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COMMISSION IMPLEMENTING REGULATION (EU) .../...

of XXX

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) .../...

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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 Union¹, 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 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

¹ OJ L 172, 30.6.2012, p. 10.

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.

- (5) At the same time, Regulation (EU) No 531/2012 provides that any fair use policy has to enable the provider's customers to consume volumes of regulated retail roaming services at the applicable domestic retail price that are consistent with their respective tariff plans.
- (6) As Member States can impose registration requirements for citizens residing more than three months in their territory, a presence of more than 90 days in another Member State than the one of the subscription to a mobile service contract thus may indicate a change of the centre of interest of a subscriber from one Member State to another and can be regarded as a more stable presence rather than periodic travel.
- (7) Data on travelling patterns across the Union indicate that a fair use policy enabling roaming customers to use regulated retail roaming services at the applicable domestic price for at least 90 days in any one year would cover virtually all communications needs of Union customers travelling periodically for holidays and professional purposes.
- (8) However, given the degree of divergence in prices for mobile retail services in national markets across the Union, an application of the criterion on 90 days in any one year alone may not always allow the roaming provider to prevent the abusive or anomalous use of roaming services at the applicable domestic price effectively.
- (9) In order to prevent the abusive or anomalous use of roaming services at the applicable domestic price effectively, roaming providers should therefore be entitled to require their customers to connect regularly to their home network. A period of at most 30 consecutive days between log-ons to the home network reflects the maximum length of time almost all roaming customers across the Union are likely to be travelling abroad in the Union.
- (10) 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 tariff plans, the roaming provider should 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 in line with the time criterion established in accordance with this Regulation.
- (11) Given the different pricing and consumption patterns across Member States, the consumption may be unlimited under the domestic tariff plan or may be subject to indeterminate limits or to consumption ceilings designed to limit only very anomalous usage behaviour. In such cases, the incentive to use very large volumes of traffic at domestic price levels while roaming on a permanent basis may increase, as the price differential *vis-à-vis* limited domestic offers may turn out to be greater than average. Without prejudice to the possibility to tackle the possible higher risk of usage of regulated retail roaming services at the applicable domestic retail price on a permanent basis in such cases, the customer should nevertheless be able to consume volumes of such services equivalent to at least the average volume consumed domestically by the customers of the tariff plan in question. This represents a volume that is in any case consistent with that domestic tariff plan and may therefore be applied in case of open bundles.
- (12) Frontier workers who commute across a border every day for work, and inhabitants of border areas spending part of the day in the neighbouring Member State on a regular

basis are travelling abroad periodically and should not be regarded as making abusive or anomalous use of regulated retail roaming services. Such customers should be able to use such services at the applicable domestic price for any period of time in any one day. As a consequence, roaming on any day with log-on to the home network should not be counted as a day of roaming consumption for the purposes of applying time limits to the consumption of regulated retail roaming services at the applicable domestic price.

- (13) In order to prevent pre-paid subscriptions from being used for roaming purposes only, the roaming provider should be entitled to require a minimum volume of domestic consumption before those subscriptions may be used to consume regulated retail roaming services at the applicable domestic price. Such a requirement is in line with a normal pattern of usage of a domestic subscription and may act as an effective safeguard against business models based on the resale of foreign pre-paid subscriptions.
- (14) Any technical restriction on the quality of roaming services provided at the applicable domestic retail price may seriously impair customers' ability to consume volumes of mobile retail services while roaming that are consistent with the domestic tariff plan in question. Therefore, operators should be prevented from applying any contractual clause limiting the quality of regulated retail roaming services consumed within any fair use policy, without prejudice to objective and general technical restrictions deriving from the overall quality of the services provided by the visited network.
- (15) In specific cases, where the operator has substantiated evidence of a given consumer's usage patterns showing a likelihood of abusive or anomalous consumption of regulated retail roaming services at domestic price levels for purposes other than periodic travelling, it should alert the customer to the risk of triggering roaming surcharges. The indicators substantiating the likelihood of abusive or anomalous usage should be spelled out in advance and be based on objective criteria linked to patterns showing insignificant domestic consumption or proof of abusive or anomalous use of SIM cards.
- (16) In accordance with Regulation (EU) No 531/2012, in the event of a dispute on the detection of the potential anomaly or abuse or on the application of a surcharge, or where the usage pattern indicating the potential abusive or anomalous usage of regulated retail roaming services no longer applies or where a plausible explanation can be provided of the legitimate character of the usage pattern, the roaming customer should have access to the out-of-court dispute resolution procedures, within the meaning of Article 34 of the Directive 2002/22/EC of the European Parliament and of the Council² available in the Member State of the domestic provider.
- (17) In accordance with Regulation (EU) No 531/2012, the national regulatory authorities have to strictly monitor and supervise the application of the fair use policy in order to ensure that any fair use policy applied by domestic providers does not impair the availability of 'roam-like-at-home' for the customer.
- (18) 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

