to at least the volume obtained by dividing the overall amount, excluding VAT, of the remaining credit available and already paid by the customer to the provider, at the moment of commencing roaming, by the regulated maximum wholesale roaming charge referred to in Article 12 of Regulation (EU) No 531/2012.

4. In the context of the processing of traffic data according to Article 6 of Directive 2002/58/EC[7], in order to prevent abusive or anomalous usage of regulated retail roaming services provided at the applicable domestic retail price, the roaming provider may apply fair, reasonable and proportionate control mechanisms based on objective indicators related to the risk of abusive or anomalous use beyond periodic travelling in the Union.

The objective indicators may include measures to establish whether customers have prevailing domestic consumption over roaming consumption or prevailing domestic presence of the customer over presence in other Member States of the Union.

In order to ensure that roaming customers engaged in periodic travel are not subjected to unnecessary or excessive alerts pursuant to Article 5(4), roaming providers which apply such measures to establish a risk of abusive or anomalous use of roaming services shall observe such indicators of presence and consumption cumulatively and for a period of time of at least four months.

The roaming provider shall specify in contracts with roaming customers to which mobile retail service or services the consumption indicator relates and the minimum duration of the observation period.

Either prevailing domestic consumption or prevailing domestic presence of the roaming customer during the defined observation period shall be considered as a proof of non-abusive and non-anomalous usage of regulated retail roaming services.

For the purpose of the second, third and fifth subparagraph, any day when a roaming customer has logged on to the domestic network shall be counted as a day of domestic presence of that customer.

Other objective indicators of a risk of abusive or anomalous use of regulated retail roaming services provided at the applicable domestic retail price may only include

(a) long inactivity of a given SIM card associated with use mostly, if not exclusively, while roaming;

[7] 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 L 201, 31.07.2002, p. 37, as amended by Directive 2006/24/EC, OJ L 105, 13.4.2006, p. 54 and Directive 2009/136/EC, OJ L 337, 18.12.2009, p. 11.

(b) subscription and sequential use of multiple SIM cards by the same customer while roaming.

5. Where the roaming provider establishes, with objective and substantiated evidence, that a number of SIM cards have been the object of organised resale to persons not effectively residing in or having stable links entailing frequent and substantial presence in the Member State of that retail roaming provider in order to enable consumption of regulated retail roaming services provided at the applicable domestic retail price other than for the purpose of periodic travel, the roaming provider may take immediate proportionate measures in order to ensure compliance with all conditions of the underlying contract.

6. The roaming provider shall comply with Directive 2002/58/EC, Directive 95/46/EC[8] and their national implementing measures, and, Regulation (EU) No 2016/679[9] when acting pursuant to this section.

7. This Regulation does not apply to any fair use policies defined in the contractual terms of alternative roaming tariffs provided in accordance with Article 6e(3) of Regulation (EU) No 531/2012.

Article 5
Transparency and supervision of fair use policies

1. When a roaming provider applies a fair use policy, it shall include in contracts with roaming customers all the terms and conditions associated with that policy, including any control mechanism applied in accordance with Article 4(4). As part of the fair use policy, the roaming provider shall put in place transparent, simple and efficient procedures to address complaints of customers relating to the application of a fair use policy. This is without prejudice to the rights of the roaming customer, pursuant to Article 17(2) of Regulation (EU) No 531/2012, to avail of transparent, simple, fair and prompt out-of-court dispute resolution procedures established in the Member State of the roaming provider in accordance with Article 34 of Directive 2002/22/EC. Such complaint mechanism and dispute resolution procedures shall permit the roaming customer to provide evidence that it is not using the regulated roaming retail services for other purposes than periodic travel, in response to an alert in accordance with paragraph (3), first sub-paragraph.

2. Fair use policies in accordance with this Regulation shall be notified by the roaming provider to the national regulatory authority.

3. Where there is objective and substantiated evidence, based on the objective indicators referred to in Article 4(4), indicating a risk of abusive or anomalous use of regulated roaming retail services within the Union at the domestic retail price by a given customer, the roaming provider shall alert the customer about the detected behaviour pattern indicating such a risk before applying any surcharge pursuant to Article 6e of Regulation (EU) No 531/2012.

   In cases where such risk results from non-fulfilment of both the prevailing domestic consumption and the prevailing domestic presence criteria over the defined

[8] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p. 31.

