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## PROPOSAL

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| From:            | Secretary-General of the European Commission,<br>signed by Mr Jordi AYET PUIGARNAU, Director  |
| date of receipt: | 15 June 2016  |
| To:              | Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of<br>the European Union  |
| No. Cion doc.:   | COM(2016) 399 final   |
| Subject:         | Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND<br>OF THE COUNCIL amending Regulation (EU) No 531/2012 as regards<br>rules for wholesale roaming markets |

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Delegations will find attached document COM(2016) 399 final.

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Encl.: COM(2016) 399 final



Brussels, 15.6.2016  
COM(2016) 399 final

2016/0185 (COD)

Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**  
**amending Regulation (EU) No 531/2012 as regards rules for wholesale roaming markets**

(Text with EEA relevance)

{SWD(2016) 201 final}

{SWD(2016) 202 final}

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

- **Reasons for and objectives of the proposal**

EU regulatory intervention on wholesale and retail roaming markets has been necessary for the last 10 years in order to improve the conditions for the functioning of the internal market for roaming services within the Union.<sup>1</sup>

In 2015, the European Parliament and the Council adopted Regulation (EU) 2015/2120,<sup>2</sup> which entered into force on 29 November 2015 and amended Regulation (EU) No 531/2012 (the Roaming Regulation)<sup>3</sup>.

Regulation (EU) 2015/2120 requires retail roaming surcharges to be abolished in the Union from 15 June 2017, subject to fair usage of roaming services and the possibility of applying a sustainability derogation mechanism of the abolition of retail roaming charges. These new rules for retail roaming services in the Union are referred to in this explanatory memorandum as the ‘roam-like-at-home’ (RLAH) rules.

While necessary, the regulation at retail level alone is not sufficient to implement RLAH. For the abolition of retail roaming surcharges to be sustainable throughout the Union and not to distort competitive conditions in domestic markets, national wholesale roaming markets need to be competitive and deliver wholesale roaming prices that enable operators to sustainably offer retail roaming services without any additional charges.

In this regard, the Commission has undertaken a review of the wholesale roaming market, with a view to assessing measures necessary to enable the abolition of retail roaming surcharges, in accordance with Article 19 (1) of the Roaming Regulation<sup>4</sup>.

This analysis of wholesale markets shows that a number of market failures still affect the functioning of these markets (such as their oligopolistic character, combined with the bilateral nature of roaming agreements and the lack of wholesale substitutes). This analysis also shows that the negotiating position of the net senders of roaming traffic, including the weaker market players on wholesale roaming markets, may in fact deteriorate under RLAH if countervailing measures are not applied. This could in turn distort the functioning of the home operators’ domestic markets.

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<sup>1</sup> See judgment in Case C-58/08, EU:C:2010:321.

<sup>2</sup> Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union

<sup>3</sup> 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.

<sup>4</sup> See for details the Report from the Commission to the European Parliament and the Council on the review of the wholesale roaming market [final reference] and the Commission Staff Working Document accompanying the Report from the Commission to the European Parliament and the the Council on the review of the wholesale roaming market. [final reference].

At the same time, any rules on the wholesale market should ensure that visited operators are able to recover the costs incurred in providing wholesale roaming services, including joint and common costs. This should preserve incentives to invest in visited networks and avoid any distortion in domestic competition in the visited markets caused by regulatory arbitrage by operators using roaming access remedies to compete in otherwise competitive domestic visited markets.

This initiative therefore aims to regulate the functioning of national wholesale roaming markets in order to abolish retail roaming surcharges by 15 June 2017 without distorting the domestic visited and home markets.

- **Consistency with existing policy provisions**

Abolishing retail roaming surcharges is an essential step towards ensuring that telecom rules support the establishment and functioning of a digital single market across the Union. This target was also stressed in the Digital Single Market Strategy set out by the Commission on 6 May 2015.<sup>5</sup> In particular, regulating the wholesale roaming market to establish RLAH in the Union will help achieve the policy objective of ensuring that well-functioning markets deliver access to high-performance wireless broadband infrastructure at affordable prices across the Union.

