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Subject: Proposal for a Regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent, and amending Directives 2002/20/EC, 2002/21/EC and 2002/22/EC and Regulations (EC) No 1211/2009 and (EU) No 531/2012
- Examination of the Presidency compromise text concerning open internet and amending 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

This document was drafted under the sole responsibility of the Latvian Presidency.

During the Transport, Telecommunications and Energy Council meeting of 12 June, the Latvian Presidency gave its assessment of the state of play. It was underlined that the Council fully supports abolishment of the roaming surcharges and establishment of the first open internet rules for the European Union. The Presidency also noted the readiness of many Member States to demonstrate further flexibility, especially what regards an earlier date of abolishment of roaming surcharges and further specification of the open internet rules, but not at any cost.

Member States are not in position to take inadequate risks, for instance those of distorting both home and visited mobile communications markets. Therefore, recovery of costs has to be the basic rule underlying the abolition of roaming surcharges, as roaming operators cannot be forced to operate below their costs. This could lead to an increase of domestic prices in one country and network failures in another, and could therefore directly affect consumers both in terms of price and quality of service.

Finally, it was emphasized that it is now up to the European Parliament to show its true commitment to close this file, noting that the European Parliament has not yet formulated a clear and text-based position during the negotiations (especially when compared to three completed full text Coreper approved mandates and numerous Presidency's written proposals and suggestions), and, in the concise position paper distributed on 11 June 2015, the Parliament has indicated almost no flexibility and no adequate consideration to the existing serious risks.

The Presidency underlines the significant concessions given by the Council in its latest mandate of 29 May 2015, most notably, proposing an end-date for roaming surcharges, moving the wholesale review date forward considerably, establishing that all traffic should be treated equally in the provision of internet access services.

Should the 4th trilogue take place, the Presidency proposes to amend the current Council's mandate to demonstrate its readiness to work in a constructive manner and conclude the negotiations as soon as possible. Regarding the dates for the abolition of roaming surcharges and the underlying wholesale review, the Presidency does not propose to make any amendments at this stage. However, in case the European Parliament would be willing to compromise on other elements, we suggest to put these dates in square brackets to demonstrate Council's possible flexibility with regard to the timetable.

In addition, based on the technical suggestions from the European Commission services, the Presidency proposes to improve the current mandate by implementing the following amendments:

- further specifying the obligation to treat all traffic equally by adding language from the net neutrality definition contained in European Parliament's first reading position (Article 3 (3));
- adding recital 9a which contains a technical explanation on measures necessary to prevent impending network congestion or mitigate the effects of exceptional or temporary network congestion, as referred to in Article 3 (3) (c);
- strengthening end-user's rights regarding regulated roaming services (amendments to Article 6 (6), (8), and (9), introduction of Article 6 (9a), related deletion of Article 8(3)).

The Latvian Presidency underlines that it is in the Council's interest to remain engaged in negotiations and to exert further pressure on the Parliament at the eve of the European Council meeting of 25 and 26 June 2015. With this approach the Council would ensure reaction to the technical non-papers from the European Commission services and its readiness to remain in negotiations. At the same time, the Council would not give unjustified concessions to the Parliament.

Compared to doc. 9167/15 additions are marked with **bold** and deletions are marked with ~~strikethrough~~.

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

laying down measures concerning open internet and amending 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

(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 Committee¹,

Having regard to the opinion of the Committee of the Regions²,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) This Regulation aims at harmonising rules on access to open internet by ensuring end-users' right to access and distribute information and lawful content, run applications and use services of their choice, as well as by establishing common rules on traffic management which not only protect end-users but simultaneously guarantee the continued functioning of the Internet ecosystem as an engine of innovation. Reforms in the field of roaming should give end-users the confidence to stay connected when they travel in the Union, and should become over time a driver of convergent pricing and other conditions in the Union.

¹ OJ C , , p. .

² OJ C , , p. .

- (2) The measures provided in this Regulation respect the principle of technological neutrality, that is to say they neither impose nor discriminate in favour of the use of a particular type of technology.
- (3) The internet has developed over the past decades as an open platform for innovation with low access barriers for end-users, content and application providers and internet service providers. The existing regulatory framework aims at promoting the ability of end-users to access and distribute information or run applications and services of their choice. However, a significant number of end-users are affected by traffic management practices which block or slow down specific applications. These tendencies require common rules at the Union level to ensure the open internet and to avoid fragmentation of the single market resulting from individual Member States' measures.
- (4) In the open internet end-users should have the right to access and distribute information and content, and to use and provide applications and services without discrimination, via their internet access service. The exercise of this right is subject to Union law and national law, compliant with Union law, regarding the lawfulness of content, services or applications. However, this Regulation does not seek to regulate the lawfulness of the information, content, application or services, nor the procedures, requirements and safeguards related thereto. These matters remain thus subject to Union legislation or national legislation in compliance with Union law, including measures giving effect to such Union or national legislation (for example, court orders, administrative decisions or other measures implementing, applying or ensuring compliance with such legislation). If those measures prohibit end-users to access unlawful content (such as, for example, child pornography), end-users should abide by those obligations by virtue of and in accordance with that Union or national law.

