Regulation (EC) No 544/2009 of the European Parliament and of the Council of 18 June 2009 amending Regulation (EC) No 717/2007 on roaming on public mobile telephone networks within the Community and Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (Text with EEA relevance)

REGULATION (EC) No 544/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 18 June 2009

amending Regulation (EC) No 717/2007 on roaming on public mobile telephone networks within the Community and Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission,

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

Having consulted the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty[(2)],

Whereas:

(1) Regulation (EC) No 717/2007[(3)] imposed, on an exceptional and temporary basis, limits on the charges that may be levied by mobile operators, at wholesale and retail levels, for the provision of international roaming services for voice calls originating and terminating within the Community. That Regulation also laid down rules aimed at increasing price transparency and improving the provision of information on charges to users of Community-wide roaming services.

(2) The Commission has carried out a review in accordance with Article 11 of Regulation (EC) No 717/2007, where it was required to evaluate whether the objectives of that Regulation had been achieved, to review developments in wholesale and retail charges for the provision to roaming customers of voice and data communications services, including SMS and MMS, and to include, if appropriate, recommendations regarding the need to regulate those services. In its report to the European Parliament and the Council, contained in its Communication of 23 September 2008 on the outcome of the review of the functioning of Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC, the Commission

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concluded that it was appropriate to extend the validity of Regulation (EC) No 717/2007 beyond 30 June 2010.

(3) Furthermore, the Commission found that the scope of Regulation (EC) No 717/2007 should be extended to cover the provision within the Community of SMS and data roaming services. The special characteristics exhibited by the international roaming markets, which justified the adoption of Regulation (EC) No 717/2007 and the imposition of obligations on mobile operators with regard to the provision of Community-wide voice roaming calls, apply equally to the provision of Community-wide SMS and data roaming services. Like voice roaming services, SMS and data roaming services are not purchased independently at national level but constitute only part of a broader retail package purchased by customers from their home provider, thereby limiting the competitive forces at play. Likewise, because of the cross-border nature of the services concerned, national regulatory authorities which are responsible for safeguarding and promoting the interests of mobile customers resident within their territory are not able to control the behaviour of the operators of the visited network, situated in other Member States.

(4) Structural problems relating to roaming services should be easier to solve in a genuine single market for mobile communication services, which is not fully in place at present, but which should be the ultimate aim of any regulatory framework.

(5) For this reason the national regulatory authorities, acting within the European Regulators Group for Electronic Communications Networks and Services (ERG), established by Commission Decision 2002/627/EC[(4)], in its response to the public consultation on the review of Regulation (EC) No 717/2007, once again called on the Commission to act at Community level, both as regards the prolongation of the Regulation and with regard to the regulation of SMS roaming and data roaming services.

(6) Data on the development of prices for Community-wide voice roaming services since the entry into force of Regulation (EC) No 717/2007, including in particular those collected by national regulatory authorities and reported on a quarterly basis through the medium of the ERG, do not provide sufficient evidence to suggest that competition at the retail or wholesale levels is likely to be sustainable from June 2010 onwards in the absence of regulatory measures. Such data indicates that retail and wholesale prices are clustering at or close to the limits set by Regulation (EC) No 717/2007, with only limited competition below those limits.

(7) The expiry in June 2010 of the regulatory safeguards which apply to intra-Community voice roaming services at wholesale and retail levels by virtue of Regulation (EC) No 717/2007 would therefore give rise to a significant risk that the underlying lack of competitive pressures in the voice roaming market and the incentive for mobile operators to maximise their roaming revenues would result in retail and wholesale prices for intra-Community roaming that do not constitute a reasonable reflection of the underlying costs involved in the provision of the service, thereby jeopardising the objectives of Regulation (EC) No 717/2007. Regulation (EC) No 717/2007 should therefore be extended beyond 30 June 2010 for a period of two years in order to ensure the smooth functioning of the internal market by guaranteeing that consumers

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continue to benefit from the assurance that they will not be charged an excessive price, in comparison with competitive national prices, when making or receiving a regulated roaming call while at the same time leaving sufficient time for competition to develop.

(8) The obligations laid down in this Regulation should not distort the competitive conditions between mobile operators within the Community and should not introduce any sort of competitive advantage, in particular on the basis of the size, type of roaming traffic or home market of the provider of roaming services.

(9) The levels of the maximum average wholesale charges for regulated roaming calls set by Regulation (EC) No 717/2007 should continue to decrease over the extended duration of the Regulation to reflect decreasing costs, including reductions in regulated mobile termination rates in the Member States, in order to ensure the smooth functioning of the internal market while at the same time continuing to meet the dual objectives of eliminating excessive prices and allowing operators freedom to compete and innovate.

(10) In order to stimulate and strengthen sustainable competition in the various roaming services, national regulatory authorities should monitor whether there is discrimination between large and smaller providers, particularly in relation to the calculation of wholesale prices.

(11) The date in 2009 on which the decrease in the maximum price limits for regulated roaming calls at both wholesale and retail levels takes effect should be brought forward from 30 August to 1 July, in order to ensure consistency with the introduction of the obligations regarding the pricing of regulated SMS messages provided for by this Regulation. In this way, users of both voice and SMS roaming services would be able to benefit from the new tariffs during the period when there is the greatest demand for those services.

(12) Where charge limits are not denominated in euro, the applicable charge limits for the initial limits and the revised values of those limits should be determined in the relevant currency by applying the reference exchange rates published in the *Official Journal of the European Union* on the dates specified in this Regulation. Where there is no publication on the date specified, the applicable reference exchange rates should be those published in the first *Official Journal of the European Union* following that date and containing such reference exchange rates.