The co-legislators acknowledged the importance of this objective for the overall digital single market when the RLAH rules were adopted in 2015. However, given the interrelationship between the wholesale and retail roaming markets, the co-legislators made the application of RLAH subject to the adoption of the legislative measures to tackle the issues at wholesale level needed to enable the abolition of the retail roaming surcharges in the Union.

This proposal for a regulation is therefore meant to complete the rules on roaming, in particular with regard to wholesale roaming markets, and enable the application of RLAH rules from 15 June 2017. This is in line with the policy objectives underpinning the Roaming Regulation and the wider Digital Single Market Strategy.

In addition to the legislative measures proposed here, the establishment of RLAH will also be accompanied by implementing acts to be adopted by 15 December 2016 that will provide for detailed rules on the application of the fair use policy and the methodology for assessing the sustainability of the abolition of retail roaming surcharges.

- **Consistency with other Union policies**

The Digital Single Market Strategy notes that information and communication technology networks provide the backbone for digital products and services which have the potential to support all aspects of our lives and which drive Europe's economic development. Regulating wholesale roaming markets with a view to enabling the abolition of roaming surcharges therefore helps develop a strong, competitive and dynamic telecoms sector, and helps create the right conditions for developing advanced digital networks and services which support all sectors of the economy, including small and medium-sized enterprises.

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<sup>5</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — A Digital Single Market Strategy for Europe COM(2015) 192.

## 2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

EU regulatory intervention on wholesale roaming markets and on retail roaming markets has been necessary for the last 10 years, on the basis of Article 114 of the Treaty on the Functioning of the European Union (TFEU). Such intervention has aimed to improve the conditions for the functioning of the internal market for roaming services within the Union<sup>6</sup> because national regulatory authorities have acknowledged that they were unable to autonomously tackle this problem due to the cross-border nature of the international roaming market.<sup>7</sup> Following the adoption of Regulation (EU) 2015/2120, it is necessary to adopt appropriate legislative measures to ensure the proper functioning of the wholesale roaming markets. This will enable the provision of RLAH across the Union, as demonstrated by the review of the wholesale roaming market. Measures to regulate wholesale roaming markets pursuant to Article 114 TFEU are therefore also necessary to ensure the functioning of the internal market for roaming services, and in particular to ensure the sustainable provision of RLAH.

- **Subsidiarity**

A Union approach for regulating wholesale roaming markets would prevent individual Member States taking different approaches to dealing with the problem of high wholesale prices. These different approaches would create obstacles to the internal market because Union roaming services providers would be subject to varying regulatory conditions depending on whether they were wholesale roaming providers (as visited operators) or buyers of wholesale roaming services (as home operators), in spite of roaming retail rules being laid down in the Roaming Regulation.

A common approach at Union level is also needed because individual Member States may have insufficient incentives to regulate national wholesale markets in a way that takes into account the impact their rules may have on the possibility to provide RLAH in other Member States. An initiative at Union level would better take into account the general interest of all Member States. Failure to ensure consistent regulation of wholesale roaming markets at Union level could make it more difficult to provide RLAH, in view of the increased risk of inconsistencies between the wholesale costs incurred in other Member States and the retail revenues.

A common approach at EU level on the contrary could establish the necessary regulatory conditions and ensure that national wholesale markets support the objective of abolishing roaming surcharges in a sustainable way throughout the Union. Finally, a common approach will also take into account the interdependence between rules for retail and wholesale markets in ensuring the smooth functioning of Union roaming markets, as already emphasised by the Court.<sup>8</sup>

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<sup>6</sup> The use of this legal basis was also confirmed in the judgment in Case C-58/08, EU:C:2010:321, paragraph 48.

<sup>7</sup> See letter of December 2005 from the European Regulators Group to the Director-General of the Commission's Directorate General for Information Society.

<sup>8</sup> In the judgment in Case 58/08, the Court considered that wholesale regulation of roaming market is compliant with the subsidiarity principle in view of the fact that 'the interdependence of retail and wholesale charges for roaming services is considerable, so that any measure seeking to reduce retail

- **Proportionality**

The legislator is given broad discretion in ensuring its choices are proportionate. However, the Court clarified, in particular with regard to rules on roaming, that the legislator must base its choices on objective criteria.

