Commission Implementing Regulation (EU) 2016/2286 of 15 December 2016 laying down detailed rules on the application of fair use policy and on the methodology for assessing the sustainability of the abolition of retail roaming surcharges and on the application to be submitted by a roaming provider for the purposes of that assessment (Text with EEA relevance)

COMMISSION IMPLEMENTING REGULATION (EU) 2016/2286

of 15 December 2016

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

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

Whereas:

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

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

(3) In order to ensure a consistent application across the Union of any policy which aims at preventing abusive or anomalous usage of roaming services (‘fair use policy’) and of authorisations to apply a surcharge, it is necessary to lay down detailed rules on the application of such fair use policy and on the methodology for assessing the

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sustainability of the abolition of retail roaming surcharges and on the application to be submitted by a roaming provider for the purposes of that assessment.

(4) According to Regulation (EU) No 531/2012, the objective of a fair use policy is to prevent abusive or anomalous usage by roaming customers of regulated retail roaming services at the applicable domestic price, such as the use of such services for purposes other than periodic travel, for instance the use of such services on a permanent basis. The implementing measures should ensure that the possibility to apply a roaming fair use policy to pursue this objective is not exploited by roaming providers for other purposes, to the detriment of roaming customers engaged in any form of periodic travel.

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

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

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

(8) Regulation (EU) No 531/2012 provides that any fair use policy has to enable the roaming provider's customers to consume volumes of regulated retail roaming services

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at the applicable domestic retail price that are consistent with their respective domestic tariff plans.

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

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

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

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

(13) Under certain domestic tariff plans, described hereafter as open data bundles, the data consumption may be unlimited or may provide data volumes at a low implicit domestic unit price relative to the regulated maximum wholesale roaming charge referred to in Article 12 of Regulation (EU) No 531/2012. In the absence of any exceptional volume safeguard specific to such open data bundles, such tariff plans are more likely than other tariff plans to be subject to organised resale to persons not residing in or having stable links entailing frequent and substantial presence in the Member State of the roaming provider. Moreover, such anomalous or abusive use of open data bundles while roaming may lead to the disappearance of such tariff plans in domestic markets, or to the restriction of roaming with such tariff plans, to the detriment of domestic users, and contrary to the objective of Regulation (EU) No 531/2012. This risk is considerably less acute for voice calls and SMS services as such services are subject to greater physical or temporal constraints, and actual usage patterns have been stable or declining over the last years. This is without prejudice to the right of operators to take measures to tackle highly atypical use patterns of voice or SMS roaming services arising from fraudulent activities. While it is necessary to provide for additional safeguards against such increased risks of abusive usage of regulated retail roaming data services at the applicable domestic retail price under open data bundles, the domestic customer periodically travelling in the Union should nevertheless be able to consume retail volumes of such services equivalent to twice the volumes that can be bought at the wholesale roaming data cap by a monetary amount equal to the overall retail domestic price, excluding VAT, of the mobile services component of the domestic tariff plan for the entire billing period in question. This represents a volume that is consistent with that domestic tariff plan, as it adapts to the domestic retail price of the tariff plan in question, and may therefore be applied in the case of open data bundles, including when bundled with other mobile retail services. The application of a multiplier of two adequately reflects the fact that operators often negotiate wholesale data roaming prices below the applicable caps, and that customers often do not consume the entire data allowance provided under their tariff plan. In this regard, customer transparency will be assured through compliance with the provisions of Regulation (EU) No 531/2012, according to which the roaming provider shall send a notification to the roaming customer when the applicable fair use volume of regulated data roaming services is fully consumed, indicating the surcharge that will be applied to any additional consumption of regulated roaming data services by the roaming customer.

(14) In order to address the risk that pre-paid subscriptions, which do not entail a long-term commitment, are used for permanent roaming purposes only, the roaming provider should be entitled, in the alternative to requiring the provision of evidence of residence or of stable links entailing frequent and substantial presence on the territory of the

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Member State of that roaming provider to limit the usage of regulated retail roaming data services at the applicable domestic retail price with a pre-paid subscription to the volumes that can be bought at the wholesale roaming data cap by the remaining monetary amount, excluding VAT, available on that pre-paid subscription at the time of the roaming consumption.

(15) The roaming provider should be able to take measures to detect and prevent abusive or anomalous usage of regulated retail roaming services at domestic prices, for purposes other than periodic travel. At the same time, roaming customers should be protected from any measure that may impinge in any manner on their ability to use regulated retail roaming services at domestic prices while periodically travelling abroad in the Union. Measures to detect and prevent abusive or anomalous usage of regulated retail roaming services at domestic prices should be simple and transparent, and should minimise administrative burden for roaming customers as well as excessive and unnecessary alerts. In line with the requirement of residence or stable links entailing frequent and substantial presence in the country of the roaming provider, the indicators substantiating the likelihood of abusive or anomalous usage should be based on objective indicators linked to traffic patterns showing the lack of prevailing domestic presence of the customer in the country of the roaming provider or of prevailing domestic use of the mobile domestic services. By definition, such objective indicators need to be established over a certain period of time. Such a period of time should be sufficiently long, at least 4 months, to enable roaming customers to consume retail roaming services at domestic prices while engaging in foreseeable forms of periodic travel in the Union. Indicators of presence in the country of the roaming provider should not be negatively affected by inadvertent roaming in border regions. In this regard, the situation of both inadvertent roamers and of frontier workers should be taken into account by considering that a log-on to the roaming provider's network at any point in a given day indicates a day of domestic presence for the purposes of applying the objective indicators. In line with Regulation (EU) No 531/2012, roaming providers should also provide adequate information in order to empower their customers to actively prevent instances of inadvertent roaming. Presence and consumption outside the Union should not negatively affect the ability of the roaming customer to benefit from roam-like-at-home in the Union, as they cannot be considered as indicators of risk that the customer is availing of roaming at the applicable domestic retail price in the Member State of the roaming provider for purposes other than periodic travel in the Union. In this regard, such presence and consumption should be counted as domestic for the purposes of applying the objective indicators. The roaming provider may also rely on other clear evidence of abusive or anomalous usage of regulated retail roaming services at domestic prices such as a subscription being hardly used in the Member State of the roaming provider but mostly while roaming, or several subscriptions being used by the same customer in sequence while roaming.

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