[9] OJ L 119, 4.5.2016, p. 1.

observation period, referred to in the fifth sub-paragraph of Article 4(4), additional indications of risk arising from the overall non-domestic presence or usage of the roaming customer shall be taken into account for the purposes of resolving any subsequent complaint as provided in paragraph (1) or dispute resolution procedure pursuant to Article 17(2) of Regulation (EU) No 531/2012, relative to the applicability of a surcharge.

This paragraph shall apply irrespective of the provision by the roaming customer of documentary evidence of residence or other stable links entailing frequent and substantial presence in the Member State of the roaming provider pursuant to Article 4(1).

4. When alerting the roaming customer pursuant to paragraph 3, the roaming provider shall inform the customer that, in the absence of a change in the usage pattern within a period which cannot be shorter than two weeks, demonstrating actual domestic consumption or presence, a surcharge pursuant to Article 6e of Regulation (EU) No 531/2012 may be applied for any further use of regulated retail roaming services with the SIM card in question after the date of such alert.

5. The roaming provider shall cease to apply the surcharge as soon as the customer's usage no longer indicates a risk of abusive or anomalous use of the regulated retail roaming services based on the objective indicators referred to in Article 4(4).

6. Where a roaming provider establishes that SIM cards have been the object of organised resale to persons who neither normally reside in nor have stable links entailing frequent and substantial presence in the Member State of the retail roaming provider to enable consumption of regulated retail roaming services other than for the purpose of periodic travel outside that Member State in accordance with Article 4(3), the operator shall notify to the national regulatory authority the evidence characterising the systematic abuse in question and the measure taken to ensure compliance with all conditions of the underlying contract at the latest at the same time as such measure is taken.

Section III

Application and methodology for assessing the sustainability of the abolition of retail roaming charges

Article 6

Data supporting the application for authorisation to apply a roaming surcharge filed by a roaming provider pursuant to Article 6c(2) of Regulation (EU) No 531/2012 in order to ensure the sustainability of its domestic charging model

1. Applications for authorisation to apply a roaming surcharge filed by a roaming provider pursuant to Article 6c(2) of Regulation (EU) No 531/2012 in order to ensure the sustainability of its domestic charging model ("application") shall be assessed on the basis of data on the overall volumes of regulated retail roaming services provided by the applicant roaming provider projected over a period of 12 months starting at the earliest on 15 June 2017. For the first application, these volume projections shall be estimated using one or a combination of the following options:

   (a) actual volumes of regulated retail roaming services provided by the applicant at the applicable regulated retail roaming price prior to 15 June 2017;

(b) projected volumes of regulated retail roaming services after 15 June 2017, where the projected volumes of regulated retail roaming services over the period in question are estimated based on actual domestic retail consumption of mobile services and time spent abroad in the Union by the roaming customers of the applicant;

(c) projected volumes of regulated retail roaming services after 15 June 2017, where the volumes of regulated retail roaming services are estimated based on the proportional change in the volumes of regulated retail roaming services experienced in the applicant's tariff plans representing a substantial part of the customer base on which the prices of regulated retail roaming services were set by the applicant at the domestic level for a period of at least 30 days, in accordance with the methodology set out in Annex I.

In the event of updates to the application being submitted pursuant to Article 6c(2) of Regulation (EU) No 531/2012, the projected overall volumes of regulated roaming services shall be updated on the basis of the actual average pattern of consumption of domestic mobile services multiplied by the observed number of roaming customers and the time they have spent in visited Member States in the previous 12 months.

2. Any data on the applicant’s costs and revenues shall be based on financial accounts, which shall be made available to the national regulatory authority, and may be adjusted according to volume estimates pursuant to paragraph 1. Where costs are projected, deviations from figures resulting from past financial accounts shall be considered only if supported by proof of financial commitments for the period covered by the projections.

3. The applicant shall provide all necessary data used to determine the mobile services margin and the overall actual and projected costs and revenues of providing regulated roaming services over the relevant period.

Article 7

Determination of roaming-specific costs for the provision of regulated retail roaming services

1. For the purposes of establishing that the applicant is unable to recover its costs, with the effect that the sustainability of its domestic charging system would be undermined, only the following roaming-specific costs shall be taken into consideration, if substantiated in the application for authorisation to apply a roaming surcharge:

(a) the costs for the purchase of wholesale roaming access;

(b) the roaming-specific retail costs.

