

**BEREC input to the European Commission  
Implementing Act on fair use policy and  
sustainability of the abolition of retail roaming  
surcharges**

13 October, 2016

## Contents

<b>I. INTRODUCTION.....</b>	<b>3</b>
1.1. Background.....	3
1.2. EC Request .....	3
1.3. Overall impact of RLAH .....	4
<b>II. FAIR USE .....</b>	<b>7</b>
2.1. Main elements of the EC proposal .....	7
2.2. BEREC comments on the proposals of the EC .....	8
<b>III. SUSTAINABILITY MECHANISM .....</b>	<b>15</b>
3.1. Main elements of the EC proposal .....	15
3.2. BEREC comments on the proposals of the EC .....	17
3.2.1. Requirement of actual RLAH data .....	18
3.2.2. Timing for application .....	19
3.2.3. Scope to be assessed .....	20
3.2.4. Sustainability .....	20
3.3. Outstanding issues .....	22
3.3.1. Level of the surcharge .....	22
3.3.1. Level of the assessment.....	22
<b>ANNEX 1 – Analysis of travel patterns .....</b>	<b>23</b>
<b>ANNEX 2 – Technical comments on the draft text.....</b>	<b>25</b>

# I. INTRODUCTION

## 1.1. Background

Regulation (EU) No. 2015/2120, adopted by the European Parliament and Council on 27 October 2015 and published in the Official Journal of 26 November 2015, included amendments to Roaming Regulation (EU) No. 531/2012 (hereinafter “Roaming Regulation”). From 15 June 2017 onwards, these amendments oblige mobile telecommunications operators not to levy any surcharge in addition to the domestic retail price on any EU roaming customer for any regulated voice call, SMS or use of data outside the customer’s home country while periodically travelling (this is termed ‘Roam like at home’ or RLAH). This obligation depends on a legislative act being proposed by the European Commission (EC) in July 2016, following a comprehensive review of national wholesale roaming markets in the EU, and to be adopted by the co-legislators by June 2017.

On 26 November 2015, the EC began its public consultation on the review of national wholesale roaming markets, a fair use policy (hereinafter FUP) and the sustainability mechanism referred to in Roaming Regulation EU No. 531/2012 as amended by Regulation No. 2015/2120. The results of the public consultation, which ended in February 2016, are published on the EC’s website.<sup>1</sup>

In addition, the EC according to Article 6d has to adopt, after having consulted the Body of European Regulators for Electronic Communications (hereinafter BEREC), Implementing Act laying down detailed rules on the application of the FUP and on the methodology for assessing the sustainability of the abolition of retail roaming surcharges. BEREC provides with this document its input to the draft Implementing Act of the EC.<sup>2</sup>

## 1.2. EC Request

The EC, in a letter from 20 June 2016, requested BEREC to deliver an opinion on (i) a first draft for the application of a FUP and on the methodology for assessing the sustainability of the abolition of retail roaming surcharges, and (ii) weighted average of maximum mobile termination rates across the EU. BEREC opinion was initially expected by 8<sup>th</sup> October 2016.

After discussions in the College of Commissioners on 21st September, the Commissioners endorsed a new approach for the FUP where costumers should be able to use their mobile devices abroad for periodic travel in the EU and providing, at the same time, certain safeguard mechanisms for operators.

As a consequence of the new approach, BEREC received a new letter on 23 September containing an extension of the initial deadline for providing its formal opinion on the new text until 17 October 2016.

---

<sup>1</sup> See <https://ec.europa.eu/digital-single-market/en/news/summary-report-public-consultation-review-national-wholesale-roaming-markets-fair-use-policy>

<sup>2</sup> See [http://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=17681](http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=17681)

The following pages include an overall assessment of the impacts of RLAH, a summary of the main elements of the proposals of the EC for the FUP and the sustainability mechanism shared with BEREC, as well as BEREC's assessment of the EC proposals. The document does not include BEREC's input on the weighted average of maximum mobile termination rates across the EU, which will be provided in an additional document that is going to be submitted to the EC.

### 1.3. Overall impact of RLAH

Although this document is about BEREC's input to the EC Implementing Act on the FUP and the sustainability mechanism, BEREC considers that these elements are interlinked with the wholesale charges, the third main element of the RLAH proposal. Any RLAH proposal can only be assessed in full by analysing the delicate trade-off between all three elements in order to prevent adverse distributional, price and competitive distortions to domestic and visited markets. Therefore, an overall impact of RLAH is discussed below.