² 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) (OJ L 108, 24.4.2002, p. 51).

the electronic communications sector, contractual clauses providing for a fair use policy should be clearly and fully brought to customers' attention before they become applicable.

- (19) As roaming usage patterns vary over the course of a year, applications for authorisation to apply a roaming surcharge filed by a roaming provider pursuant to Article 6c(2) of Regulation (EU) No 531/2012 in order to ensure the sustainability of its domestic charging model should be assessed on the basis of traffic data covering at least 12 months. In order to calculate the volume of traffic over the year, the roaming provider should also be allowed to show traffic projections, provided that those are based on the traffic growth rate observed over all tariff plans of roaming customers over a minimum period of actual application of 'roam-like-at-home' in accordance with Article 6a of Regulation (EU) No 531/2012.
- (20) Any cost and revenue data supporting the application for authorisations to apply a roaming surcharge filed by a roaming provider pursuant to Article 6c(2) of Regulation (EU) No 531/2012 in order to ensure the sustainability of its domestic charging model should be based on financial accounts which may be adjusted to traffic volume projections. Deviations from cost and revenue projections based on financial accounts should be allowed only if supported by proof of financial commitments already entered into at the time of the application.
- (21) A harmonised methodology should be provided for determining the costs and revenues of providing regulated retail roaming services, with a view to ensuring consistent assessment of applications for authorisation to apply a surcharge filed by a roaming provider pursuant to Article 6c(2) of Regulation (EU) No 531/2012 in order to ensure the sustainability of its domestic charging model.
- (22) The provision of regulated retail roaming services entails two general categories of costs: the cost of purchasing wholesale roaming access from visited networks for unbalanced traffic, and other roaming-specific costs. In accordance with Regulation (EU) No 531/2012, the cost of purchasing wholesale roaming access from visited networks for unbalanced traffic is covered by the effective wholesale roaming charges applied to the volumes by which the roaming provider's outbound roaming traffic exceeds its inbound roaming traffic.
- (23) Other roaming-specific costs of providing regulated retail roaming services are common to the provision of roaming services within the Union and in non-EU countries and some are also common to both wholesale and retail provision of roaming services. For the purposes of an application for authorisation to apply a roaming surcharge filed by a roaming provider pursuant to Article 6c(2) of Regulation (EU) No 531/2012 in order to ensure the sustainability of its domestic charging model, those common costs should be allocated to the provision of retail roaming services within the Union and, in the case of those common to retail and wholesale provision of roaming services, in accordance with the general ratio of inbound and outbound roaming revenues.
- (24) The costs of providing regulated retail roaming services could also be calculated as including a proportion of joint and common costs incurred for the provision of mobile retail services in general, provided that the calculation reflects the ratio used for the allocation to such services of revenues from the provision of all other mobile retail services.