- (5) End-users should be free to choose between various types of terminal equipment (defined in Directive 2008/63/EC on competition in the markets in telecommunications terminal equipment) to access the internet. Providers of internet access service should not impose restrictions on the use of terminal equipment connecting to the network, in addition to those imposed by terminal equipment's manufacturers or distributors in compliance with Union law.
- (6) Internet access service is a publicly available electronic communications service that provides access to the internet, irrespective of the network technology and terminal equipment used by end-user. However, for reasons outside the control of internet access service providers, some end points of the internet may not always be accessible, for instance due to measures taken by public authorities. Therefore, a provider is deemed to comply with its obligation related to the offering an internet access service within the meaning of this Regulation when that service provides connectivity to virtually all end points of the internet. Providers of internet access services should therefore not restrict connectivity to any end-points of the internet which are accessible to them.
- (7) In order to exercise their right set out in Article 3(1), end-users should be free to agree with providers of internet access services on tariffs with specific data volumes and speeds of the internet access service. Such agreements, as well as commercial practices conducted by providers of internet access service, should not limit the exercise of the right set out in Article 3(1) and thus circumvent provisions of this Regulation on safeguarding internet access. National regulatory authorities should be empowered to intervene against commercial practices which by reason of their scale, lead to situations where end-users' choice is significantly reduced in practice. Since the right to open internet is based on end-user's choice to access preferred content and information, national regulatory authorities should be required, as part of their monitoring and enforcement function, to and intervene when commercial practices would result in undermining the essence of this right.

- (8) End-users should have rights to access their preferred content and information, to use and provide preferred services and applications, as well as terminal equipment. Reasonable traffic management contributes to an efficient use of network resources and to an optimisation of overall transmission quality responding to the technical requirements of the content, services and applications transmitted. Moreover, reasonable traffic management measures applied by providers of internet access services should be transparent, proportionate, non-discriminatory and should not constitute anti-competitive behaviour. The requirement for traffic management measures to be non-discriminatory does not preclude providers of internet access services to implement, in order to optimise the overall transmission quality, traffic management measures which differentiate between different categories of traffic services or applications. Any such differentiation should be permitted only on the basis of objective technical quality of service requirements (for example, in terms of latency, jitter, packet loss, and bandwidth) of the different categories of traffic, but not on the basis of commercial considerations. Such differentiating traffic management measures should be proportionate in relation to the purpose of overall quality optimisation and should treat equivalent traffic equally. Any traffic management practice which goes beyond such reasonable measures, including reasonable differentiation, by blocking, slowing down, altering, degrading or discriminating between specific content, applications or services should be prohibited, subject to justified and defined exceptions laid down in this Regulation. Content, services and applications should be protected because of the negative impact of blocking or other restrictive measures on end-user choice and innovation. Rules against altering content, services or applications refer to a modification of the content of the communication, but do not ban non-discriminatory data compression techniques which reduce the size of a data file without any modification of the content. Such compression enables a more efficient use of scarce resources and serves the end-users' interest in reducing data volumes, increasing speed and enhancing the experience of using the content, services or applications in question.

- (9) Providers of internet access service may be subject to legal obligations requiring, for example, blocking of specific content, applications or services. Those legal obligations should be laid down in Union or national legislation (for example, Union or national legislation related to the lawfulness of information, content, applications or services, or legislation related to public safety), in compliance with Union law, or they should be established in measures implementing or applying such legislation, such as national measures of general application, courts orders, decisions of public authorities vested with relevant powers, or other measures ensuring compliance with such legislation (for example, obligations to comply with court orders or orders by public authorities requiring to block unlawful content). The requirement to comply with Union law relates, among others, to the compliance with the requirements of the Charter of Fundamental rights of the European Union in relation to limitations of fundamental rights and freedoms. Reasonable traffic management should also allow actions to protect the integrity of the network, for instance in preventing cyber-attacks through the spread of malicious software or end-users' identity theft through spyware. ~~In the operation of their networks, providers of internet access services should be allowed to implement reasonable traffic management measures to avoid congestion of the network. Exceptionally, more restrictive traffic management measures affecting certain categories of content, applications or services may be necessary for the purpose of preventing network congestion, i.e. situations where congestion is about to materialise, and in the mitigation of the effects of network congestion, provided that such congestion occurs only temporarily or in exceptional circumstances. The principle of proportionality requires that traffic management measures based on this exception treat equivalent categories of traffic equally. Temporary congestion refers to specific, non-recurring situations during short periods of time. Exceptional circumstances are infrequent situations, especially in mobile access networks, where despite operators' efforts to ensure the most efficient use of the resources available and thus prevent congestion, demand occasionally exceeds the available capacity of the network, for example in large sport events, concerts or festivals and other situations where a much larger number than usual of users is trying to make use of the network at the same time.~~

(9a) The exceptions should also include more restrictive traffic management measures which go beyond reasonable traffic management measures, affecting certain categories of content, applications or services which may be necessary for the purpose of preventing impending network congestion, i.e. situations where congestion is about to materialise, and in the mitigation of the effects of network congestion, provided that such congestion occurs only temporarily or in exceptional circumstances. Temporary congestion should be understood as referring to specific situations of short duration, where a sudden increase in the number of users in addition to the regular users, or a sudden increase in demand for a particular content or service, may overflow the transmission capacity of some elements of the network and make the rest of the network less reactive. Temporary congestion may occur especially in mobile networks, which are subject to more variable conditions, such as physical obstructions, lower indoor coverage, or a variable number of active users with changing location. It may be predictable that such temporary congestion will occur from time to time at certain points in the network – such that it cannot be regarded as exceptional, without it recurring often or for such extensive periods that a capacity expansion would be economically justified. Exceptional congestion should be understood as referring to unpredictable and unavoidable situations of congestion, both in mobile and fixed networks. These situations may be caused, for example, by a technical failure such as a service outage due to broken cables or other infrastructure elements, unexpected changes in routing of traffic or large increases in network traffic due to emergency or other situations beyond the control of the internet access service provider. Such congestion problems are likely to be infrequent but may be severe, and are not necessarily of short duration. The need to apply traffic management measures going beyond reasonable measure in order to prevent or mitigate the effects of temporary or exceptional network congestion should not give operators the possibility to circumvent the general prohibition of blocking, slowing down, altering, degrading or discriminating between specific content, applications or services. Recurrent and more long-lasting network congestion which is neither exceptional nor temporary should not benefit from such an exception and should rather be tackled through expansion of network capacity.

