

17 May 2015

**The Presidency's non-paper with a view to the preparation for the third informal
trilogue
on the 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**

With a view to the meeting of the Working Party on Telecommunications and Information Society (WP TELE) of 19 May 2015, the Delegations will find enclosed Presidency's informal suggestions for a possible draft compromise on roaming and open internet/net neutrality elements, based on the compromise proposal of the European Parliament discussed in the WP TELE meeting of 12 May 2015.

The Presidency would like to examine article-by-article these informal suggestions, as set out in the Annex I and Annex II, in the WP TELE meeting of 19 May 2015 (sequence of examination – Annex II (open internet/net neutrality), followed by Annex I (roaming)), in order to determine whether and to what extent these informal suggestions could be acceptable to the Delegations. The presented views would allow the Presidency to prepare a new compromise text with a view to the third informal trilogue.

Article 6a
Abolition of retail roaming surcharges

With effect from 15 December ~~2016~~ **2018**, roaming providers shall not levy any surcharge in comparison to the charges for mobile communications services at domestic level on roaming customers in any Member States 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.

Article 6b
Fair usage

1. By way of derogation from Article 6a, roaming providers may apply a "fair use ~~clause~~ **limit**" to the consumption of regulated retail roaming services provided at the applicable domestic price level ~~by reference to fair use criteria~~.

The application of the fair use limit shall meet the following criteria:

(a) ~~These criteria shall be applied in such a way that~~ ***ensure that*** roaming providers' ~~end-users~~ ***customers*** are in a position to confidently replicate ~~their own typical~~ ***average*** domestic consumption pattern ***of the Union*** while periodically travelling within the Union;

(b) ensure that roaming providers are able to recover costs of providing regulated retail roaming services;

~~The application of fair use criteria shall not result in~~ ***ensure as a minimum*** the provision of a ~~smaller~~ ***the*** volume of regulated retail roaming services provided at the applicable domestic price level ~~than~~ ***within*** the transitional roaming allowance ***fair use limit set out in Article 6d;***

(d) taking into account (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; and (iv) the evolution of effective wholesale roaming rates for unbalanced traffic between roaming providers.

2. ~~In accordance with Article 20 of Directive 2002/22/EC,~~ **Roaming providers shall publish and include in their contracts covering regulated retail roaming services detailed quantified information on how any fair use criteria are limit is applied, by reference to the main pricing, volume or other parameters of the retail package in question.**

3. ~~By 15 March 2016, BEREC shall, after consulting stakeholders and in close cooperation with the Commission, lay down general guidelines for the application of fair use criteria in retail contracts provided by roaming providers. BEREC shall have regard in particular to the evolution of pricing and consumption patterns in the Member States, to the degree of convergence of domestic price levels across the Union, to any observable effect of roaming at domestic service rates on the evolution of such rates, and to the evolution of effective wholesale roaming rates for unbalanced traffic between roaming providers. In addition, BEREC's guidelines may~~

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also have regard to relevant objective variations between Member States or between roaming providers in respect of factors such as domestic price levels, typical volumes included in retail packages or the average period during which customers travel within the Union.

~~3-4.~~ In order to ensure consistent and simultaneous implementation across the Union of the application of the fair use criteria *limit by roaming providers and subject to the criteria referred to in the second subparagraph of paragraph 1*, the Commission shall, by means of implementing acts and ~~based on~~ *after having consulted* the BEREC guidelines referred on paragraph 3, adopt, by ~~30 June 2016~~ *15 March 2018*, detailed rules on the application of fair use criteria *limit*. *Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 6c(2) and shall apply from 15 December 2018.*

~~4-5.~~ The competent national regulatory authority shall strictly monitor and supervise the application of fair use *limit* criteria as defined by the Commission implementing act referred on paragraph 4, taking utmost account of the BEREC general guidelines, of relevant objective factors specific to its Member State and of relevant objective variations between roaming providers, and shall ensure that unreasonable terms are not applied.

~~5-6.~~ The retail surcharges laid down in Article ~~6ed~~(2) (a) of this Regulation shall apply ~~for~~ *to* regulated *retail* roaming services exceeding any fair use limit applied in accordance with this Article.

Article 6c *Committee procedure*

- 1. The Commission shall be assisted by the Communications Committee established by Article 22 of the Framework Directive. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.*
- 2. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.*

Article 6ed **Transitional retail roaming charges**

- ~~1. From 15 December 2015~~ *30 April 2016* until 14 December ~~2016~~ *2018*, roaming providers shall ~~include in~~ *may apply to* all tariff plans containing regulated roaming services a ~~roaming allowance~~ *transitional fair use limit* referred to in Article 6e. For consumption not exceeding the transitional fair use limit, roaming providers shall not levy any surcharge in comparison to the domestic retail price for mobile communications services 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.
2. Where roaming providers apply a surcharge for the consumption of regulated roaming services in excess of the transitional roaming allowance, 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

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wholesale charges provided for in Articles 7(2) [~~5 cents~~], 9(1) [~~2 cents~~] and 12(1) [~~5 cents~~], 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 3.