- (25) In determining the revenues from the provision of regulated retail roaming services, the application for authorisation to apply a surcharge filed by a roaming provider pursuant to Article 6c(2) of Regulation (EU) No 531/2012 in order to ensure the sustainability of its domestic charging model should take full account of all retail revenues directly billed for the provision of mobile retail services originated in a visited Member State, such as revenues for traffic in excess of volumes under any fair use policy or from alternative regulated roaming services, as well as any other per-unit charge or other payment triggered by the use of mobile retail services in a visited Member State.
- (26) As regulated retail roaming services are provided under applicable domestic conditions, they should be seen as generating some of the revenue from fixed periodic charges for the provision of domestic mobile retail services. They should therefore be taken into account when assessing the application for authorisation to apply a roaming surcharge filed by a roaming provider pursuant to Article 6c(2) of Regulation (EU) No 531/2012 in order to ensure the sustainability of its domestic charging model in accordance with the methodology set out in this Regulation. For that purpose revenues from each mobile retail service should be allocated on the basis of a key reflecting the ratio between traffic of various mobile services, as weighted in accordance with the ratio between per-unit average wholesale roaming charges.
- (27) To be regarded as having the effect of undermining the sustainability of the operator's domestic charging model, any roaming retail net margin resulting from the deduction of the costs of providing regulated retail roaming services from the corresponding revenues should be negative at least by an amount that generates a risk of an appreciable effect on domestic price developments. In particular, to be regarded as giving rise to such a risk, the negative roaming retail net margin should represent at least an appreciable proportion of overall earnings, before interest tax depreciation and amortisation, from the provision of other mobile services.
- (28) Even where the roaming retail net margin represents an appreciable proportion of the overall margin for the provision of other mobile services, specific circumstances, such as the level of competition in the domestic market and in particular the limited incentive to increase prices in more competitive markets, or the specific characteristics of the applicant could still rule out a risk of an appreciable effect on domestic price developments.
- (29) In its application for authorisation to apply a roaming surcharge filed by a roaming provider pursuant to Article 6c(2) of Regulation (EU) No 531/2012 in order to ensure the sustainability of its domestic charging model, the roaming provider should estimate the losses due to the provision of 'roam-like-at-home' and the corresponding arrangements for applying the surcharge needed to recoup these, having regard to applicable maximum wholesale charges.
- (30) In view of national regulatory authorities' obligations to supervise strictly the application of fair use policy and the measures on the sustainability of the abolition of retail roaming surcharges, as well as to report annually to the Commission on the application of the relevant provisions, this Regulation should specify the minimum information that they should gather and transmit to the Commission to enable it to monitor its application.
- (31) Pursuant to Regulation (EU) No 531/2012, the Commission is to periodically review this implementing act in the light of market developments.

- (32) The measures provided for in this Regulation are in accordance with the opinion of the Communications Committee,

HAS ADOPTED THIS REGULATION:

Section I
General provisions

Article 1
Subject matter and scope

1. This Regulation lays down detailed rules to ensure the consistent implementation of a fair use policy that roaming providers may apply to the consumption of regulated retail roaming services provided at the applicable domestic retail price in accordance with Article 6b of Regulation (EU) No 531/2012.
2. It also lays down detailed rules on:
 - (a) roaming providers' applications for authorisation to apply a roaming surcharge filed pursuant to Article 6c(2) of Regulation (EU) No 531/2012 in order to ensure the sustainability of their domestic charging model;
 - (b) the methodology to be applied by national regulatory authorities in assessing whether the roaming provider has established that it is unable to recover its costs of providing regulated roaming services, with the effect that the sustainability of its domestic charging model would be undermined.

Article 2
Definitions

1. For the purposes of this Regulation, the definitions in Regulation (EU) No 531/2012 apply.
2. The following definitions also apply:
 - (a) 'fair use policy' means a set of contractual terms and conditions defined by a roaming provider with a view to preventing abusive or anomalous usage by the customer of regulated retail roaming services within the Union at the applicable domestic retail price;
 - (b) 'mobile retail services' means public mobile communications services provided to end-users, including voice, SMS and data services;
 - (c) 'open bundle' means a tariff plan for the provision of one or more mobile retail services which does not limit the volume of mobile retail services included against the payment of a fixed periodic fee or for which any limit provided is indeterminate in character or reached by an insignificant proportion of the tariff plan's end-users;
 - (d) 'pre-paid tariff plan' means a tariff plan under which mobile retail services are provided upon deduction of credit made available by the customer to the provider, either on a per-unit basis or upon payment of fixed periodic charges, in advance of consumption;

- (e) ‘metered tariff plan’ means a tariff plan under which the provision of one or more mobile retail services is billed on a per-unit basis;
- (f) ‘other mobile retail services’ means public mobile communications services provided to end-users other than retail roaming services provided within the Union;
- (g) ‘visited Member State’ means a Member State other than that of the roaming customer’s domestic provider;
- (h) ‘mobile services margin’ means earnings, before interest tax depreciation and amortisation, from the sale of mobile services other than retail roaming services provided within the Union;
- (i) ‘group’ means a parent undertaking and all its subsidiary undertakings subject to its control within the meaning of Council Regulation (EC) No 139/2004³