- (10) For the purposes of this Regulation, prior explicit consent should mean any freely given specific, distinct and informed indication of end-user's wishes by which the end-user signifies his unambiguous agreement to allow the provider of internet access services to prevent the transmission of unsolicited communication or to implement parental control measures. For the purposes of giving effect to the provision requiring a prior explicit consent of the end-user for the implementation of parental control measures by the provider of the internet access services, this Regulation should be applied in accordance with national rules. Therefore, this Regulation does not affect national rules which define, for example, parental rights and obligations. In this respect, and by way of an example, the aim of parental control measures could be to prevent the access of minors to content, applications and services, such as those involving pornography or gratuitous violence, which might seriously impair minors' physical, mental or moral development. Parental control measures should be applied in a manner that ensures that the end-user decides which categories of content should be filtered, blocked or controlled. They should also include a clear alert to the end-user that such measures have been used to filter, block or control content or categories of content when the end-user attempts to access such content. The measures should also include a clear and transparent mechanism by which the end-user who has consented to the use of these measures may withdraw this consent at any time.

- (11) There is demand on the part of content, applications and services providers, as well as on the part of end-users, for the provision of electronic communication services other than internet access services, based on specific quality of service levels. Agreements in this respect could also play an important role in the provision of services with a public interest as well as in the development of new services such as machine-to-machine communications. At the same time, such agreements should allow providers of electronic communications to the public to better balance traffic and prevent network congestion. End-users should therefore remain free to conclude agreements with providers of electronic communications to the public and providers of content applications and services, which require specific levels of quality of service. Such services should not be offered as a replacement for internet access services, and their provision should not impair in a material manner the availability and quality of internet access services for other end-users. National regulatory authorities should ensure that providers of electronic communications to the public comply with this requirement, as set out in Article 4. In this respect, national regulatory authorities should assess whether the negative impact on the availability and quality of internet access services is material by analysing, inter alia, quality parameters such as timing and reliability parameters (latency, jitter, packet loss), levels and effects of congestion in the network, actual versus advertised speeds, performance of internet access services compared with services other than internet access services, and quality as perceived by end-users.
- (12) National regulatory authorities play an essential role in ensuring that end-users are effectively able to exercise the right to avail of open internet access. To this end, national regulatory authorities should have monitoring and reporting obligations, and should ensure compliance of providers of electronic communications to the public with the obligation to ensure sufficient network capacity for the provision of non-discriminatory internet access services of high quality which should not be impaired by provision of services with a specific level of quality. Providers of internet access services should ensure maximum transparency in the provision of internet access services according to the additional transparency measures laid down in Article 4. Therefore, national regulatory authorities should enforce compliance with Article 3 and the respective parts of Article 4.

They should also have powers to impose minimum quality of service requirements on all or individual providers of electronic communications to the public if this is necessary to prevent degradation of the quality of service of internet access services for other end-users. In doing so, national regulatory authorities should take utmost account of relevant guidance from BEREC.

- (13) The mobile communications market remains fragmented in the Union, with no mobile network covering all Member States. As a consequence, in order to provide mobile communications services to their domestic customers travelling within the Union, roaming providers have to purchase wholesale roaming services from operators in a visited Member State.
- (14) Regulation No 531/2012 establishes the policy objective that the difference between roaming and domestic tariffs should approach zero. However, the ultimate aim of eliminating the difference between domestic charges and roaming charges cannot be attained in a sustainable manner with the observed level of wholesale charges. Therefore this Regulation sets out that retail roaming surcharges should be abolished from [15 June 2018], provided that the issues currently observed in the wholesale roaming markets have been addressed. In this respect, the Commission should conduct a review of the wholesale roaming market, and come forward with a legislative proposal based on the outcome of this review.

- (15) At the same time, roaming providers may apply a “fair use policy” to the consumption of regulated retail roaming services provided at the applicable domestic retail price. This fair use policy should be applied only to the extent necessary to ensure that the roaming provider is able to recover all costs of providing these services. At the same time, subject to the cost recovery criterion, the fair use policy applied should ensure that the customers can confidently replicate at least the average domestic consumption pattern in the Union while periodically travelling. In addition, the abolition of retail roaming surcharges should not lead to a situation which is less beneficial for the consumers than the transitional regime. Finally, the fair use policy may also be applied to prevent abusive and anomalous usage of regulated retail roaming services, in particular the phenomenon of “permanent roaming”.
- (16) In order to ensure a smooth transition from Regulation (EU) No 531/2012 to the abolition of roaming charges, this Regulation should introduce a transitional period, in which the roaming providers should offer a certain amount of regulated retail roaming services at levels not exceeding those applicable for domestic services. Once these volumes are consumed, roaming providers should be able to add a surcharge to domestic retail prices for regulated retail roaming services. The volume of roaming services offered at domestic retail prices should be set at a level which ensures that consumers’ basic communication needs are met while travelling within the EU, until the necessary review of the wholesale roaming markets has been undertaken. These volumes should also mirror the variety of services included in the tariff plan of the customer.