(13) As compliance with the wholesale charge limit established by Regulation (EC) No 717/2007 is measured by reference to the average wholesale price prevailing between any two operators over a 12-month period, it is appropriate to clarify that the period may be shorter, for example where the date of a scheduled decrease in the level of the maximum average wholesale charge occurs before the end of the 12-month period.

(14) The practice by some mobile network operators of billing for the provision of wholesale roaming calls on the basis of minimum charging periods of up to 60 seconds, as opposed to the per second basis normally applied for other wholesale interconnection charges, creates a distortion of competition between these operators and those applying different billing methods and undermines the consistent application of the wholesale price limits introduced by Regulation (EC) No 717/2007. Moreover it represents an additional

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charge which, by increasing wholesale costs, has negative consequences for the pricing of voice roaming services at retail level. Mobile operators should therefore be required to bill for the wholesale provision of regulated roaming calls on a per second basis.

(15) The maximum levels of the Eurotariff, both for calls made and calls received, should continue to decrease annually during the extended period of validity of Regulation (EC) No 717/2007 in a manner consistent with the decreases required during the initial period of application of that Regulation, to reflect the continuing decreases in domestic mobile prices generally and the continuing decreases in the underlying costs of providing regulated roaming calls. In this way, the continuity in the effects of that Regulation is maintained.

(16) The increased margins between maximum wholesale and retail charges provided for by this Regulation should allow increased scope for operators to compete on price at the retail level, thereby maximising the chances that a properly competitive market will emerge.

(17) Some operators face higher wholesale costs than others due to geographical or other circumstances, such as difficult topography, regions with low population density and large influxes of tourists within short time periods.

(18) The ERG has estimated that the practice of mobile operators of using charging intervals of more than one second when billing for roaming services at retail level has added 24 % to a typical Eurotariff bill for calls made and 19 % for calls received. They also stated that these increases represent a form of hidden charge since they are not transparent to most consumers. For this reason, the ERG recommended urgent action to address the different billing practices at retail level applied to the Eurotariff.

(19) While Regulation (EC) No 717/2007, by introducing a Eurotariff in the Community, established a common approach to ensuring that roaming customers are not charged excessive prices for regulated roaming calls, the different billing unitisation practices employed by mobile operators seriously undermines its consistent application. This also means that, despite the Community-wide, cross-border nature of intra-Community roaming services, there are divergent approaches in relation to the billing of regulated roaming calls which distort competitive conditions in the single market.

(20) A common set of rules regarding unitisation of Eurotariff bills at retail level should therefore be introduced in order to further strengthen the single market and provide throughout the Community a common level of protection to consumers of Community-wide roaming services.

(21) Providers of regulated roaming calls at the retail level should therefore be required to bill their customers on a per second basis for all calls subject to a Eurotariff, subject only to the possibility to apply a minimum initial charging period of no more than 30 seconds for calls made. This will enable operators to cover any reasonable set-up costs and to provide flexibility to compete by offering shorter minimum charging periods. However, no minimum initial charging period is justified in the case of Eurotariff calls received, as the underlying wholesale cost is charged on a per second basis and any specific set-up costs are already covered by mobile termination rates.

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(22) Customers should not have to pay for receiving voice mail messages in a visited network, as they cannot control the duration of such messages. This should be without prejudice to other applicable voice mail charges, for example charges for listening to such messages.

(23) As regards SMS roaming services, the market data collected by the ERG and the Commission since the entry into force of Regulation (EC) No 717/2007 have demonstrated that a situation persists across the Community in which wholesale charges for these services have remained broadly stable and have no meaningful relationship with underlying costs. As is the case for voice roaming services, there appear to be insufficient competitive pressures on operators to reduce wholesale prices. Retail prices for SMS roaming services have also, with no clear justification, remained broadly stable, subject to high margins and priced significantly above equivalent domestic SMS services.

(24) Just as is the case for voice roaming calls, there is a significant risk that imposing wholesale pricing obligations alone would not result automatically in lower rates for retail customers. On the other hand, action to reduce the level of retail prices without addressing the level of the wholesale costs associated with the provision of these services could prejudice the position of some operators, in particular smaller operators, by increasing the risk of price squeeze.

(25) Furthermore, because of the particular structure of the roaming market and its cross-border nature, the 2002 regulatory framework has not provided national regulatory authorities with suitable tools to address effectively the competitive problems underlying the high level of wholesale and retail prices for regulated roaming SMS services. This fails to ensure the smooth functioning of the internal market and should be corrected.

(26) The ERG also stated in its response to the Commission's public consultation on the review of the operation of Regulation (EC) No 717/2007 that it considered that regulation of SMS roaming was necessary, at both wholesale and retail levels, in order to bring prices more into line with costs and with domestic prices. It considered that arrangements analogous to those for voice roaming would be suitable. More specifically, the ERG recommended introducing a cap on the average wholesale rate charged by any one operator to any other operator for SMS roaming, and amending the Eurotariff obligation to include an offer of SMS roaming at a rate no greater than a specified maximum cap.

(27) Regulatory obligations should therefore be imposed with regard to regulated roaming SMS services at wholesale level, in order to establish a more reasonable relationship between wholesale charges and the underlying costs of provision, and at retail level to protect the interests of roaming customers.

(28) These regulatory obligations should take effect as soon as possible, while allowing the operators concerned a reasonable period to adapt their prices and service offers to ensure compliance.