Section II
Fair use policy

Article 3
Rules on the application of fair use policy

1. Any fair use policy applied by a roaming provider to its customers shall not include any term or condition or technical restriction which may result in the following:
 - (a) the customer cannot consume regulated retail roaming services within the Union at the domestic retail price applicable at the moment of the roaming consumption for up to 90 days per year;
 - (b) the customer is obliged to log on to the roaming provider’s home network before a period of 30 consecutive days since the last log-on to that network has elapsed;
 - (c) the customer cannot consume all the volumes available at the moment of the roaming consumption under the applicable domestic tariff plan, including unlimited volumes in the case of metered tariffs or any additional volume which can be obtained under the plan in return for an additional domestic charge, except in the case of open bundles;
 - (d) in the case of open bundles, the roaming customer cannot consume during the corresponding billing period a volume of roaming retail services within the Union at the domestic retail price equivalent to at least the average monthly consumption of the customers under the tariff plan in question, calculated on a yearly basis and made publicly available under the terms and conditions of the fair use policy;
 - (e) in the case of pre-paid subscriptions, customers are required to have consumed a minimum volume of domestic mobile retail services in excess of the monthly average retail revenues per user for such services reported in the Member State of the provider, as made publicly available under the terms and conditions of

³ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ L 24, 29.1.2004, p. 1)

the fair use policy, before they can consume roaming retail services within the Union at the domestic retail price.

2. Where a customer logs off from the home network for a visited network and reconnects to the home network within a given day, that day shall not be counted in the 90-day and 30-day periods referred to in points (a) and (b) of paragraph 1.
3. When a roaming provider applies a fair use policy, it shall include in contracts with roaming customers all the terms and conditions associated with that policy. A roaming provider may not include in the roaming customer's contract specific restrictions on the quality of regulated retail roaming services within the Union consumed in the framework of a fair use policy.

Article 4

Detection of risk of abusive or anomalous use of regulated retail roaming services

1. In order to prevent abusive or anomalous usage of regulated retail roaming services, as part of the 'fair use policy', the roaming provider may apply and, where this is the case, shall include in contracts concluded with customers of regulated retail roaming services objective indicators in order to determine a risk of abusive or anomalous use of those services, such as:
 - (a) for subscriptions without a minimum contractual period, a volume of traffic originated domestically that is insignificant as compared with that originated or terminated while roaming, having regard to the monthly average retail revenues per user for mobile retail services reported in the Member State in question;
 - (b) subscription of multiple SIM cards by the same customer, as associated with sequential use while roaming;
 - (c) long inactivity of a given SIM card, as associated with use (origination or termination or both) mostly, if not exclusively, while roaming;
 - (d) proof of cloning of a given SIM card, as duly reported to the competent authorities.

In order to establish a risk of abusive or anomalous use of roaming services, the presence of such indicators shall be observed for at least 45 days.

The observation for at least 45 days shall not apply to cases of reported cloning.

2. Where there is objective and substantiated evidence indicating a risk of abusive or anomalous use of roaming retail services within the Union at the domestic retail price by a given customer, the domestic provider may apply a surcharge pursuant to Article 6e of Regulation (EU) No 531/2012 after alerting the customer to the detected behaviour pattern indicating such a risk.
3. When alerting the customer pursuant to paragraph 2, the operator shall inform him that, in the absence of a change in his usage pattern within at least two weeks, demonstrating actual domestic consumption, a surcharge pursuant to Article 6e of Regulation (EU) No 531/2012 may be applied for any further use of regulated retail roaming services with the SIM card in question.

Section III
Application and methodology for assessing the sustainability of the abolition of retail roaming charges

Article 5

Data supporting the application for authorisation to apply a roaming surcharge filed by a roaming provider pursuant to Article 6c(2) of Regulation (EU) No 531/2012 in order to ensure the sustainability of its domestic charging model

1. Applications for authorisation to apply a roaming surcharge filed by a roaming provider pursuant to Article 6c(2) of Regulation (EU) No 531/2012 in order to ensure the sustainability of its domestic charging model ("application") shall be assessed on the basis of data on the overall volumes of regulated retail roaming services provided by the applicant roaming provider over a period of 12 months. For the first application, these data shall cover volumes actually provided by the applicant at the applicable domestic retail price over at least 45 days and by default over all tariff plans of roaming customers.

The applicant shall derive the projected volumes for the rest of the 12-month period covered by the application in accordance with the methodology set out in Annex I.