- (17) The relevant domestic retail price should be equal to the retail per-unit domestic charge. However, in situations where there are no specific domestic retail prices that could be used as a basis for a regulated retail roaming service (for example, in case of domestic unlimited tariff plans, bundles or domestic tariffs which do not include data), the domestic retail price should be deemed to be the same charging mechanism as if the customer would be consuming the domestic tariff in his Member State.
- (18) With a view to improving competition in the retail roaming market, Regulation (EU) No 531/2012 requires domestic providers to enable their customers to access regulated voice, SMS and roaming services, provided as a bundle by any alternative roaming provider. Given that the retail roaming regime set out in Articles 6a, 6b and 6c of this Regulation will ultimately lead to the abolition of retail roaming charges set out in Articles 8, 10 and 13 of Regulation (EU) No 531/2012, it would no longer be proportionate to oblige operators to implement this type of separate sale of regulated roaming services. Providers which have already enabled their customers to access regulated voice, SMS and roaming services, provided as a bundle by any alternative roaming provider, may continue to do so. On the other hand, while the transitional roaming volumes or those available under the wider fair use policy and the mechanism which limits the surcharge over the domestic retail price provide data roaming customers with certain safeguards against excessive roaming charges, it may not allow all roaming customers to confidently replicate the domestic consumption patterns for data roaming services. Given the increasing demand and importance of data roaming services, roaming customers should be provided with alternative ways of accessing data roaming services when travelling. Therefore, the obligation on domestic and roaming providers not to prevent customers from accessing regulated data roaming services provided directly on a visited network by an alternative roaming provider as provided for in Regulation (EU) No 531/2012 should be maintained.

- (19) In accordance with the calling party pays principle mobile customers do not pay for receiving domestic mobile calls, instead the cost of terminating a call in the network of the called party is covered in the retail charge of the calling party. The convergence of mobile termination rates across the Member States should allow for the implementation of the same principle for regulated retail roaming calls. However, since this is not yet the case, in situations set out in this Regulation where roaming providers are allowed to apply a surcharge for regulated retail roaming services, the surcharge applied for incoming roaming calls, should not exceed the average maximum wholesale mobile termination rate set across the Union. This is considered to be a transitory regime until the Commission addresses this outstanding issue. In addition, in order to prevent anomalous or abusive usage of regulated roaming calls received, roaming providers may apply appropriate usage policies. These usage policies may be applied during the transitional period and accordingly they may include limitations on the volumes of roaming calls received in case those volumes significantly exceed the average volumes of domestic calls received.
- (20) Regulation (EU) No 531/2012 should therefore be amended accordingly.
- (21) This Regulation should constitute a specific measure within the meaning of Article 1(5) of Directive 2002/21/EC³. Therefore, where providers of Union-wide roaming services make changes to their retail roaming tariffs and to accompanying roaming usage policies in order to comply with the requirements of this Regulation, such changes should not trigger for mobile customers any right under national laws transposing the current regulatory framework for electronic communications to withdraw from their contracts.

³ 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).

- (22) In order to strengthen the rights of end-users, including the rights of roaming customers, laid down in this Regulation, this Regulation should lay down in relation to internet access services and regulated retail roaming services specific information requirements for contracts and specific transparency requirements. It should also establish a complaint mechanism in relation to end-users' right to access open internet. Finally, since this Regulation constitutes a specific measure in relation to the Framework Directive and the Specific Directives⁴, the information and transparency requirements in relation to internet access service and regulated retail roaming services complement those Directives. Those Directives should be without prejudice to this Regulation.
- (23) In order to ensure uniform conditions for the implementation of the provisions of this Regulation, implementing powers should be conferred on the Commission in respect of setting out the weighted average of maximum mobile termination rates, and detailed rules on the application of the fair use policy. Those powers should be exercised in accordance with Regulation (EU) 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States and the Commission's exercise of implementing powers⁵.
- (24) This Regulation complies with the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union, notably the protection of personal data, the freedom of expression and information, the freedom to conduct a business, non-discrimination and consumer protection.

⁴ 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), 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), 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), and 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).

⁵ OJ L 55, 28.2.2011, p.13.

(25) Since the objective of this Regulation, namely to establish common rules necessary for ensuring open internet and abolishing retail roaming charges, cannot be sufficiently achieved by the Member States and can therefore, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as 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 that objective.

HAVE ADOPTED THIS REGULATION:

Article 1 – Objective and scope

1. This Regulation establishes common rules to ensure open internet access, safeguarding related end-user’s rights and equal treatment of traffic in the provision of internet access services.
2. This Regulation sets up a new retail pricing mechanism for Union-wide regulated roaming services in order to abolish retail roaming surcharges.

Article 2 – Definitions

For the purposes of this Regulation, the definitions set out in Directive 2002/21/EC shall apply.

The following definitions shall also apply:

- (1) “provider of electronic communications to the public” means an undertaking providing public electronic communications networks or publicly available electronic communications services;
- (2) “internet access service” means a publicly available electronic communications service that provides access to the internet, and thereby connectivity to virtually all end points of the internet, irrespective of the network technology and terminal equipment used.

Article 3 – Safeguarding of open internet access

1. End-users shall have the right to access and distribute information and content, use and provide applications and services and use terminal equipment of their choice, irrespective of the end-user’s or provider’s location or the location, origin or destination of the service, information or content, via their internet access service.

This paragraph is without prejudice to Union law or national law, in compliance with Union law, related to the lawfulness of the information, content, application or services.

2. Providers of internet access services and end-users may agree on commercial and technical conditions and characteristics of internet access services such as price, data volumes or speed. Such agreements, and any commercial practices conducted by providers of internet access services, shall not limit the exercise of the right of end-users set out in paragraph 1.