The implementation of RLAH is a comprehensive process that requires a range of risks to be understood and trade-offs to be considered. As mentioned in BEREC's previous analyses, a number of concerns about the implications of implementing RLAH are identified. These issues are intrinsically linked, meaning that consideration of the implications of RLAH requires them to be taken into account in a holistic manner.

One principle is to ensure that operators in both the domestic network and the visited network have an opportunity to recover efficiently incurred costs. Failure to allow this opportunity may harm dynamic efficiency by undermining incentives to invest and innovate. It can be thought of as a requirement that retail prices for roaming services exceed the wholesale roaming charges, which in turn exceed the efficient costs of service provision:

$$\text{Retail price} \geq \text{wholesale charge} \geq \text{wholesale cost}$$

Addressing the elements of this requirement in turn, since RLAH necessitates that international roaming retail prices are set equal to domestic prices, entails that domestic retail prices in all EEA Member States should exceed wholesale roaming charges (which are generally lower than the wholesale caps) and at the same time the wholesale roaming caps should exceed the wholesale roaming costs. If either relationship does not hold then domestic tariff rebalancing may not be avoided. However, the potential for reducing the existing wholesale caps, currently under discussion in the Council/EP, is constrained by wholesale costs. This principle has been reflected in Regulation 2120/2015: "in assessing measures necessary to enable the abolition of retail roaming surcharges, the Commission shall take into account the need to ensure that the visited network operators are able to recover all costs of providing regulated wholesale roaming services, including joint and common costs."

The challenge is finding a balance between wholesale charges that are sufficiently low to support RLAH without requiring increases in retail prices in domestic countries, and sufficiently high to allow wholesale cost recovery and avoid an increase in retail prices in the visited countries. In this sense, it is necessary to consider in greater detail the scale and

scope of the various risks to competition and consumers, and the potential for mitigating negative effects through other measures (e.g. FUP), as well as the developments of competition in the retail roaming markets and any observable risks of distortion of competition and investment incentives in domestic and visited markets.

#### Risks related to wholesale charges

- Risks arising from too low wholesale cap: If wholesale caps are set too low they will risk being below wholesale costs and this might lead to an increase of domestic retail prices in the visited country in order to recover the wholesale costs (a ‘waterbed effect’ arises). This would imply that the costs of the introduction of RLAH are borne by customers of the visited country. This is especially to the disadvantage for those who do not travel at all and therefore do not benefit from RLAH, but have to pay higher prices in order to compensate the losses incurred by travellers from other countries. In this sense, the level of wholesale caps to be adopted should be set at a level that ensures recovery of costs associated with the provision of wholesale roaming services<sup>3</sup> (including joint and common costs) in all EEA countries. Additionally, the FUP foresees measures to prevent permanent roaming at the retail level but does not provide additional measures for visited networks against the abuse of roaming at the wholesale level (the current provisions in Article 3 of the Roaming Regulation might not be sufficient). In this sense, in the absence of effective appropriate measures at wholesale level and should the wholesale charges be set close to the commercial national mobile wholesale access tariffs, new business opportunities might be exploited by arbitrageurs which could offer domestic services by permanent roaming in the visited markets with better commercial conditions, leading to unfair competition and creating competitive distortions.
- Risks arising from too high wholesale charges: If the costs of the domestic operator for offering international roaming services to their retail customers cannot be recovered from the retail prices, this raises the possibility of another ‘waterbed effect’, where the domestic operator raises its retail prices in order to recover its wholesale payments<sup>4</sup>. An increase of retail prices could entail distributional effects, which means that customers that do not travel at all, have to pay higher prices in order to compensate the losses incurred by the operator due to frequent travellers using RLAH services. The alternatives for operators would be either to apply for the sustainability mechanism or even stop offering retail roaming services at all. In addition, variations in retail prices across the EEA could encourage consumers to engage in permanent roaming (i.e. purchasing SIM cards in countries with low retail prices and using them in a permanent roaming situation<sup>5</sup>). In a scenario with high wholesale charges, such behaviour would have negative impacts for the domestic operator if the foreseen measures at retail level, i.e. FUPs, are proven not to be effective.