In the event of updates to the application being submitted pursuant to Article 6c(2) of Regulation (EU) No 531/2012, the projected overall volumes of regulated roaming services shall be updated on the basis of the actual average pattern of consumption of domestic mobile services multiplied by the observed number of roaming customers and the time they have spent in visited Member States in the previous 12 months.

2. Any data on the applicant's costs and revenues shall be based on financial accounts, which shall be made available to the national regulatory authority, and may be adjusted according to volume estimates pursuant to paragraph 1. Where costs and revenues are projected, deviations from figures resulting from past financial accounts shall be considered only if supported by proof of financial commitments for the period covered by the projections.
3. The applicant shall provide all necessary data used to determine the mobile services margin.

Article 6

Determination of roaming-specific costs for the provision of regulated retail roaming services

1. For the purposes of establishing that the applicant is unable to recover its costs, with the effect that the sustainability of its domestic charging system would be undermined, only the following roaming-specific costs shall be taken into consideration, if substantiated in the application for authorisation to apply a roaming surcharge:
 - (a) the actual costs for the purchase of wholesale roaming access;
 - (b) the roaming-specific retail costs.
2. With regard to the actual costs incurred for the purchase of regulated wholesale roaming services, only the amount by which the applicant's overall payments to counterparts providing such services in the Union exceed the overall sums due to it for the provision of the same services to other roaming providers in the Union shall be taken into account.

3. With regard to the roaming-specific retail costs, only the following costs shall be taken into account, if substantiated in the application:
 - (a) the costs of operating and managing roaming activities, including all business intelligence systems and software dedicated to roaming operation and management;
 - (b) data-clearing and payment costs, including both data-clearing and financial clearing costs;
 - (c) contract negotiation and agreement costs, including external fees and use of internal resources;
 - (d) costs sustained in order to comply with the requirements for the provision of regulated retail roaming services laid down in Articles 14 and 15 of Regulation (EU) No 531/2012, taking into account the applicable fair use policy adopted by the roaming provider.
4. Costs referred to in points (a) , (b) and (c) of paragraph 3 shall be taken into account only in proportion to the ratio of overall traffic volume of the applicant's regulated retail roaming services to the overall retail outbound and wholesale inbound traffic of its roaming services, in accordance with the methodology set out in Annex II, points (1) and (2), and in proportion to the ratio of overall amount of traffic of its retail roaming services within the Union to the overall traffic of its retail roaming services within and outside the Union, in accordance with the methodology set out in Annex II, points (1) and (3).
5. The costs referred to in point (d) of paragraph 3 shall be taken into account only in proportion to the ratio of overall traffic volume of the applicant's retail roaming services within the Union to the overall traffic of its retail roaming services within and outside the Union, in accordance with the methodology set out in Annex II, points (1) and (3).

Article 7

Allocation of retail joint and common costs to the provision of regulated retail roaming services

1. In addition to the costs determined pursuant to Article 6, a proportion of joint and common costs incurred for the provision of mobile retail services in general may be included in the application for authorisation to apply a roaming surcharge. Only the following costs shall be taken into account, if substantiated in the application :
 - (a) billing and collection costs, including all costs associated with processing, calculating, producing and notifying the actual customer bill;
 - (b) sales and distribution costs, including the costs of operating shops and other distribution channels for the sale of mobile retail services;
 - (c) customer care costs, including the cost of operating all customer care services available to the end-user;
 - (d) bad debt management costs, including costs incurred in writing off customers' unredeemable debts and collecting bad debts;
 - (e) marketing costs associated with roaming services, including all expenses for advertising mobile services.

2. The costs referred to in paragraph 1, if substantiated in the application, shall be taken into account only in proportion to the ratio of overall traffic of the applicant's retail roaming services within the Union to the overall retail traffic of all mobile retail services, obtained as a weighted average of that ratio per mobile service, with weights reflecting the respective average wholesale roaming prices paid by the applicant in accordance with the methodology set out in Annex II, points (1) and (4).