In such a case, when assessing the burdens associated with various possible measures, it must be examined whether the objectives pursued are such as to justify even substantial negative economic consequences for certain operators.<sup>9</sup> Consequently, the proposed regulatory measures take into account two elements in accordance with the criteria laid down in Article 19 (1) of the Roaming Regulation, namely the need to ensure that visited operators are able to recover all costs, including joint and common costs, incurred in providing regulated wholesale roaming services and the need to prevent permanent roaming or anomalous or abusive use of wholesale roaming access for purposes other than the provision of regulated roaming services to roaming providers' customers while the latter are periodically travelling within the Union.

These specific requirements ensure that, in accordance with the proportionality principle, wholesale roaming rules only do what is necessary to achieve the general policy objective. They must not, for example, create negative economic consequences which are not justified in achieving the objective, such as requiring efficient operators to provide services below cost or imposing access rules which visited operators cannot limit to the provision of roaming services.

On the other hand, as highlighted by the Court, compliance with the proportionality principle does not preclude some operators possibly experiencing negative economic consequences in specific cases, such as a reduction in profits which are above the level which would be incurred in fully competitive markets for wholesale roaming activities or losses due to inefficient management of network costs. This is because in such cases these negative consequences are indeed justified and necessary in order to achieve the objective pursued.

- **Choice of instrument**

The proposed measures are meant to define directly applicable rules for the provision of wholesale roaming services, by amending the corresponding provisions laid down in the Roaming Regulation. For this reason, a regulation is proposed.

### **3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS.**

- **Ex-post evaluations/fitness checks of existing legislation**

The Commission has conducted a comprehensive review of the wholesale roaming market in the Union in view of the specific objectives laid down in the Roaming Regulation.

The review shows in particular that wholesale roaming markets do not always function properly. The impact of these market failures on the functioning of wholesale markets results in prices substantially above estimated costs, in particular for data. However, any competitive

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charges alone without affecting the level of costs for the wholesale supply of Community-wide roaming services would have been liable to disrupt the smooth functioning of the Community-wide roaming market' (paragraph 77).

<sup>9</sup> Judgment of the Court in case C-58/08, EU:C:2010:321, paragraph 53.

dynamics that may be observed on the wholesale roaming markets in the Union are essentially linked to existing wholesale roaming regulated charges. These capped charges are often the only ones available to operators with more limited bargaining power (smaller operators or mobile virtual network operators). The review also concludes that it is not possible to anticipate with certainty the impact of the future RLAH obligation, and in particular the expected increase of roaming traffic, on competition on national wholesale roaming markets. On the contrary, with persistent market failures affecting the wholesale roaming markets, the review report does not exclude the risk that, in the absence of countervailing measures, the position of a substantial number of market players would in fact deteriorate under RLAH.

- **Stakeholder consultations**

The Commission ran a public consultation on the review of national wholesale roaming markets from 29 November 2015 to 18 February 2016. The purpose of the consultation was to gather views on how well roaming markets function in the EU and on the current regulation of national wholesale roaming markets in the Union in the light of obligation provided in the Roaming Regulation to abolish retail roaming surcharges by 15 June 2017. A total of 97 replies were received (92 via the online questionnaire, 3 by email and 2 position papers) from 25 Member States and Norway.

Operators have differing perceptions of how well wholesale roaming markets are functioning. Certain long-standing incumbents and operators with a large footprint, and generally operators with large inbound roaming traffic, argue that there are some competitive dynamics, as shown by wholesale market charges often being below the current regulatory caps. Other operators, in particular smaller ones, mobile virtual network operators and operators with large outbound roaming traffic, argue that the prices available to them on the wholesale market are at or are close to the current caps and are substantially above costs. Views on the effect of RLAH on competition in the wholesale roaming markets are also split between these two groups of operators, the former arguing that RLAH will increase competition, the latter claiming the opposite.

National regulatory authorities and governments express views similar to those of the operators in their countries. Large inbound roaming countries consider that national wholesale roaming markets function well, while large outbound roaming countries take the opposite view. Finally, consumers and consumer associations are cautious in expressing views on wholesale roaming markets since they are not directly involved in these markets.