In order to mitigate the negative effects of the two scenarios above, in particular the described risks of permanent roaming (whether initiated by users or operators) and thus

---

<sup>3</sup> By taking into account the seasonal character of roaming services.

<sup>4</sup> Some operators argue that current price increases in some Member States are in light of the future introduction of RLAH.

<sup>5</sup> Commission SWD – Impact assessment accompanying the document “Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 531/2012 as regards rules for wholesale roaming markets“

prevent abusive or anomalous usage of regulated roaming services, Regulation 2120/2015 foresees the establishment of a FUP. The challenge is to define a retail FUP that provides, in combination with appropriate measures at the wholesale level, adequate protection for customers and operators. As described above, there is a risk of waterbed effects stemming from an abusive usage of RLAH. At the same time a FUP should not be too restrictive as it would otherwise undermine the goal of the Roaming Regulation to allow customers to 'roam like at home' while periodically travelling within the Union.

## II. FAIR USE

The Roaming Regulation requires the EC to determine the FUP by an Implementing Act. The scope of the Roaming Regulation is limited to periodic travel. Pursuant to Article 6b (1), a FUP shall prevent abusive and anomalous usage of roaming services at the applicable domestic retail price level. The Article also explains that abusive or anomalous usage is likely to include permanent (rather than periodic) roaming. Article 6e (1) further sets out that a surcharge may be applied for the consumption of regulated retail roaming services in excess of any limits under any FUP.

According to Article 6b (1) and Recital 22, the FUP shall enable the roaming providers' customers to consume volumes of regulated retail roaming services at the applicable domestic retail price that are consistent with their respective tariff plans.

When adopting the Implementing Act, according Article 6d (2) the EC should further take into account:

- the evolution of pricing and consumption patterns in the Member States
- the degree of convergence of domestic price levels across the Union
- the travelling patterns in the Union and
- any observable risks of distortion of competition and investment incentives in domestic and visited markets.

BEREC therefore considers that the Implementing Act on the FUP should be defined in accordance with the above mentioned criteria. It follows that it should enable providers to define limits as regards to what they may consider a use for purposes other than periodic travel.

### 2.1. Main elements of the EC proposal

The revised draft Implementing Act provides as a basic principle that roaming providers must offer regulated retail roaming services at domestic prices to their customers who are a normal resident or have stable links entailing a frequent and substantial presence in the country of the domestic operator while they are periodically travelling.

The draft Implementing Act states that any FUP that operators can apply is subject to the following conditions:

- Roaming providers may request from their customers a proof of normal residence or other stable links with the Member State
- To prevent abusive or anomalous usage the roaming provider may apply a control mechanism based on objective indicators such as
  - insignificant domestic traffic compared to roaming traffic
  - long inactivity of a given SIM card associated with use mostly while roaming
  - subscription and sequential use of multiple SIM cards by the same customer while roaming
- Where roaming providers detect organized resale to persons not residing in or having stable links in the Member State of the roaming provider, the roaming

provider may take immediate proportionate measures to ensure compliance with the conditions of the underlying contract.

- Roaming providers shall comply with Directive 2002/58/EC (Directive on privacy and electronic communications) when acting pursuant to this section.

The provisions only apply to RLAH tariffs, not to alternative tariffs according to Art 6e (3).

When a roaming provider applies such a FUP, it shall include the necessary details including any control mechanism applied in the contracts with the end-user. Furthermore, the roaming provider shall establish transparent, simple and efficient customer complaint procedures. Operators have to notify any FUP applied. NRAs shall according to Recital 18 strictly monitor and supervise the application of the FUP in order to ensure that any FUP applied by domestic providers does not impair the availability to “roam like at home”.

If there is evidence of abusive or anomalous use of RLAH, the roaming provider may apply a surcharge, after having alerted the customer. Once the customer no longer indicates a risk of abusive or anomalous usage, the roaming provider shall cease to apply the surcharge.

Where a roaming provider identifies that SIM cards are resold to customers who do not have a normal residence or stable link in that Member State, the operator shall inform the NRA of the evidence characterizing the systematic abuse and any measure taken to ensure compliance with the conditions of the underlying contract at the latest at the same time as such measure is taken.