Article 8

Determination of revenues from the provision of regulated retail roaming services

1. For the purposes of establishing that the applicant is unable to recover its costs, with the effect that the sustainability of its domestic charging system would be undermined, only the following revenues shall be taken into account and included in the application for authorisation to apply a roaming surcharge:
 - (a) revenues deriving directly from traffic of mobile retail services originated in a visited Member State;
 - (b) a proportion of overall revenues from the sale of mobile retail services based on fixed periodic charges.
2. The revenues referred to in point (a) of paragraph 1 shall include:
 - (a) any retail charge levied pursuant to Article 6e of Regulation (EU) No 531/2012 for traffic exceeding any fair use policy applied by the roaming provider;
 - (b) any revenues from alternative regulated roaming services pursuant to Article 6e(3) of Regulation (EU) No 531/2012;
 - (c) any domestic retail price billed on a per-unit basis or in excess of fixed periodic charges for the provision of mobile retail services and triggered by the use of mobile retail services in a visited Member State.
3. For the purposes of determining the revenues referred to in point (b) of paragraph 1, in the event of bundled sale of mobile retail services with other services or terminals, only revenues linked to the sale of mobile retail services shall be considered. Those revenues shall be determined by reference to the price applied to the separate sale of each component of the bundle, if available, or to the sale of such services with the same characteristics on a stand-alone basis.
4. In order to determine the proportion of overall revenues from the sale of mobile retail prices linked to the provision of regulated retail roaming services, the methodology set out in Annex II, points (1) and (5) shall be applied.

Article 9

Assessment of applications for authorisation to apply a roaming surcharge filed by a roaming provider pursuant to Article 6c(2) of Regulation (EU) No 531/2012 in order to ensure the sustainability of its domestic charging model

1. When assessing an application for authorisation to apply a roaming surcharge filed by a roaming provider pursuant to Article 6c(2) of Regulation (EU) No 531/2012 in order to ensure the sustainability of its domestic charging model, the national regulatory authority may conclude that the applicant is unable to recover its costs of providing regulated retail roaming services, with the effect that the sustainability of its domestic charging model would be undermined, only where the negative roaming retail net margin of the applicant is equivalent to 5 % or more of its mobile services margin.

The roaming retail net margin shall be the amount remaining after the costs of providing regulated retail roaming services are deducted from the revenues from providing such services, as determined in accordance with this Regulation. In order to determine it, the national regulatory authority shall review the data provided in the application to ensure compliance with the methodology for determining costs and revenues, as laid down in Articles 6, 7 and 8.

2. Where the negative roaming retail net margin is equivalent to 5 % or more of the mobile services margin, the national regulatory authority shall nevertheless refuse the surcharge where it can establish that specific circumstances make it unlikely that the sustainability of the domestic charging model would be undermined. Such circumstances include situations in which:
 - (a) the applicant is part of a group and there is evidence of internal transfer pricing in favour of the other subsidiaries of the group within the Union, in particular in view of substantive imbalance of wholesale roaming charges applied within the group;
 - (b) the degree of competition on domestic markets means that there is capacity to absorb reduced margins;
 - (c) the application of a more restrictive fair use policy, still in compliance with Articles 3 and 4 , would reduce the roaming retail net margin to a proportion of less than 5 %.
3. When authorising the surcharge on regulated roaming services, the final decision of the competent national regulatory authority shall identify the amount of the ascertained negative retail roaming margin that may be recovered through the application of a retail surcharge on roaming services provided within the Union. The surcharge shall be consistent with the roaming traffic assumptions underpinning the assessment of the application and be set in accordance with the principles set out in Article 8 of Directive 2002/21/EC of the European Parliament and of the Council⁴

Section IV Final provisions

Article 10

Monitoring of fair use policy and applications for authorisation to apply a roaming surcharge filed by a roaming provider pursuant to Article 6c(2) of Regulation (EU) No 531/2012 in order to ensure the sustainability of its domestic charging model

In order to monitor the consistent application of Articles 6b and 6c of Regulation (EU) No 531/2012 and of this Regulation, and with a view to informing the Commission annually of applications pursuant to Article 6d(5) of Regulation (EU) No 531/2012, the national regulatory authorities shall regularly collect information concerning:

- (a) any action they take to supervise the application of Article 6b of Regulation (EU) No 531/2012 and the detailed rules laid down in this Regulation;

⁴ 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)

(b) the number of applications to apply a roaming surcharge filed, authorised and renewed in the course of the year pursuant to Article 6c(2) and (4) of Regulation (EU) No 531/2012;

(c) the extent of negative roaming retail net margins recognised in their decisions to authorise the roaming surcharge and the arrangements concerning a surcharge declared in the applications for authorisation to apply a roaming surcharge filed by a roaming provider pursuant to Article 6c(2) of Regulation (EU) No 531/2012 in order to ensure the sustainability of its domestic charging model.

Article 11
Entry into force

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

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The President
Jean-Claude Juncker