A large majority of respondents are of the view that EU-wide wholesale roaming charges caps valid in all Member States would be the most appropriate regulatory approach to enabling RLAH in 2017. However, because of different perceptions of how the wholesale roaming market functions, operators are divided on the most appropriate level of such caps to enable sustainable RLAH. Some support confirming current wholesale roaming charges caps while others are urging for a significant reduction in order to enable sustainable RLAH. Moreover, many operators noted the importance of the level of termination rates to roaming traffic in order to enable RLAH for voice calls.

- **Collection and use of expertise**

In order to gather the evidence needed for the review report, and in addition to the public consultation, in autumn 2015, the Commission and the Body of European Regulators for Electronic Communications (BEREC) collected a comprehensive body of data from

operators.<sup>10</sup> The Commission also requested an external study to estimate the cost of providing wholesale roaming services<sup>11</sup> and analysed the qualitative and quantitative data received on wholesale and retail roaming markets.<sup>12</sup>

- **Impact assessment**

The accompanying Impact Assessment SWD<sup>13</sup> was submitted to the Regulatory Scrutiny Board, which provided a positive opinion on 15 April 2016.

Four options were considered:

*Option 1 - no action at Union level* (baseline scenario). RLAH would not be applicable from 15 June 2017 and consumers would continue to pay retail roaming surcharges.

*Option 2 - set EU-wide wholesale roaming charges caps at the current level.* In this option the current wholesale roaming charges caps laid down in the Roaming Regulation (EUR 0.05 per minute of call made, EUR 0.02 per SMS, EUR 0.05 per MB) would be confirmed in a legislative act, such that RLAH would enter into force as from 15 June 2017.

*Option 3 - set EU-wide wholesale roaming charges caps at a lower level than today.* Under this option, legislation would reduce the current wholesale roaming charges caps to EUR 0.04 per minutes of call made, EUR 0,01 per SMS and EUR 0,0085 per MB and would also ensure that RLAH enters into force.

*Option 4 - set country-specific wholesale roaming charges caps.* This option would apply country-specific wholesale roaming charges caps equal to cost estimates in each Member States and based on a common cost model. It would equally enable RLAH from 15 June 2017.

In addition to the cap-based option among options 2 to 4, the Commission also analysed a complementary measure that would give the parties to a wholesale roaming agreement the possibility to negotiate a de-regulated pricing scheme, thus waiving the application of maximum unit-based wholesale roaming charges caps provided in the Roaming Regulation.

On the basis of the analysis carried out in the impact assessment, **option 3 is best suited to enabling sustainable RLAH in the Union**, including for operators with less bargaining power. It ensures that visited operators can recover their anticipated costs of providing wholesale roaming services and will keep investment incentives in the visited markets. The cap level under option 3 also leaves space for competition below the cap, allowing operators to derive economic advantages from scale, thus enabling them to negotiate lower tariffs.

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<sup>10</sup> The data collected were analysed in collaboration with the Joint Research Centre (JRC). JRC is the European Commission's in-house science service employing scientists to carry out research in order to provide independent, evidence-based scientific advice and support to EU policy. For further information, visit the JRC's website at: <https://ec.europa.eu/jrc/>.

<sup>11</sup> SMART 2015/006 'Assessment of the cost of providing wholesale roaming services in the EU', TERA Consultants.

<sup>12</sup> The analysis was developed by DG CONNECT in collaboration with the JRC's Competence Centre on Microeconomic Evaluation. For further information, visit the JRC's website at: <https://ec.europa.eu/jrc/>

<sup>13</sup> Commission Staff Working Document Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council on rules for wholesale roaming markets and amending Regulation (EU) No 531/2012 on roaming on public communications networks within the Union.



The analysis also shows that allowing the visited and visiting operators to agree together not to apply wholesale caps but to have an unregulated contract, e.g. capacity-based pricing or any other contractual form, would impact positively on the wholesale roaming market. This could therefore also be permitted as a complementary measure.

On the contrary, option 4 would not significantly improve the sustainability of RLAH at operator level compared to option 3, but would entail greater risks in terms of cost recovery at wholesale level and considerable implementation difficulties.