## **2.2. BEREC comments on the proposals of the EC**

BEREC has analysed the proposed framework for the FUP and based on the general principles and the overall impact of RLAH referred to above, BEREC is commenting on the current proposal and highlighting the impact on domestic and visited markets.

To begin with, BEREC questions that the proposed Implementing Act is in line with the legal basis in the Roaming Regulation. Firstly, Articles 6b (2) and 6e (1) of the Roaming Regulation stipulate that a provider may apply a surcharge for consumption of regulated roaming services in excess of any 'limits' under a FUP, thus assuming that it should be possible for roaming providers to define limits for the consumption in a FUP. However, Recital 11 of the draft Implementing Act states that there should not be volume limits other than the domestic limit. Hence, BEREC observes that the proposed rules are not sufficiently clear on whether or not a limit can be applied on unlimited tariffs, as the draft Implementing Act can be interpreted as not allowing specific limits. Should it be indeed possible to set limits, the proposed rules are not clear about how such limits may be legitimately determined in a FUP.

Secondly, Article 6b (1) of the Roaming Regulation provides a reference to periodic travel when defining the FUP. BEREC is concerned that the proposed rules do not allow roaming providers to efficiently limit RLAH to periodic travel in accordance with Article 6b of the Roaming Regulation, but that the rules defined in the Implementing Act could also encompass longer stays. It is unclear whether the term “periodic travel” also refers to regular stays outside the home country or only to a few continuous stays (the latter most likely to be periodic travel).



This in turn leads to the question, whether the draft provisions allow specific conditions in relation to time and/or volume limits for the application of the FUP. BEREC understands that according to Recital 7 all stays outside the home network's Member State almost always qualify as periodic travel, as long as the normal residence/stable links criterion still points to the home network's Member State. If so the references throughout Articles 3 and 4 to "periodically travelling" would no longer be necessary. BEREC understands that the draft Implementing Act allows the roaming provider to apply a surcharge if objective and substantiated evidence indicate a risk of abusive or anomalous usage, including usage for purposes other than periodic travel. Another interpretation (supported by recitals 10 and 13) is that the objective indicators themselves do not lead to surcharging on their own and, instead, they are a means by which roaming providers can detect abusive or anomalous use – and it is only where such use has been identified that a roaming provider can require a consumer to provide documentary evidence of their residency/links to the home Member State. If the latter interpretation is correct then it would be useful for the Implementing Act to make clear the consequences if a consumer triggers the objective indicators but satisfies the residency or stable links test. Therefore, the position on the circumstances where surcharging is possible appears to require further clarification. Furthermore, BEREC is concerned that the objective indicators are not defined with sufficient clarity, as described below.

The aforementioned concern could be at least partly remedied if the Implementing Act would clearly set out the conditions under and the extent to which specific limits may be set as a FUP. Such an approach would also be more transparent to end-users and entail fewer risks to domestic markets, as there would be less uncertainty as to actual consumption in roaming and a lower risk for the roaming provider not being able to sustain its domestic charging model, especially when offering high-end or unlimited offers. Moreover, it would be much easier for NRAs to monitor. In fact, BEREC is concerned by the additional workload for NRAs.

In consequence, BEREC notes that the Commission's proposal does not define limits in the Implementing Act. Should the EC maintain this approach regardless of the above-mentioned concerns, it is at least important for a harmonised implementation of FUPs in the EEA to provide home operators and also NRAs that have to monitor and supervise the FUP, more detailed guidance (rules) on the three objective criteria to identify abusive or anomalous use.

While noting the political goal that customers should be able to consume the whole domestic allowance while roaming during periodic traveling, such an approach could be harmful for operators at the current stage of market development (especially regarding data services) and thus customers (because of potential increase in domestic prices). As described in chapter 1.3, finding the optimal balanced level for the wholesale caps is challenging and there are also structural differences in the costs of providing services on the domestic (mainly fixed) and roaming markets (purely variable) and the different flows of roaming traffic and revenues. The EC itself also identified this as an issue to be considered in its impact assessment document<sup>6</sup> explaining that "*in the wholesale roaming market, there is a strong level of uncertainty regarding actual volume consumption, especially for data. The RLAH*