3. Subject to this paragraph, providers of internet access services shall treat all traffic equally, when providing internet access services, **without discrimination, restriction or interference, and irrespective of the sender and receiver, the content accessed or distributed, the applications or services used or provided, or the terminal equipment used.**

Providers of internet access services may implement reasonable traffic management measures. In order to be deemed reasonable, such measures shall be transparent, non-discriminatory, proportionate, shall not constitute anti-competitive behaviour and shall be based on objectively different technical quality of service requirements of specific categories of traffic. Such measures shall not be maintained longer than necessary.

Providers of internet access services shall not engage in traffic management measures going beyond the reasonable measures set out in subparagraph 2, and shall not block, slow down, alter, degrade or discriminate between specific content, applications or services, except as necessary, and only for as long as necessary, to:

a) comply with legal obligations to which the internet access service provider is subject, that are laid down in Union legislation or national legislation, in compliance with Union law, or in measures giving effect to such Union or national legislation, including orders by courts or public authorities vested with relevant powers;

b) preserve the integrity and security of the network, services provided via this network, and the end-users' terminal equipment;

c) prevent impending network congestion and mitigate the effects of exceptional or temporary network congestion, provided that equivalent categories of traffic are treated equally;

d) prevent transmission of unsolicited communication within the meaning of Article 13 of Directive 2002/58/EC⁶ or implement parental control measures, subject to a prior explicit consent of the end-user. The end-user shall be given the possibility to withdraw this consent at any time.

4. Any traffic management measures may only entail processing of personal data that is necessary and proportionate to achieve the objectives of paragraph 3. Such processing shall be carried out in accordance with Directive 95/46. Traffic management measures shall also comply with Directive 2002/58.

5. Providers of electronic communications to the public, including providers of internet access services, and providers of content, applications and services shall be free to offer services other than internet access services which are optimised for specific content, applications or services, or a combination thereof, in order to meet their requirements for a specific level of quality.

⁶ 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).

Providers of electronic communications to the public, including providers of internet access services, may offer such services only if the network capacity is sufficient to provide them. Such services shall not be offered as a replacement for internet access services, and shall not be to the detriment of the availability or general quality of internet access services for other end-users.

Article 4 – Supervision, enforcement and transparency measures for ensuring open internet access

1. National regulatory authorities shall closely monitor and ensure compliance with Article 3 and with paragraphs 3 and 5 of this Article, and shall promote the continued availability of open internet access at levels of quality that reflect advances in technology. For those purposes national regulatory authorities may impose technical characteristics and minimum quality of service requirements in accordance with the second subparagraph of Article 22(3) of the Universal Service Directive. National regulatory authorities shall publish reports on an annual basis regarding their monitoring and findings, and provide those reports to the Commission and BEREC.

2. Providers of electronic communication services to the public, including providers of internet access services, shall make available, at the request of the national regulatory authority, information relevant to the obligations set out in Article 3 and paragraphs 3 and 5 of this Article, in particular information about how their network traffic and capacity are managed, as well as justifications for any traffic management measures applied. Those providers shall provide such information promptly on request and in accordance with the time limits and the level of detail required by the national regulatory authority.

3. Providers of internet access services shall ensure that a contract which includes an internet access service shall specify at least the following information:

(a) information on how traffic management measures applied by that provider could impact on internet access service quality, end-users' privacy and the protection of personal data;

(b) a clear and comprehensible explanation as to how any volume limitation, speed and other quality of service parameters may in practice have an impact on internet access services, in particular the use of content, applications and services;

(c) a clear and comprehensible explanation as to how any services within the meaning of Article 3(5), to which the end-user subscribes might in practice have an impact on the same end-user's internet access services.

Providers of internet access services shall publish the information referred to in the first subparagraph.

4. Providers of internet access services shall put in place transparent, simple and efficient procedures to address complaints of end-users relating to rights and obligations under Article 3 and paragraph 3 of this Article.

5. No later than nine months after this Regulation enters into force, in order to contribute to the consistent application of this Regulation, BEREC shall, after consulting stakeholders and in close cooperation with the Commission, lay down guidelines for the implementation of the obligations of national regulatory authorities under this Article.

6. For the purposes of this Article, “national regulatory authorities” shall mean the body or bodies within the meaning of point (g) of Article 2 of Directive 2002/21/EC and any other body or bodies charged by a Member State with the tasks assigned in this Article.

Article 5 – Penalties

Member States shall lay down the rules on penalties applicable to infringements of the provisions in Articles 3 and 4 and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by [30 April 2016] at the latest and shall notify it without delay of any subsequent amendment affecting them.

Article 6 – Amendments to Regulation (EU) No 531/2012

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

(1) In Article 2, paragraph 2 is amended as follows:

- a. points (i), (l) and (n) are deleted;
- b. the following points are added:
 - (r) *“domestic retail price” means roaming provider’s retail per unit domestic charge applicable to calls made and SMS sent (both originated and terminated on different public communications networks within the same Member State), and to data consumed by a customer. In case there is no specific domestic retail price per unit, the domestic retail price shall be deemed to be the same charging mechanism as if the customer would be consuming the domestic tariff in his Member State;*

- (s) “*separate sale of regulated retail data roaming services*” means the provision of regulated data roaming services provided to roaming customers directly on a visited network by an alternative roaming provider.

(2) Article 4 is amended as follows:

- (a) the title of Article 4 is replaced by the following:

Separate sale of regulated retail *data* roaming services.

- (b) paragraph 1, the first subparagraph is deleted;

- (c) paragraphs 4 and 5 are deleted.

(3) Article 5 is amended as follows:

- (a) the title of Article 5 is replaced by the following:

Implementation of separate sale of regulated retail *data* roaming services.

