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Working Document

Subject: Draft Commission implementing regulation 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

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of XXX

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)

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 Union¹, 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

¹ OJ L 172, 30.6.2012, p. 10.

services at the applicable domestic price, such as the use of such services for purposes other than periodic travel, for instance the use of such services on a permanent basis.

- (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. 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 not 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 is 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) 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. Evidence of stable links with a Member State entailing frequent and substantial presence on its territory could include proof of an employment relationship, proof of durable contractual relations entailing physical presence of a self-employed person, or proof of participation in recurring courses of study. Roaming providers should limit requests for the submission of such evidence 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.

- (11) 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 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.
- (12) 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,
- (13) 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 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. The indicators substantiating the likelihood of abusive or anomalous usage should be based on objective criteria linked to patterns showing insignificant domestic consumption or proof of abusive or anomalous use of SIM cards. The application of such measures by the roaming provider 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.

- (14) 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.
- (15) In specific cases, where the operator has substantiated evidence of a given consumer'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, it should alert the customer to the risk of triggering roaming surcharges. The objective indicators substantiating the likelihood of abusive or anomalous usage should be spelled out in advance in the contract.
- (16) 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.
- (17) 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/EC².
- (18) 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.
- (19) 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

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.

subscribe to such networks or services; and any national measures regarding continuity of service or of pre-paid credit with a given number or SIM card.

- (20) 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 also be allowed to show traffic projections, provided that those are based on the traffic growth rate observed over all tariff plans of roaming customers over a minimum period of actual application of 'roam-like-at-home' in accordance with Article 6a of Regulation (EU) No 531/2012.
- (21) 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 and revenue 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.
- (22) 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.
- (23) 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.
- (24) 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.
- (25) 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.
- (26) 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.

- (27) 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.
- (28) 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.
- (29) 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 and in particular the limited incentive to increase prices in more competitive markets, or the specific characteristics of the applicant could still rule out a risk of an appreciable effect on domestic price developments.
- (30) 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.
- (31) 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.
- (32) Pursuant to Regulation (EU) No 531/2012, the Commission is to periodically review this implementing act in the light of market developments.
- (33) The measures provided for in this Regulation are in accordance with the opinion of the Communications Committee,

- (34) 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/EC³, Directive 2002/58/EC⁴ and Regulation (EU) No 2016/679⁵. 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.

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.

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.

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) ‘mobile retail services’ means public mobile communications services provided to end-users, including voice, SMS and data services;
 - (b) ‘visited Member State’ means a Member State other than that of the roaming customer’s domestic provider;
 - (c) ‘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;
 - (d) ‘group’ means a parent undertaking and all its subsidiary undertakings subject to its control within the meaning of Council Regulation (EC) No 139/2004⁶.

Section II
Fair use policy

Article 3
Basic principle

A roaming provider shall provide regulated retail roaming services at domestic price to its 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.

Any fair use policy applied by a roaming provider shall be subject to the conditions set out in Articles 4 and 5 and shall ensure that all such 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. In the context of the processing of traffic data according to Article 6 of Directive 2002/58/EC⁷, in order to prevent abusive or anomalous usage of regulated retail

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)

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.

roaming services provided at the applicable domestic retail price, the roaming provider may apply proportionate control mechanisms based on objective indicators related to the risk of abusive or anomalous use beyond periodic travelling in the Union.

Objective indicators of a risk of abusive or anomalous use of regulated retail roaming services provided at the applicable domestic retail price include:

- a. insignificant domestic traffic compared to roaming traffic;
 - b. long inactivity of a given SIM card associated with use mostly, if not exclusively, while roaming;
 - c. subscription and sequential use of multiple SIM cards by the same customer while roaming.
3. 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.
 4. The roaming provider shall comply with Directive 2002/58/EC, Directive 95/46/EC⁸ and their national implementing measures, and, Regulation (EU) No 2016/679⁹ when acting pursuant to this section.
 5. 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(2). 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.
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 indicating a risk of abusive or anomalous use of a specific regulated roaming retail service within the Union at the domestic retail price by a given customer the roaming provider may apply a surcharge

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.

for the provision of that specific service pursuant to Article 6e of Regulation (EU) No 531/2012, after alerting the customer about the detected behaviour pattern indicating such a risk, and about the possibility of such a surcharge for any further use of regulated retail roaming services by that customer.

