Regulation (EU) 2017/920 of the European Parliament and of the Council of 17 May 2017 amending Regulation (EU) No 531/2012 as regards rules for wholesale roaming markets (Text with EEA relevance)

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(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

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

Having regard to the opinion of the European Economic and Social Committee[(1)],

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure[(2)],

Whereas:

(1) Regulation (EU) No 531/2012 of the European Parliament and the Council[(3)] introduces a common approach to the regulation of roaming on public mobile communications networks within the Union.

(2) The Digital Single Market Strategy for Europe set out in the Commission's communication of 6 May 2015 considered the Telecoms Single Market package, subsequently adopted by Regulation (EU) 2015/2120 of the European Parliament and of the Council[(4)], to be a first step towards eliminating retail roaming surcharges, thereby supporting the establishment of a digital single market in the Union.

(3) Regulation (EU) 2015/2120 sets up a new retail pricing mechanism for Union-wide regulated roaming services in order to abolish retail roaming surcharges from 15 June 2017 without distorting domestic and visited markets.

(4) The abolition of retail roaming surcharges set up by Regulation (EU) 2015/2120, also referred to as 'roam-like-at-home' (RLAH), is necessary to establish and ease the functioning of a digital single market across the Union. However, that Regulation alone is not sufficient to ensure the proper functioning of the roaming market. This Regulation should therefore contribute to pricing models in domestic markets not being affected by the abolition of retail roaming surcharges.

Changes to legislation: *There are currently no known outstanding effects for the Regulation (EU) 2017/920 of the European Parliament and of the Council. (See end of Document for details)*

(5) The abolition of retail roaming surcharges from 15 June 2017 is subject to the applicability of any legislative act proposed by the Commission that provides for appropriate measures following the review of the wholesale roaming markets.

(6) The Commission has conducted a comprehensive review of wholesale roaming markets to assess which measures are necessary to enable retail roaming surcharges to be abolished from 15 June 2017.

(7) In light of the findings of its review, the Commission adopted its report on the review of the wholesale roaming market on 15 June 2016 ('the Commission Report'). The Commission Report finds that, in order to ensure that retail roaming services can be provided at domestic retail prices, wholesale roaming inputs must be available at a level that allows home operators to provide RLAH. Although having fully competitive national wholesale roaming markets in which prices are in line with visited networks' underlying costs of provision would clearly make RLAH more sustainable, the Commission Report shows that this is not the case. The Commission Report also demonstrates that the future retail RLAH obligation alone is highly unlikely to lead to well-functioning wholesale roaming markets that would enable the provision of RLAH in the Union from 15 June 2017.

(8) In particular, the current functioning of wholesale roaming markets could affect competition and investments in home operators' domestic markets due to excessive wholesale roaming charges compared to the domestic retail prices applied to end users. This applies, in particular, to smaller operators, mobile virtual network operators (MVNOs), or net out-bound operators, making RLAH structurally unsustainable.

(9) The functioning of wholesale roaming markets should allow operators to recover all costs of providing regulated wholesale roaming services, including joint and common costs. This should preserve incentives to invest in visited networks and avoid any distortion of domestic competition in the visited markets caused by regulatory arbitrage by operators using wholesale roaming access remedies to compete in domestic visited markets.

(10) In light of obstacles identified, current measures applicable on the wholesale roaming markets should be amended to ensure that the level of wholesale roaming charges enables the sustainable provision of RLAH in the Union.

(11) In order to allow for the development of more efficient, integrated and competitive markets for roaming services, when negotiating wholesale roaming access for the purpose of providing retail roaming services, operators should be given the alternative to negotiate innovative wholesale pricing schemes which are not directly linked to volumes actually consumed, such as flat payments, upfront commitments or capacity-based contracts, or pricing schemes that reflect variations of demand across the year. The negotiating parties should therefore have the option of agreeing not to apply maximum regulated wholesale roaming charges for the duration of wholesale roaming agreements. This would exclude the possibility for either party to subsequently request the application of volume-based maximum wholesale charges to actual consumption, as set out in Regulation (EU) No 531/2012. This alternative should be without prejudice to

obligations as regards the provision of regulated retail roaming services in accordance with that Regulation.