(b) paragraph 1 is replaced by the following:

Domestic providers shall implement the *obligation related to* separate sale of regulated retail *data* roaming services provided for in Article 4 so that roaming customers can use separate regulated *data* roaming services. Domestic providers shall meet all reasonable requests for access to facilities and related support services relevant for the separate sale of regulated retail *data* roaming services. Access to those facilities and support services that are necessary for the separate sale of regulated *data* roaming services, including user authentication services, shall be free of charge and shall not entail any direct charges to roaming customers.

(c) paragraph 2 is replaced by the following:

In order to ensure consistent and simultaneous implementation across the Union of the separate sale of regulated retail *data* roaming services, the Commission shall, by means of implementing acts and after having consulted BEREC, adopt detailed rules on a technical solution for the implementation of the separate sale of regulated retail *data* roaming services. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 6(2).

(d) in paragraph 3, the introduction is amended as follows:

The technical solution to implement the separate sale of regulated retail *data* roaming services shall meet the following criteria:

(4) Articles 8, 10 and 13 are deleted.

(5) Articles 6a and 6b are inserted:

Article 6a

Abolition of retail roaming surcharges

With effect from [15 June 2018], provided that the legislative act referred to in Article 19(2) is applicable on this date, roaming providers shall not levy any surcharge in comparison to the domestic retail price on roaming customers in any Member State for any regulated roaming call made or received, for any regulated roaming SMS/MMS message sent and for any regulated data roaming services used, nor any general charge to enable the terminal equipment or service to be used abroad, subject to Article 6b.

Article 6b

Fair usage

1. Roaming providers may apply a “fair use policy” to the consumption of regulated retail roaming services provided at the applicable domestic retail price level.

The application of the fair use policy shall meet both of the following criteria:

(a) apply only to the extent necessary to ensure that a roaming provider is able to recover all costs of providing regulated retail roaming services, including costs of acquisition of wholesale services and joint and common costs; and

(b) ensure that roaming providers’ customers are in a position to confidently replicate at least the average domestic consumption pattern in the Union while periodically travelling within the Union. In case the volumes calculated on the basis of this point are lower than the volumes provided at domestic retail prices set out in Article 6d, the fair use policy shall ensure as a minimum the provision of the volumes set out in Article 6d, calculated per calendar year.

A fair use policy may also be applied to prevent abusive and anomalous usage of regulated retail roaming services by roaming customers, in particular use of such services by roaming customers in a Member State other than that of his domestic provider for purposes other than periodic travel.

2. In order to ensure consistent application of the fair use policy by roaming providers, subject to paragraph 1 and the second subparagraph of this paragraph, the Commission shall, by means of implementing acts and after having consulted BEREC, adopt, by [31 March 2017], detailed rules on the application of fair use policy.

The Commission shall take into account the following:

- (i) the evolution of pricing and consumption patterns in the Member States;*
- (ii) the degree of convergence of domestic price levels across the Union;*
- (iii) any observable effect of roaming at domestic retail prices on the evolution of such rates;*
- (iv) the evolution of effective wholesale roaming rates for unbalanced traffic between roaming providers; and*
- (v) any observable risks of distortion of competition and investment incentives in home and visited markets.*

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 6(2) and shall apply from [15 June 2018]. The Commission shall periodically review those implementing acts in the light of market developments in accordance with the same procedure.

3. Article 6c shall apply to regulated retail roaming services exceeding any fair use policy.

(6) Article 6c is inserted:

Article 6c

Provision of regulated retail roaming services

1. Without prejudice to the second subparagraph, where a roaming provider applies a surcharge for the consumption of regulated roaming services in excess of the fair use policy, it shall meet the following requirements:

(a) any surcharge applied for regulated roaming calls made, regulated roaming SMS messages sent and regulated data roaming services shall not exceed the maximum wholesale charges provided for in Articles 7(2), 9(1) and 12(1), respectively;

(b) the sum of the domestic retail price and any surcharge applied for regulated roaming calls made, regulated roaming SMS messages sent or regulated data roaming services shall not exceed EUR 0,19 per minute, EUR 0,06 per SMS message and EUR 0,20 per megabyte used, respectively;

(c) any surcharge applied for regulated roaming calls received shall not exceed the weighted average of maximum mobile termination rates across the Union set out in accordance with paragraph 2.

Roaming providers shall not apply any surcharge to a regulated roaming SMS message received or to a roaming voicemail message received. This shall be without prejudice to other applicable charges such as those for listening to such messages.

Roaming providers shall charge roaming calls made and received on a per second basis. Roaming providers may apply an initial minimum charging period not exceeding 30 seconds to calls made. Roaming providers shall charge its customers for the provision of regulated data roaming services on a per-kilobyte basis, except for Multimedia Messaging Service (MMS) messages which may be charged on a per-unit basis.

This paragraph shall not preclude offers which provide roaming customers, for a per diem or any other fixed periodic charge, a certain volume allowance consistent with ordinary domestic usage and typical travel periods provided that the amount of the consumption of the full amount of the volume included in the offer leads to a unit price per regulated roaming calls made, calls received, SMS messages sent and data roaming services which does not exceed the respective domestic retail price and the maximum surcharge as set out in the first subparagraph.

2. By [31 December 2015], the Commission shall after having consulted BEREC and subject to the second subparagraph of this paragraph, adopt implementing acts setting out the weighted average of maximum mobile termination rates referred to in point (b) of paragraph 1.

The weighted average of maximum mobile termination rates shall be based on the following criteria:

(i) the maximum level of mobile termination rates imposed in the market for wholesale voice call termination on individual mobile networks by the national regulatory authorities in accordance with Articles 7 and 16 of the Framework Directive and Article 13 of Directive 2002/19/EC, and

(ii) the total number of subscribers in Member States.