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 service in question.

4. 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 over a period of 12 months. For the first application, these data shall cover volumes actually provided by the applicant at the applicable domestic retail price over at least 45 days and by default over all tariff plans of roaming customers.

The applicant shall derive the projected volumes for the rest of the 12-month period covered by the application 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 and revenues 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.

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 actual costs for the purchase of wholesale roaming access;
 - (b) the roaming-specific retail costs.
2. With regard to the actual 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 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.
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 associated with roaming services, 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 prices 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 5 % 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 negative roaming retail net margin is equivalent to 5 % 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 5 %.

3. When authorising the surcharge on regulated roaming services, the final decision of the competent 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 Council¹⁰.

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;

(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

The Commission shall conduct the first review of this implementing act 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.

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)

Done at Brussels,

For the Commission

The President

[...]

On behalf of the President

DRAFT

ANNEX I

Proportional change in actual volumes of regulated roaming services under 'roam-like-at-home' compared with the same period in the previous year:

$$\left(\frac{\sum_{j=1}^n \text{volume}_j(t)}{\sum_{j=1}^n \text{volume}_j(t-1)} - 1 \right) * 100$$

where n is the number of days of 'roam-like-at-home' application ($n \geq 45$) and t is the year of first 'roam-like-at-home' application.

This percentage should be used to estimate the change in volumes over the remainder of the 12-month period by multiplying it by the volumes in the previous year.

ANNEX II

1) Weights w_i of mobile retail services:

$$w_i = \frac{\text{average wholesale roaming price paid by operator}_i}{\sum_{k=1}^3 \text{average wholesale roaming price paid by operator}_k}$$

where i, k = service (1 = voice, 2 =SMS, 3 = data)

2) Ratio of overall traffic volume of applicant's retail roaming services to overall retail outbound and wholesale inbound traffic of its roaming services:

$$\frac{\text{retail outbound roaming traffic}}{(\text{retail outbound} + \text{wholesale inbound}) \text{roaming traffic}} = \sum_{k=1}^3 w_k * \frac{\text{retail outbound roaming traffic}_k}{(\text{retail outbound} + \text{wholesale inbound}) \text{roaming traffic}_k}$$

where k = service (1 = voice, 2 =SMS, 3 = data)

3) Ratio of overall traffic volume of applicant's retail roaming services within the Union to overall traffic of its retail roaming services within and outside the Union:

$$\frac{\text{retail outbound EU roaming traffic}}{\text{retail outbound (EU + nonEU)roaming traffic}} = \sum_{k=1}^3 w_k * \frac{\text{retail outbound EU roaming traffic}_k}{\text{retail outbound (EU + nonEU) roaming traffic}_k}$$

where k = service (1 = voice, 2 =SMS, 3 = data)

4) Ratio of overall traffic of applicant's retail roaming services within the Union to overall retail traffic of all mobile retail services:

$$\frac{\text{retail outbound EU roaming traffic}}{\text{retail outbound (EU + nonEU) roaming traffic} + \text{retail domestic traffic}}$$

$$= \sum_{k=1}^3 w_k$$

$$* \frac{\text{retail outbound EU roaming traffic}_k}{\text{retail outbound (EU + nonEU) roaming traffic}_k + \text{retail domestic traffic}_k}$$

where k = service (1 = voice, 2 =SMS, 3 = data)

5) Retail EU roaming revenue:

$$\text{Retail EU roaming revenue} = \text{retail domestic revenue}$$

$$* \left(\sum_{k=1}^3 w_k \frac{\text{retail outbound EU roaming traffic}_k}{\text{retail outbound (EU + nonEU) roaming traffic}_k + \text{retail domestic traffic}_k} \right)$$

where k = service (1 = voice, 2 =SMS, 3 = data)