---

<sup>6</sup> Commission SWD – Impact assessment accompanying the document "Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 531/2012 as regards rules for wholesale roaming markets"

*policy, which gives security to the consumer, and links usage to domestic tariffs that are generally not unit-based and potentially unlimited, could translate into higher volume consumption, which increases even further the level of uncertainty. Moreover, the cost structure of domestic offers (mostly fixed capex expenses) often differs from the roaming cost structure (mostly variable opex expenditure), as also highlighted in the public consultation. The RLAH policy could also increase this divergence between domestic and roaming cost structure”.*

In this regard, operators providing domestic offers with high allowances face a higher risk of being exposed to higher wholesale costs that could cause a number of these operators to have recourse to the exemption mechanism. Also smaller operators and MVNOs with lower bargaining power, might in such a scenario be forced to apply for exemption. This could lead to a situation where the sustainability mechanism cannot be considered exceptional or could, alternatively, lead to distortions of domestic markets through price increases or decreases in domestic volume allowances, or the limitation of access to roaming services to a certain category of offers. This runs counter to the competition process between operators (which is supposed to lead to providing more competitive offers to customers).

BEREC would like to comment on the observable risks of distortion of competition and investment incentives in domestic and visited markets. In this regard, large operators and/or operators with a large footprint could be less impacted. This could reinforce the tendency towards more consolidation in the mobile markets.

In addition, visited networks will also be faced with traffic increases which may require additional investments in their networks in order to maintain an adequate quality of service. In fact there is an additional connection between the retail FUP and the maximum wholesale roaming caps in the sense that the less restrictive the retail FUP is, the more probable is the significant increase of usage of regulated retail roaming services. This has an impact on the visited network operators, who have to face additional costs to deal with the increased traffic while ensuring a stable quality of service.

In view of the above, allowing customers to consume the whole domestic allowance while periodically travelling regardless of the size of the bundle, could imply a higher consumption than normal during a relatively short period, which again implies a negative impact on domestic operators because of the cost structure of the roaming market.

BEREC understands implicitly from Recital 11 that at least unlimited offers could be subject to volume limits, which would help to address the problem mentioned. If that is indeed the EC's intention BEREC suggests that this be made explicit in the Implementing Act in combination with a supplementary definition of unlimited offers. BEREC would like to note that similar risks occur with high-end offers (very large limited bundles, where the limit is reached only by very few customers), and similar measures could remedy the aforementioned impact. A simple volume limit for data could for instance take the average usage from the three Member States with the highest data consumption as a point of reference. In case BEREC's understanding does not reflect the EC's intention and no volume limits for roaming services are possible even for unlimited offers, this might make it impossible for some domestic operators to sustain the domestic unlimited volume charging models without applying a surcharge. In BEREC's opinion, the Implementing Act should not

discourage the provision of high-end or unlimited domestic offers, which are beneficial to customers.

Furthermore, as the Regulation links the FUP to periodic travel, BEREC analysed travel patterns as one important source of data to be considered, which BEREC would like to share with the co-legislators - all the more as Article 6d (2) (c) of the Roaming Regulation explicitly requests to take into account travelling patterns in the Union. As the precise number of days spent abroad by EU residents is not available, the number can only be estimated using several assumptions. Taking into account the data presented in Figure 1 below and the drawbacks referred to in Annex 1, it becomes evident that travelling patterns in the EU are in its majority characterized by short trips. Many EU residents do not make any trips abroad at all and those who travel have rather short trip durations.