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 6(2), and shall be reviewed every year in accordance with the same procedure.

3. *Roaming providers may offer and roaming customers may deliberately choose a roaming tariff other than the one set out in Articles 6a and 6b, and paragraph 1 of this Article, by virtue of which roaming customers benefit from a different tariff for regulated roaming service than they would have been accorded in the absence of such a choice. The roaming provider shall remind those roaming customers of the nature of the roaming advantages which would thereby be lost.*

Without prejudice to the previous subparagraph, roaming providers shall apply the tariff set out in Articles 6a and 6b, and paragraph 1 of this Article to all existing and new roaming customers automatically.

Any roaming customer may request to switch to or from the tariff set out in Articles 6a and 6b and paragraph 1 of this Article, at any point in time. When roaming customers deliberately choose to switch from or back to the tariff set out in Articles 6a and 6b, and paragraph 1 of this Article, any switch shall be made within one working day of receipt of the request and shall be free of charge and shall not entail conditions or restrictions pertaining to elements of the subscriptions other than roaming. Roaming providers may delay a switch until the previous roaming tariff has been effective for a minimum specified period not exceeding two months.

4. *Roaming providers shall ensure that a contract which includes any type of regulated retail roaming service shall specify the main characteristics of that regulated retail roaming service provided, including in particular:*

(a) the specific tariff plan or tariff plans and, for each such tariff plan, the types of services offered, including the volumes of communications;

(b) any restrictions imposed on the consumption of regulated retail roaming services provided at the applicable retail domestic price level, in particular quantified information on how any fair use policy is applied by reference to the main pricing, volume or other parameters of the provided regulated retail roaming service in question.

Roaming providers shall publish the information referred to in first subparagraph.

(7) Article 6d is inserted:

Article 6d

Transitional retail roaming charges

1. From [30 April 2016] until [14 June 2018], roaming providers shall offer at least 50 minutes of regulated roaming voice calls made, 50 minutes of regulated roaming voice calls received, 50 regulated roaming SMS messages sent and 100 megabytes of regulated data roaming services at the applicable domestic retail price. Those volumes shall be calculated per a 12 month period.

Roaming providers may implement usage policies in relation to the following:

- a) concerning active domestic use of subscriptions in order to prevent anomalous or abusive usage of these offers; and*
- (b) to prevent anomalous or abusive usage of calls received.*

2. Article 6c shall apply mutatis mutandis to regulated retail roaming services exceeding the volumes set out in paragraph 1.

(8) In Article 14, paragraphs 1 and 3 are replaced as follows:

1. To alert roaming customers to the fact that they *may* be subject to roaming charges when making or receiving a call or when sending an SMS message, each roaming provider shall, except when the customer has notified the roaming provider that he does not require this service, provide the customer, automatically by means of a Message Service, without undue delay and free of charge, when he enters a Member State other than that of his domestic provider, with basic personalised pricing information on the roaming charges (including VAT) that apply to the making and receiving of calls and to the sending of SMS messages by that customer in the visited Member State.

That basic personalised information shall include *information on the regulated roaming volumes set out in Article 6d, and as of the date of application of Article 6a, on fair use policy the roaming customer is subject to within the EU. That basic personalised information shall also include information, in particular on the volume available, and on the charges which apply in excess of the regulated roaming volumes set out in Article 6d, and as of the date of application of Article 6a, on the charges which apply in excess of the fair use policy within the EU* (in the currency of the home bill provided by the customer's domestic provider) to which the customer may be subject under his tariff scheme for:

- (a) making regulated roaming calls within the visited Member State and back to the Member State of his domestic provider, as well as for regulated roaming calls received; and
- (b) sending regulated roaming SMS messages while in the visited Member State.

[Subparagraphs 3-5 unchanged]

The first, second, fourth and fifth subparagraphs, *with exception of the reference to the regulated roaming volumes set out in Article 6d and the fair use policy therein*, shall also apply to voice and SMS roaming services used by roaming customers travelling outside the Union and provided by a roaming provider.

3. Roaming providers shall provide all customers with full information on applicable roaming charges, when subscriptions are taken out. They shall also provide their roaming customers with updates on applicable roaming charges without undue delay each time there is a change in these charges.

They shall send a reminder at reasonable intervals thereafter to all customers who have opted for another tariff.

(9) In Article 15, paragraphs 2 and 6 are replaced as follows:

2. An automatic message from the roaming provider shall inform the roaming customer that the latter is *using regulated data roaming services and provide basic personalised information on the regulated roaming volumes set out in Article 6d, and as of the date of application of Article 6a, on the fair use policy the roaming customer is subject to within the EU. That basic personalised information shall also include information*, ~~in particular on the volume available, and on the charges which apply in excess of the regulated roaming volumes set out in Article 6d, and as of the date of application of Article 6a, on the charges which apply in excess of the fair use policy the roaming customer is subject to within the EU~~ (in the currency of the home bill provided by the customer's domestic provider), expressed in price per megabyte, applicable to the provision of regulated data roaming services to that roaming customer in the Member State concerned, except where the customer has notified the roaming provider that he does not require that information.

The basic personalised information shall be delivered to the roaming customer's mobile device, for example by an SMS message, an e-mail or a pop-up window on the mobile device, every time the roaming customer enters a Member State other than that of his domestic provider and initiates for the first time a data roaming service in that particular Member State. It shall be provided free of charge at the moment the roaming customer initiates a regulated data roaming service, by an appropriate means adapted to facilitate its receipt and easy comprehension.