Roaming providers may implement usage policies necessary to prevent anomalous or abusive usage of calls received.

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.

3. By ~~15~~ **31** December 2015, BEREC shall set out the weighted average of maximum mobile termination rates referred to in point (b) of paragraph 2 on the basis of (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) total number of subscribers in Member States. At the request from BEREC, national regulatory authorities shall communicate to BEREC the information referred to in (ii). BEREC shall review the average of maximum mobile termination rates set out in accordance with this Article every year from the date of application of this Regulation.

Decisions taken by the Board of Regulators of BEREC for the purposes of this paragraph may be subject of proceedings before the Court of Justice of the European Union.

4. Roaming providers may offer and roaming customers may deliberately choose a roaming tariff other than the one set out in paragraphs 1 and 2, 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 paragraphs 1 and 2 to all existing and new roaming customers automatically.

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When roaming customers deliberately choose to switch from or back to the tariff set out in paragraphs 1 and 2, any switch shall be made within one working day of receipt of the request and shall be free of charge. Roaming providers may delay a switch until the previous roaming tariff has been effective for a minimum specified period not exceeding two months.

Article 6de **Transitional roaming allowance fair use limit**

1. The ~~roaming allowance~~ **transitional fair use limit** referred to in Article 6d(1) shall include, ~~for the period from 15 December 2015 until 14 December 2016~~, at least ~~100~~ **40** minutes of regulated roaming voice calls made, ~~100~~ **40** minutes of regulated roaming voice calls received, ~~100~~ **40** regulated roaming SMS messages sent and ~~200~~ **80** megabytes of regulated data roaming services **per calendar year**.

~~2. Roaming providers may implement usage policies concerning active domestic use of pre-paid subscriptions in order to prevent anomalous or abusive usage of the transitional roaming allowance. The competent national regulatory authority shall supervise the application of such usage policies, taking account of local commercial practices, and shall ensure that no unreasonable terms are applied.~~

~~3. Roaming providers shall publish and include in their contracts detailed quantified information on how the transitional roaming allowance is applied, by reference to its main pricing or volume parameters.~~

In order to prevent abusive usage of the transitional fair use limit by roaming customers, roaming providers may offer the transitional fair use limit as a daily, weekly, monthly or any other periodic allowance, provided that the following requirements are met:

- a) the sum of these periodic allowances in a calendar year shall not be lower than the minimum yearly consumption set out in the first subparagraph, and***
- b) the consumption limits set out by the roaming provider for a chosen period other than a calendar year shall at least allow a roaming customer to fulfil his basic communication needs.***

Article 19 **Wholesale review**

1. Upon entry into force of this Regulation, the Commission shall initiate a review of the wholesale roaming market with a view to assessing the measures necessary to enable abolition of retail roaming surcharges by 15 December ~~2016~~ **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.

2. The Commission shall, by 15 ~~June~~ **December 2016** ~~2017~~ submit a 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 maximum wholesale roaming charges set out in this Regulation or to

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provide for another solution to address the issues identified at wholesale level with a view to abolishing retail roaming surcharge *by 15 December 2018*.

4. 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 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 markets, in particular the competitive situation of smaller, 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 roaming services.

5. 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.

~~New text suggested by Commission to address issue of arbitrage at wholesale level, which could be acceptable following further explanation~~

~~[Article 3(6): The reference offer referred to in paragraph 5 shall be sufficiently detailed and shall include all components necessary for wholesale roaming access as referred to in paragraph 3, providing a description of the offerings relevant for direct wholesale roaming access and wholesale roaming resale access, and the associated terms and conditions. The reference offer referred to in paragraph 5 may include conditions to prevent permanent roaming or anomalous or abusive use of wholesale roaming access for purposes other than provision of regulated roaming services to roaming providers' end-users while the latter are periodically travelling within the Union. If necessary, national regulatory authorities shall impose changes to reference offers to give effect to obligations laid down in this Article.]~~

Article 1 – Objective and scope

1. This Regulation establishes common rules ~~on aiming at ensuring~~ *to ensure* open internet access ~~offered by providers of electronic communications to the public,~~ safeguarding end-users' rights and ensuring non-discriminatory treatment of traffic.