Finally, option 1 and, to a lesser extent, option 2 would not achieve the objective of ensuring RLAH across the Union. This is because option 1 would not ensure the abolition of retail roaming surcharges: in particular under option 1, the loss of consumer welfare would amount to EUR 1.4 billion. Nor would option 2 address the widespread unsustainability of RLAH for several operators (around 20 % of the sample analysed) and across several Member States (more than 20 % of Member States).

- **Fundamental rights**

The proposal's impact on fundamental rights, such as the freedom to conduct a business, has been analysed. In this regard, taking into account that the proposed caps aim to address a market failure and ensure cost recovery, they do not constitute a disproportionate measure in relation to the objective pursued or an intolerable interference impairing on the very substance of this freedom. The possibility to opt out is also meant to increase parties' freedom to conclude a wholesale agreement.

#### **4. BUDGETARY IMPLICATIONS**

The proposal does not have budgetary implications for the EU.

#### **5. OTHER ELEMENTS**

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The RLAH will become mandatory from June 2017, subject to the applicability on that date of the legislative act to be adopted following the present proposal. The Commission therefore proposes linking the reporting obligations to the entry into force of RLAH so that any new retail and wholesale rules have a similar period of application.

With regard to the content of the monitoring and evaluation exercise, the current review clause in Article 19(3) of the Roaming Regulation requires the Commission to assess the *'degree of competition in both the retail and wholesale roaming markets, in particular the competitive situation of small, independent or newly started operators, including the competition effects of commercial agreements and the degree of interconnection between operators'*.

This is therefore directly relevant when assessing the effects of the rules on wholesale roaming considered in the context of this initiative. Within this existing reporting obligation, the Commission proposes using the following indicators to assess the measures specific to this initiative:

- the number of sustainability requests;
  - total inbound and outbound roaming traffic volumes per quarter;
  - average wholesale prices and volumes for unbalanced and balanced traffic;
  - the number and main features of capacity-based wholesale contracts; and
  - the wholesale contractual measures adopted to tackle large-scale business activities based on permanent roaming or anomalous or abusive use of wholesale roaming access and their effective application.
- **Detailed explanation of the specific provisions of the proposal**

The proposed Regulation is composed of two articles, one including all the proposed amendments to the Roaming Regulation and another on entry into force.

Article 1 proposes the following amendments to the Roaming Regulation:

- Point 1 modifies Article 3 of Roaming Regulation by adding the possibility for the parties to a wholesale agreement to waive the application of maximum wholesale caps provided in Articles 7, 9 and 12 of the Roaming Regulation.
- Points 2 to 4 introduce amendments to the existing provisions setting the maximum average wholesale roaming charges for calls, SMS and data, and modify the applicable values. The amendments also ensure the consistency of the three amended Articles (Articles 7, 9 and 12).
- Point 5 introduces an amendment to Article 17, with a view to ensure consultation of BEREC in disputes concerning inputs necessary for the provision of regulated wholesale roaming services.
- Points 6 to 7 introduce amendments to the review clause in order to ensure consistency following the entry into force of RLAH and to clarify BEREC's data-gathering powers in view of the review.

Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**amending Regulation (EU) No 531/2012 as regards rules for wholesale roaming markets**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee,<sup>1</sup>

After consulting the Committee of the Regions,<sup>2</sup>

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Regulation (EU) No 531/2012 of the European Parliament and the Council<sup>3</sup> introduces a common approach to the regulation of roaming on public communications networks within the Union.
- (2) The Digital Single Market Strategy set out by the Commission on 6 May 2015<sup>4</sup> considered the Telecom Single Market package, adopted by Regulation (EU) 2015/2120 of the European Parliament and of the Council<sup>5</sup>, a first step towards

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<sup>1</sup> OJ C , , p. .

<sup>2</sup> OJ C , , p. .

<sup>3</sup> 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, OJ L 172, 30.6.2012, p. 10.

<sup>4</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — A Digital Single Market Strategy for Europe, COM(2015) 192.

<sup>5</sup> Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union, OJ L 310, 26.11.2015, p. 1.

eliminating retail roaming surcharges, thereby supporting the establishment of a digital single market in the Union.