2. With regard to the costs incurred for the purchase of regulated wholesale roaming services, only the amount by which the applicant’s overall payments to counterparts providing such services in the Union is expected to exceed the overall sums due to it for the provision of the same services to other roaming providers in the Union shall be taken into account. As regards the sums due to the roaming provider for the provision of regulated wholesale roaming services, the roaming provider shall assume projected volumes of these wholesale roaming services that are consistent with the assumption underlying its projected volumes in Article 6(1).

3. With regard to the roaming-specific retail costs, only the following costs shall be taken into account, if substantiated in the application:

(a) the costs of operating and managing roaming activities, including all business intelligence systems and software dedicated to roaming operation and management;

(b) data-clearing and payment costs, including both data-clearing and financial clearing costs;

(c) contract negotiation and agreement costs, including external fees and use of internal resources;

(d) costs sustained in order to comply with the requirements for the provision of regulated retail roaming services laid down in Articles 14 and 15 of Regulation (EU) No 531/2012, taking into account the applicable fair use policy adopted by the roaming provider.

4. Costs referred to in points (a), (b) and (c) of paragraph 3 shall be taken into account only in proportion to the ratio of overall traffic volume of the applicant's regulated retail roaming services to the overall retail outbound and wholesale inbound traffic of its roaming services, in accordance with the methodology set out in Annex II, points (1) and (2), and in proportion to the ratio of overall amount of traffic of its retail roaming services within the Union to the overall traffic of its retail roaming services within and outside the Union, in accordance with the methodology set out in Annex II, points (1) and (3).

5. The costs referred to in point (d) of paragraph 3 shall be taken into account only in proportion to the ratio of overall traffic volume of the applicant's retail roaming services within the Union to the overall traffic of its retail roaming services within and outside the Union, in accordance with the methodology set out in Annex II, points (1) and (3).

Article 8

Allocation of retail joint and common costs to the provision of regulated retail roaming services

1. In addition to the costs determined pursuant to Article 7, a proportion of joint and common costs incurred for the provision of mobile retail services in general may be included in the application for authorisation to apply a roaming surcharge. Only the following costs shall be taken into account, if substantiated in the application:

(a) billing and collection costs, including all costs associated with processing, calculating, producing and notifying the actual customer bill;

(b) sales and distribution costs, including the costs of operating shops and other distribution channels for the sale of mobile retail services;

(c) customer care costs, including the cost of operating all customer care services available to the end-user;

(d) bad debt management costs, including costs incurred in writing off customers' unredeemable debts and collecting bad debts;

(e) marketing costs, including all expenses for advertising mobile services.

2. The costs referred to in paragraph 1, if substantiated in the application, shall be taken into account only in proportion to the ratio of overall traffic of the applicant's retail roaming services within the Union to the overall retail traffic of all mobile retail services, obtained as a weighted average of that ratio per mobile service, with weights

reflecting the respective average wholesale roaming prices paid by the applicant in accordance with the methodology set out in Annex II, points (1) and (4).

Article 9

Determination of revenues from the provision of regulated retail roaming services

1. For the purposes of establishing that the applicant is unable to recover its costs, with the effect that the sustainability of its domestic charging system would be undermined, only the following revenues shall be taken into account and included in the application for authorisation to apply a roaming surcharge:

   (a) revenues deriving directly from traffic of mobile retail services originated in a visited Member State;

   (b) a proportion of overall revenues from the sale of mobile retail services based on fixed periodic charges.

2. The revenues referred to in point (a) of paragraph 1 shall include:

   (a) any retail charge levied pursuant to Article 6e of Regulation (EU) No 531/2012 for traffic exceeding any fair use policy applied by the roaming provider;

   (b) any revenues from alternative regulated roaming services pursuant to Article 6e(3) of Regulation (EU) No 531/2012;

   (c) any domestic retail price billed on a per-unit basis or in excess of fixed periodic charges for the provision of mobile retail services and triggered by the use of mobile retail services in a visited Member State.

3. For the purposes of determining the revenues referred to in point (b) of paragraph 1, in the event of bundled sale of mobile retail services with other services or terminals, only revenues linked to the sale of mobile retail services shall be considered. Those revenues shall be determined by reference to the price applied to the separate sale of each component of the bundle, if available, or to the sale of such services with the same characteristics on a stand-alone basis.