(12) The conditions that may be included in the reference offers in order to allow mobile network operators to prevent permanent roaming or anomalous or abusive use of wholesale roaming access should be clarified. In particular, where the visited network operator has reasonable grounds for considering that permanent roaming by a significant share of the roaming provider's customers or anomalous or abusive use of wholesale roaming access is taking place, it should be able to require the roaming provider to provide, in an aggregated manner and in full compliance with Union and national data protection requirements, information allowing the determination of whether a significant share of the roaming provider's customers is in a situation of permanent roaming or whether there is anomalous or abusive use of wholesale roaming access, such as information on the share of customers with insignificant domestic consumption compared to the roaming consumption. Moreover, termination of wholesale roaming agreements with a view to preventing permanent roaming or anomalous or abusive use of wholesale roaming access should be effected only where less stringent measures have failed to address the situation. Such termination should be subject to prior authorisation by the national regulatory authority of the visited network operator, taking the utmost account of the opinion of the Body of European Regulators for Electronic Communications (BEREC) where it has been consulted. Less stringent measures could consist of setting higher wholesale charges not exceeding the maximum wholesale charges provided for in this Regulation for volumes exceeding an aggregated volume specified in the agreement. Such higher wholesale charges should be set in advance, or from the moment when the visited network operator has established and informed the home network operator that, based on objective criteria, permanent roaming by a significant share of the roaming provider's customers or anomalous or abusive use of wholesale roaming access is taking place. Less stringent measures could also consist of a commitment by the home network operator to adopt or revise the fair use policies applicable to its customers in accordance with the detailed rules adopted pursuant to Article 6d of Regulation (EU) No 531/2012, or the possibility for the visited network operator to request that the wholesale roaming agreement be revised. In the interests of transparency, the national regulatory authority should make information concerning requests for authorisation to terminate wholesale roaming agreements available to the public, subject to business confidentiality.

(13) With regard to rules on wholesale charges, regulatory obligations at Union level should be maintained since any measure that enables RLAH across the Union without addressing the level of the wholesale costs associated with providing wholesale roaming services could risk disrupting the internal market for roaming services and would not encourage more competition. Wholesale charges at an appropriate level should facilitate sustainable competition, including by new entrants, small and medium-sized enterprises and start-ups.

(14) Maximum wholesale charges should act as a safeguard level and should ensure that operators can recover their costs, including joint and common costs. They should also

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enable the widespread sustainable provision of RLAH, while at the same time leaving a margin for commercial negotiations between operators.

(15) The cost estimates for the provision of wholesale roaming services, including joint and common costs, have been assessed on the basis of several sources. One source was a general cost model for wholesale roaming services populated with national data and based on the method used by national regulatory authorities to determine mobile termination rates caps in accordance with Union law. A second source was alternative cost estimates based on consistent approaches across the Union on the regulation of national mobile termination rates. The assessment also drew on current wholesale roaming charges for unbalanced traffic in the Union and evidence of current wholesale access charges in domestic markets.

(16) In considering cost estimates, the potential impact of the seasonal nature of roaming traffic on the overall costs of providing wholesale roaming services at national level has been taken into consideration. Such estimates noted the counterbalancing effects that would mitigate any potential increase in costs caused by the seasonality of roaming traffic. In particular for data services, increasing domestic demand means that any seasonal traffic peak in a given year is likely to be exceeded by total domestic demand in the following year(s). Accordingly, since terrestrial public mobile communications networks are dimensioned in order to cope with that general upward trend driven by domestic demand, any peak in total network demand caused by seasonal roaming flows is unlikely to drive mobile network dimensioning costs. For voice calls, where demand is more stable, in some Member States seasonal roaming peaks may have an impact on overall network dimensioning costs. However, such localised seasonal peaks in traffic are also likely to be driven by the movement of domestic users into tourist areas and mitigated by the compensating effect of users of roaming services on capacity usage in metropolitan areas during the summer holiday season.