- (3) Regulation (EU) 2015/2120 establishes a new retail pricing mechanism for Union-wide regulated roaming services in order to abolish retail roaming surcharges without distorting domestic and visited markets.
- (4) The abolition of retail roaming surcharges introduced by Regulation (EU) No 2015/2120, also named "roam-like-at-home" (RLAH), is necessary to establish and ease the functioning of a digital single market across the Union. However, that Regulation alone is not sufficient to ensure the correct functioning of the roaming market.
- (5) The abolition of roaming surcharges as of 15 June 2017, as provided for in Regulation (EU) No 531/2012, is therefore subject to the applicability of any legislative act proposed by the Commission that provides for appropriate measures following its review of the wholesale roaming markets.
- (6) The Commission has conducted a comprehensive review of wholesale roaming markets to assess which measures are necessary to enable retail roaming surcharges to be abolished by 15 June 2017.
- (7) In light of the findings of the review, the Commission adopted its report on the review of the wholesale roaming market<sup>6</sup>. In this regard, in order to ensure that retail roaming services can be provided at domestic retail prices, wholesale roaming inputs must be available at a level that allows home operators to provide RLAH. Although having fully competitive national wholesale roaming markets in which prices are in line with visited networks' underlying costs of provision would clearly make RLAH more sustainable, the review shows that this is not the case. The review also demonstrated that the future retail RLAH obligation alone is highly unlikely to lead to well-functioning wholesale roaming markets that would enable the provision of RLAH in the Union by 15 June 2017.
- (8) In particular, the current functioning of wholesale roaming markets could affect competition and investments in home operators' domestic markets due to excessive wholesale roaming charges compared to the domestic retail prices applied to end-users. This applies in particular for smaller or net out-bound operators, thus making RLAH structurally unsustainable.
- (9) The functioning of the wholesale roaming market should allow that operators recover all costs of providing regulated wholesale roaming services, including joint and common costs. This should preserve incentives to invest in visited networks and avoid any distortion of domestic competition in the visited markets caused by regulatory arbitrage by operators using wholesale roaming access remedies to compete in domestic visited markets.

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<sup>6</sup> Report from the Commission to the European Parliament and the Council on the review of the wholesale roaming market [final reference]

- (10) In light of the problems identified, current measures applicable on the wholesale roaming markets should be amended to ensure that the level of wholesale roaming charges enables the sustainable provision of RLAH in the Union.
- (11) In order to allow for the development of a more efficient, integrated and competitive market for roaming services, when negotiating wholesale access for the purpose of providing retail roaming services, operators should be given the alternative to negotiate innovative wholesale pricing schemes which are not directly linked to actual consumed volumes, such as flat payments, up-front commitments or capacity-based contracts, or pricing schemes that reflect variations of demand across the year. Therefore, the negotiating parties should have the option of agreeing not to apply maximum regulated wholesale roaming charges for the duration of the wholesale roaming agreements or any other pre-defined periods of time. This would exclude the possibility for either party to subsequently request the application of the volume-based maximum wholesale roaming charges based on actual consumption set in Regulation (EU) No 531/2012. This alternative is without prejudice to the obligations as regards the provision of regulated retail roaming services in accordance with Regulation (EU) No 531/2012.
- (12) With regard to rules on wholesale charges, regulatory obligations at Union level should be maintained since any measure that enables RLAH across the Union without addressing the level of the wholesale costs associated with providing these services could risk disrupting the internal market for roaming services and would not encourage more competition.
- (13) The maximum wholesale charges should act as a safeguard level and ensure that operators can recover their costs, including joint and common costs. It should also enable the widespread sustainable provision of RLAH, while at the same time leaving margin for commercial negotiations between operators.
- (14) The cost estimates for the provision of wholesale roaming services, including joint and common costs, have been assessed on the basis of several sources. One source was a general cost model for wholesale roaming services populated with national data and based on the method used by national regulatory authorities to determine mobile termination rates caps in accordance with Union law. A second source was alternative cost estimates based on consistent approaches across the Union on the regulation of national mobile termination rates. The assessment also drew on current wholesale roaming charges for unbalanced traffic in the Union and evidence of current wholesale access charges in domestic markets.
- (15) In considering cost estimates, the potential impact of the seasonal nature of roaming traffic on the overall costs of providing wholesale roaming services at national level was taken into consideration. Such estimates noted the counterbalancing effects that would mitigate any potential increase in costs caused by the seasonality of roaming traffic. In particular for data services, increasing domestic demand means that any seasonal traffic peak in a given year is likely to be exceeded by total domestic demand in the following year(s). Accordingly, since terrestrial mobile communications networks are dimensioned in order to cope with this general upward trend driven by domestic demand, any peak in total network demand caused by seasonal roaming flows is unlikely to drive mobile network dimensioning costs. For voice calls, where demand is more stable, in some countries seasonal roaming peaks may have an impact