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) 'net neutrality' means the principle according to which all internet traffic is treated equally, without discrimination, restriction or interference, independently of its sender, recipient, type, content, device, service or application;

(2) *I* “internet access service” means a publicly available electronic communications service that provides access to the internet in accordance with the principle of net neutrality, and thereby connectivity between virtually all end points of the internet, irrespective of the network technology or terminal equipment used;

(2) *“provider of electronic communications to the public” means an undertaking providing public electronic communications networks or publicly available electronic communications services.*

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 to 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 the commercial conditions for internet access services related to price, data volumes or speed. Such agreements, and any commercial practices conducted by providers of internet access services, shall ~~[be non-discriminatory and shall]~~ not limit the exercise of the right of end-users set out in paragraph 1.

3. Subject to this paragraph ~~and in accordance with the principle of net neutrality,~~ providers of internet access services shall treat all traffic equally when providing internet access services.

Providers of internet access services may implement reasonable traffic management measures. In order to be deemed reasonable ~~and compliant with the principle of equal treatment,~~ such measures shall be transparent, non-discriminatory, proportionate and shall not constitute anti-competitive behaviour, ~~account being taken of~~ *and shall be based on* objectively different technical quality of service requirements of specific

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~~categories~~ *classes* of traffic, ~~whereas such a distinction can only be made on the basis of the packet header.~~ 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 sub-paragraph 2, ~~and in particular~~ shall not block, slow down, alter, degrade or discriminate between specific content, applications or services, ~~or specific categories or entire classes of traffic~~, 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*** ~~or~~ mitigate the effects of temporary ~~and~~ ***or*** exceptional network congestion, provided that equivalent types of traffic are treated equally.

d) subject to a prior explicit consent of the end-users concerned,

(i) prevent the transmission of unsolicited communications within the meaning of Article 13 of Directive 2002/58/EC or

(ii) implement parental control measures.

The end-user shall be given the possibility to withdraw this consent at any time.

~~Any~~ \mp traffic management measures may only entail processing of personal data that is necessary and proportionate to achieve the objectives of ***this*** paragraph ~~3 (a—d)~~. Such processing shall be carried out in accordance with Directive 95/46. Traffic management measures shall also comply with Directive 2002/58.

~~4. End-users shall be provided with complete information in accordance with Article 20(2), Article 21(3) and Article 21a of Directive 2002/22/EC, including information on any traffic management measures applied that might affect access to and distribution of information, content, applications and services as specified in this Article.~~

~~45.~~ Providers of electronic communications to the public, including providers of internet access services, and ***end users, including*** providers of content, applications and services shall be free to ~~offer individual~~ ***agree on the provision of*** services which are distinct from internet access services and 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.

~~Such services~~ ***Providers of electronic communications to the public, including providers of internet access services, and providers of content, applications and services*** shall ~~only be offered~~ ***such services only*** if the network capacity made available by providers of electronic communications services to the public, ~~including providers of internet access services,~~ is sufficient to provide them in addition to internet access services, they are not marketed or usable as substitute for internet access services and are not to the ***material*** detriment of the availability or quality of internet access services ***for other end-users.***

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Article 4 – ~~Safeguards for quality of service and the availability of Supervision and enforcement of open internet access services~~

1. National regulatory authorities shall closely monitor and ensure compliance with Article 3, and shall promote the continued availability of ~~non-discriminatory~~ internet access services at levels of quality that reflects advances in technology and are not impaired by services referring to Article 3(5). For those purposes national regulatory authorities may impose technical characteristics and minimum quality of service requirements. 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 their obligations under Article 3 and 4, 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 time limits and the level of detail required by the national regulatory authority.* ~~Article 5 of the Framework Directive shall apply, mutatis mutandis, in respect of the provision of information under this Article.~~

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

(a) information on how traffic management measures applied by that provider could impact on internet access service quality;

(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.

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

~~3~~ 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 competent authorities under this Article, including with respect to the application of traffic management measures set out in Article 3(4) and for monitoring of compliance.

~~Article 4a (new) – Supervision and enforcement~~

~~1. National regulatory authorities shall monitor and supervise compliance with this Regulation within their territories.~~

~~2. National regulatory authorities shall make up-to-date information on the application of this Regulation publicly available in a manner that enables interested parties to have easy access to it.~~

~~3. National regulatory authorities shall have the power to require undertakings subject to obligations under this Regulation to supply all information relevant to the~~

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~~implementation and enforcement of this Regulation. Those undertakings shall provide such information promptly on request and in accordance with time limits and the level of detail required by the national regulatory authority.~~

~~4. National regulatory authorities may intervene on their own initiative in order to ensure compliance with this Regulation.~~

~~5. National regulatory authorities shall put in place appropriate, clear, open and efficient procedures aimed at addressing complaints alleging breaches of Article 3. To this end, all users of internet access services shall be entitled to make use of such complaint procedures in front of the relevant authority. National regulatory authorities shall respond to complaints within a reasonable time.~~

~~6. Where a national regulatory authority finds that a breach of the obligations set out in this Regulation has occurred, it must require the immediate cessation of such a breach.~~

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