(17) Usage of data services is growing rapidly in the Union and across the world. The introduction of RLAH from 15 June 2017 should contribute to that growth in the roaming context, leading to the cost per unit of data transmitted being driven down significantly. In order to take account of the increased usage of data services and the reduction in cost per unit of data transmitted, the maximum wholesale charge for regulated data roaming services should decrease each year and should be set in euro per gigabytes where a gigabyte is equal to 1 000 megabytes. In setting the maximum wholesale charge for regulated data roaming services, all the access components needed to enable the provision of roaming services have been taken into account, including the transit costs of delivering data traffic to an exchange point identified by the home network operator.

(18) The portfolio of services provided by each provider of wholesale roaming services and their expected volumes of traffic should be taken into account when considering the safeguard role of wholesale roaming charges in achieving the twin objectives of ensuring that providers of wholesale roaming services recover all their relevant costs, while ensuring that the non-sustainability of RLAH remains exceptional.

(19) The existing maximum wholesale charges for voice, SMS and data roaming services should therefore be lowered substantially.

(20) While ensuring business confidentiality and in order to monitor and supervise the application of Regulation (EU) No 531/2012 and developments in wholesale roaming markets, national regulatory authorities should be entitled to require information on wholesale roaming agreements that do not provide for the application of the maximum wholesale roaming charges. Those authorities should also be allowed to require information on the adoption and application of conditions in wholesale roaming agreements aiming to prevent permanent roaming and any anomalous or abusive use of wholesale roaming access for purposes other than the provision of regulated roaming services to roaming providers' customers travelling within the Union.

(21) The specific price regulation applicable to wholesale roaming services entails that an overall Union cap applies to a composite product which may also include other wholesale roaming access and interconnection inputs, including, in particular, those subject to national or, potentially, cross-border regulation. In this regard divergences across the Union in the regulation of those inputs are predicted to decrease, in particular because of possible additional measures that may be taken in accordance with Directive 2002/21/EC of the European Parliament and of the Council[(5)] (Framework Directive) aiming to ensure greater consistency of regulatory approaches. In the meantime, any dispute between visited network operators and other operators on the rates applied to those regulated inputs necessary for the provision of wholesale roaming services should be addressed, taking into account BEREC's opinion, where it has been consulted, in accordance with the specific regulatory obligations applicable to roaming as well as with the Framework Directive and with Directives 2002/19/EC[(6)], 2002/20/EC[(7)], and 2002/22/EC[(8)] of the European Parliament and of the Council.

(22) It is necessary to monitor and to review regularly the functioning of wholesale roaming markets and their interrelationship with the retail roaming markets, taking into account competitive and technological developments and traffic flows. To that end, the Commission should, by 15 December 2018, submit to the European Parliament and to the Council, an interim report summarising the effects of the abolition of retail roaming surcharges, taking into account any relevant BEREC report. The Commission should subsequently submit biennial reports to the European Parliament and to the Council. The first such report should be submitted by 15 December 2019. In its biennial reports, the Commission should, in particular, assess whether RLAH has any impact on the evolution of tariff plans available on the retail markets. This should include, on the one hand, an assessment of any emergence of tariff plans that include only domestic services and that exclude retail roaming services altogether, thus undermining the very objective of RLAH and, on the other, an assessment of any reduction in the availability of flat-rate tariff plans, which could also represent a loss for consumers and undermine the objectives of the digital single market. The Commission's biennial reports should, in particular, analyse the extent to which exceptional retail roaming surcharges have been authorised by national regulatory authorities, the ability of home network operators to sustain their domestic charging models and the ability of visited network operators