on overall network dimensioning costs. However, such localised seasonal peaks in traffic are likely to also be driven by domestic users moving into tourist areas and be somewhat mitigated by compensating effect of roamers on capacity usage in metropolitan areas during the summer holiday season.

- (16) In setting the maximum wholesale charge for regulated data roaming services, all the access components needed to enable the provision of roaming services have been taken into account, including the transit costs of delivering data traffic to an exchange point identified by the home network operator.
- (17) The portfolio of services provided by each wholesale roaming provider, and their expected volumes of traffic should be taken into account when considering the safeguard role of wholesale roaming charges in achieving the twin objectives of ensuring that wholesale providers recover all their relevant costs, while ensuring that the non-sustainability of RLAH remains exceptional.
- (18) Therefore, the existing maximum wholesale roaming charges for voice calls, SMS and data services should be lowered.
- (19) While ensuring the confidentiality of business and commercial secrets and in order to monitor and supervise the application of Regulation (EU) No 531/2012 and developments in wholesale roaming markets, national regulatory authorities should be entitled to require information on wholesale roaming agreements that do not provide for the application of the maximum wholesale roaming charges. They should also be allowed to require information on the adoption and application of conditions in wholesale agreements aimed at preventing permanent roaming and on any anomalous or abusive use of wholesale roaming access for purposes others than providing regulated roaming services to roaming providers' customers travelling within the Union.
- (20) The specific price regulation applicable to roaming entails that an overall Union cap applies to a composite product which may also include other wholesale access and interconnection inputs, including in particular those subject to national or, potentially, cross-border regulation. In this regard divergences across the Union in the regulation of these inputs are foreseen to decrease, in particular through the prospect of additional measures taken in accordance with Directive 2002/21/EC (Framework Directive)<sup>7</sup> aiming at ensuring greater consistency of regulatory approaches. In the meantime, any dispute between visited network operators and other operators on the rates applied to those regulated inputs necessary for the provision of wholesale roaming services should be addressed taking into account the opinion to be issued by BEREC, in accordance with the specific regulatory obligations applicable to roaming as well as with Directive 2002/21/EC (Framework Directive), Directive 2002/20/EC (Authorisation Directive)<sup>8</sup>, Directive 2002/19/EC (Access Directive)<sup>9</sup> and Directive 2002/22/EC (Universal Service Directive)<sup>10</sup> ..

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<sup>7</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33.

<sup>8</sup> Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), OJ L 108, 24.4.2002, p. 21.

- (21) It is necessary to monitor and regularly review the functioning of wholesale roaming markets and their interrelationship with the retail roaming market, taking into account competitive and technological developments and traffic flows. In order to properly assess how roaming markets will adapt to RLAH rules, sufficient data should be gathered on functioning of these markets after the implementation of these rules.
- (22) In order to assess the competitive developments in Union-wide roaming markets and to report regularly on changes in actual wholesale roaming charges for unbalanced traffic between roaming providers, BEREC should be given the task of collecting data from national regulatory authorities on the actual charges applied for balanced and unbalanced traffic respectively. It should also collect data on cases where parties to a wholesale agreement have opted out from the application of maximum wholesale roaming charges or have implemented measures at wholesale level that are aimed at preventing permanent roaming or anomalous or abusive use of wholesale roaming access for purposes other than the provision of regulated roaming services to roaming providers' customers while the latter are periodically travelling within the Union.
- (23) Regulation (EU) No 531/2012 should therefore be amended accordingly.
- (24) The objectives of this Regulation cannot be sufficiently achieved by the Member States because national measures cannot ensure that rules on national wholesale markets are consistent with EU rules on retail roaming services. Instead, the cross-border effects of national wholesale roaming markets on the provision of retail roaming services within the Union, mean the objectives can be better achieved at Union level. The Union may therefore adopt measures, in accordance with the principle of subsidiarity set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve its objectives.
- (25) This Regulation respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union,