[Subparagraph 3 unchanged]

6. This Article, with the exception of paragraph 5 *and of the reference to the regulated roaming volumes set out in Article 6d and to the fair use policy in paragraph 2*, and subject to the second and third subparagraph of this paragraph, shall also apply to data roaming services used by roaming customers travelling outside the Union and provided by a roaming provider.

[Subparagraphs 2 and 3 unchanged]

(9a) In Article 15, paragraph 2a is added:

2a. When the regulated data roaming volume set out in Article 6d is reached, the roaming provider shall send a notification to the roaming customer. That notification shall indicate the regulated roaming surcharge that will be applied to any additional consumption of regulated data roaming services by the roaming customer. As of the date of application of Article 6a, that notification shall be sent to the roaming customer when the applicable fair use volume of regulated data roaming consumption is reached. Each customer shall have the right to require the roaming provider to stop sending such notifications and shall have the right, at any time and free of charge, to require the provider to provide the service again.

(10) Article 16 is amended as follows:

a) in the first paragraph, the following subparagraph is added:

National regulatory authorities shall monitor in particular whether roaming providers availing of Article 6c(3) engage in business practices which amount to circumvention of Articles 6a, 6b and 6c(1).

b) paragraph 2 is replaced by the following:

National regulatory authorities shall make up-to-date information on the application of this Regulation, in particular Articles 6a, 6b, 6c, 7, 9, and 12 publicly available in a manner that enables interested parties to have easy access to it.

(11) Article 19 is replaced by the following:

1. Upon entry into force of this Regulation, the Commission shall initiate a review of the wholesale roaming market with a view to assessing measures necessary to enable abolition of retail roaming surcharges by [15 June 2018]. The Commission shall review, inter alia, the degree of competition in national wholesale markets, and in particular assess the level of wholesale costs incurred and wholesale charges applied, and the competitive situation of operators with limited geographic scope, including the effects of commercial agreements on competition as well as the ability of operators to take advantage of economies of scale. The Commission shall also assess the competition developments in the retail roaming markets and any observable risks of distortion of competition and investment incentives in home and visited markets. In assessing measures necessary to enable abolition of retail roaming surcharges, the Commission shall take into account the need to ensure that roaming providers are able to recover all costs of providing regulated wholesale roaming services, including joint and common costs. The Commission shall also take into account 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' end-users while the latter are periodically travelling within the Union.

2. The Commission shall, by [15 December 2016] submit after a public consultation, report to the European Parliament and the Council on the findings of the review referred to in paragraph 1.

That report shall be accompanied by an appropriate legislative proposal to amend the wholesale charges for regulated roaming services set out in this Regulation or to provide for another solution to address the issues identified at wholesale level with a view to abolishing retail roaming surcharges by [15 June 2018].

3. In addition, the Commission shall submit a report to the European Parliament and the Council every two years after the report referred to in paragraph 2. Each report shall include, inter alia, an assessment of:

(a) the availability and quality of services, including those which are an alternative to regulated retail voice, SMS and data roaming services, in particular in the light of technological developments;

(b) 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;

(c) the extent to which the implementation of the structural measures provided for in Articles 3 and 4 has produced results in developing competition in the internal market for regulated roaming services.

4. In order to assess the competitive developments in the Union-wide roaming markets, BEREC shall regularly collect data from national regulatory authorities on the development of retail and wholesale charges for regulated voice, SMS and data roaming services. Those data shall be notified to the Commission at least twice a year. The Commission shall make them public.

On the basis of collected data, BEREC shall also report regularly on the evolution of pricing and consumption patterns in the Member States both for domestic and roaming services and the evolution of actual wholesale roaming rates for unbalanced traffic between roaming providers.

BEREC shall also annually collect information from national regulatory authorities on transparency and comparability of different tariffs offered by operators to their customers. The Commission shall make those data and findings public.

Article 7 – Review clause

The Commission shall review Articles 3, 4 and 5 of this Regulation and report to the European Parliament and the Council. The first report shall be submitted no later than [30 June 2018]. Subsequent reports shall be submitted every four years thereafter. The Commission shall, if necessary, submit appropriate proposals with a view to amending this Regulation.

Article 8 – Entry into force

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

2. It shall apply from [30 April 2016], except for the following:

(a) Article 6(5), which shall apply from [15 June 2018] provided that the legislative act referred to in Article 6(11) is applicable on this date.

In case that legislative act is not applicable on [15 June 2018], Article 6(7) shall apply instead of Article 6(5) until that legislative act is applicable.

In case that legislative act is applicable after [15 June 2018], Article 6(5) shall apply from the date of application of that legislative act;

(b) conferral of implementing powers on the Commission foreseen in Article 6(3), (5) and (6), which shall apply from the date of entry into force of this Regulation;

(c) task of BEREC foreseen in Article 4(6), which shall apply from the entry into force of this Regulation;

(d) Article 6(11) which shall apply from the entry into force of this Regulation.

~~3. In Article 6(6), (8) and (9), during the period from 30 April 2016 until the date determined pursuant to paragraph 2(a) of this Article, the reference to fair use policy shall be understood as a reference to the volumes offered at the applicable domestic retail price referred to in Article 6(7) of this Regulation.~~

~~3.4.~~ The provisions of Commission Implementing Regulation (EU) No 1203/2012 of 14 December 2012 on the separate sale of regulated retail roaming services within the Union⁷ related to the technical modality for the implementation of accessing local data roaming services on a visited network shall continue to apply for the purposes of separate sale of retail regulated data roaming services until the adoption of the implementing act referred to in point (c) of Article 6(3) of this Regulation.

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

⁷ OJ L 347/1, 15.12.2012.