4. In order to determine the proportion of overall revenues from the sale of mobile retail services linked to the provision of regulated retail roaming services, the methodology set out in Annex II, points (1) and (5) shall be applied.

Article 10

Assessment of applications for authorisation to apply a roaming surcharge filed by a roaming provider pursuant to Article 6c(2) of Regulation (EU) No 531/2012 in order to ensure the sustainability of its domestic charging model

1. When assessing an application for authorisation to apply a roaming surcharge filed by a roaming provider pursuant to Article 6c(2) of Regulation (EU) No 531/2012 in order to ensure the sustainability of its domestic charging model, the national regulatory authority may conclude that the applicant is unable to recover its costs of providing regulated retail roaming services, with the effect that the sustainability of its domestic charging model would be undermined, only where the negative roaming retail net margin of the applicant is equivalent to 3% or more of its mobile services margin.

   The roaming retail net margin shall be the amount remaining after the costs of providing regulated retail roaming services are deducted from the revenues from providing such services, as determined in accordance with this Regulation. In order to

determine it, the national regulatory authority shall review the data provided in the application to ensure compliance with the methodology for determining costs and revenues, as laid down in Articles 7, 8 and 9.

2. Where the absolute value of the roaming retail net margin is equivalent to 3% or more of the mobile services margin, the national regulatory authority shall nevertheless refuse the surcharge where it can establish that specific circumstances make it unlikely that the sustainability of the domestic charging model would be undermined. Such circumstances include situations in which:

   (a) the applicant is part of a group and there is evidence of internal transfer pricing in favour of the other subsidiaries of the group within the Union, in particular in view of substantive imbalance of wholesale roaming charges applied within the group;

   (b) the degree of competition on domestic markets means that there is capacity to absorb reduced margins;

   (c) the application of a more restrictive fair use policy, still in compliance with Articles 3 and 4, would reduce the roaming retail net margin to a proportion of less than 3%.

3. In the exceptional circumstances where an operator has a negative mobile services margin and a negative roaming retail net margin, the national regulatory authority shall authorise the application of a surcharge on regulated roaming services.

4. When authorising the surcharge on regulated roaming services, the final decision of the national regulatory authority shall identify the amount of the ascertained negative retail roaming margin that may be recovered through the application of a retail surcharge on roaming services provided within the Union. The surcharge shall be consistent with the roaming traffic assumptions underpinning the assessment of the application and be set in accordance with the principles set out in Article 8 of Directive 2002/21/EC of the European Parliament and of the Council[10].

Section IV
Final provisions

Article 11
Monitoring of fair use policy and applications for authorisation to apply a roaming surcharge filed by a roaming provider pursuant to Article 6c(2) of Regulation (EU) No 531/2012 in order to ensure the sustainability of its domestic charging model

In order to monitor the consistent application of Articles 6b and 6c of Regulation (EU) No 531/2012 and of this Regulation, and with a view to informing the Commission annually of applications pursuant to Article 6d(5) of Regulation (EU) No 531/2012, the national regulatory authorities shall regularly collect information concerning:

   (a) any action they take to supervise the application of Article 6b of Regulation (EU) No 531/2012 and the detailed rules laid down in this Regulation;

[10] 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 L 108, 24.4.2002, p. 33)

(b) the number of applications to apply a roaming surcharge filed, authorised and renewed in the course of the year pursuant to Article 6c(2) and (4) of Regulation (EU) No 531/2012;

(c) the extent of negative roaming retail net margins recognised in their decisions to authorise the roaming surcharge and the arrangements concerning a surcharge declared in the applications for authorisation to apply a roaming surcharge filed by a roaming provider pursuant to Article 6c(2) of Regulation (EU) No 531/2012 in order to ensure the sustainability of its domestic charging model.

Article 12
Review

Without prejudice to the possibility to conduct an earlier review in the light of initial implementation experience and of any significant changes in the factors mentioned in Article 6d(2) of Regulation No 531/2012, the Commission shall review this implementing act at the latest by June 2019, after having consulted BEREC.

Article 13
Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 15.12.2016

For the Commission
The President
Jean-Claude JUNCKER