HAVE ADOPTED THIS REGULATION:

### *Article 1*

#### Amendments to Regulation (EU) No 531/2012

Regulation (EU) No 531/2012 is amended as follows:

- (1) In Article 3, paragraph 4 is replaced by the following:

‘4. Rules on regulated wholesale roaming charges laid down in Articles 7, 9 and 12 shall apply to the provision of access to all components of wholesale

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<sup>9</sup> Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), OJ L 108, 24.4.2002, p. 7

<sup>10</sup> 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, 24.4.2002, p. 51.

roaming access referred to in paragraph 3, unless both parties to the wholesale roaming agreement explicitly agree that any average wholesale roaming charge resulting from the application of the agreement should not be subject to the maximum regulated wholesale roaming charge for a defined period of time.'

(2) In Article 7, paragraphs 1 and 2 are replaced by the following:

'1. The average wholesale charge that the visited network operator may levy on the roaming provider for the provision of a regulated roaming call originating on that visited network, inclusive, among others, of origination, transit and termination costs, shall not exceed a safeguard limit of EUR 0.04 per minute as of 15 June 2017 and shall, without prejudice to Article 19, remain at EUR 0.04 until 30 June 2022

2. The average wholesale charge referred to in paragraph 1 shall apply between any pair of operators and shall be calculated over a 12-month period or any such shorter period as may remain before the end of the period of application of a maximum average wholesale charge as provided for in paragraph 1 or before 30 June 2022.'

(3) In Article 9 paragraph 1 is replaced by the following:

'1. With effect from 15 June 2017, the average wholesale charge that the visited network operator may levy on the roaming provider for the provision of a regulated roaming SMS message originating on that visited network shall not exceed a safeguard limit of EUR 0.01 per SMS message and shall, without prejudice to Article 19, remain at EUR 0.01 until 30 June 2022.'

(4) In Article 12 paragraph 1 is replaced by the following:

'1. With effect from 15 June 2017, the average wholesale charge that the visited network operator may levy on the roaming provider for the provision of regulated data roaming services by means of that visited network shall not exceed a safeguard limit of EUR 0.0085 per megabyte of data transmitted and shall, without prejudice to Article 19, remain at EUR 0.0085 per megabyte of data transmitted until 30 June 2022.'

(5) In Article 17 ( 1) the following subparagraph is added:

'Disputes between visited network operators and other operators on rates applied to inputs necessary for the provision of regulated wholesale roaming services may be referred to the competent national regulatory authority or authorities pursuant to Article 20 or 21 of the Framework Directive. In such a case, the competent national regulatory authority or authorities shall consult BEREC, about the action to be taken in accordance with the provisions of the Framework Directive, the Specific Directives or this Regulation to resolve the dispute, and shall await BEREC's opinion before taking action to resolve the dispute.'

(6) Article 19 is amended as follows:

(a) in paragraph 3 the first sentence is replaced by the following:



‘In addition, the Commission shall submit a report to the European Parliament and the Council every two years after 15 June 2017.’ .

(b) in paragraph 4 first subparagraph, the first sentence is replaced by the following:

‘In order to assess competitive developments in the Union-wide roaming markets, BEREC shall regularly collect data from national regulatory authorities on developments in retail and wholesale charges for regulated voice, SMS and data roaming services, including wholesale charges applied for balanced and unbalanced roaming traffic respectively. It shall also collect data on the wholesale agreements not subject to the maximum wholesale roaming charges provided in Articles 7, 9 or 12 and on the implementation of contractual measures at wholesale level aimed at preventing permanent roaming or anomalous or abusive use of wholesale roaming access for purposes other than the provision of regulated roaming services to roaming providers’ customers while the latter are periodically travelling within the Union.’

## *Article 2*

### 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,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*