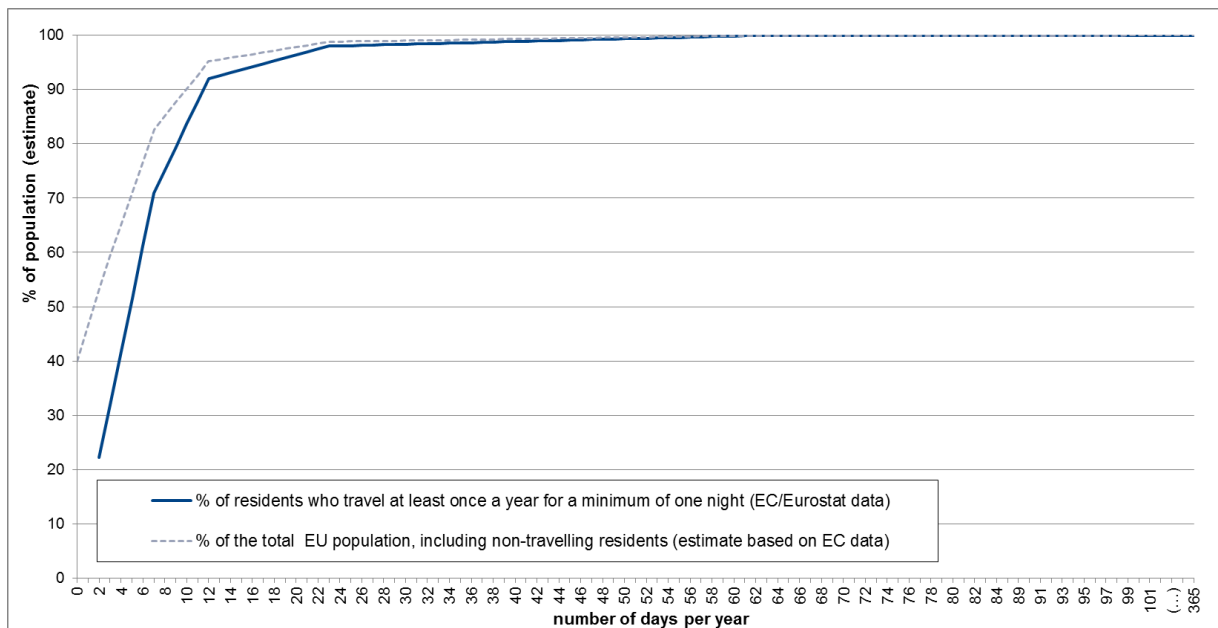


Figure 1: Estimate of number of days per year spent in other EU countries by EU residents.

With regard to the draft text of the Implementing Act, BEREC would furthermore like to point out the following concerns:

- Although a number of examples are given in Recital 10, the terms “stable link”, “normal residence” and “periodic travel” referred to as part of the basic principles explanation in Article 3 still need clear definitions in Article 2, in order to allow a common interpretation of these terms.<sup>7</sup>
  - BEREC understands that the burden to select the method of proving normal residence or a stable link is on the operators. BEREC considers it necessary to define these terms, including the associated references to “a frequent and substantial presence” in the Member State of the home roaming provider in order to help achieve consistency of regulatory approaches and to minimize the risk of disputes between operators and their customers.

<sup>7</sup> For some countries such a provision might raise more difficulties than for others, because for prepaid SIM cards a registration of the customer is not a necessary condition. Operators therefore could restrict RLAH to those prepaid customers that register and prove that they have a stable link.

- Article 3 suggests that Articles 4 and 5 set out the conditions to which FUPs are subject – however the first three paragraphs of Article 4 do not set conditions on roaming providers but rather are permissive in saying what can be done under a FUP instead of establishing clear criteria.
- Some of the proposed measures do not seem to be appropriate for providing the proof of normal residence or a stable link (e.g. a simple postal address might not be enough).
- There is no definition of “periodic travel” though it appears that the intention of the text may be to say that where the principles are met in Article 3 then periodic travel is assumed. If that is the case, BEREC considers that this needs to be stated explicitly or alternatively a definition of periodic travel would have to be provided. Should this not happen, customers could end up in a situation where roaming providers exploit any uncertainty to argue for a highly restrictive definition of periodic travel.
  - In addition, at present, the draft text could be interpreted as suggesting that a roaming provider might need to demonstrate a “risk of abusive or anomalous use beyond periodic travelling in the Union” before being able to apply a surcharge or “control mechanisms” even if normal residence or stable links have been established. On the other hand other interpretations are possible, namely: just identifying a risk of abusive or anomalous use as a result of the ‘objective indicators’ being triggered is enough to surcharge (even if the customer satisfies the residency/stable links threshold).
  - Proof that the customer does not satisfy the residency/stable links threshold would be sufficient to surcharge – even if the objective indicators aren’t met.
  - Roaming providers have to identify a risk of abusive or anomalous use as a result of the objective indicators being triggered BEFORE they can even request documentary evidence from consumers about their residency/links to the home country.

The draft text requires clarification on this point.
- BEREC considers that the references to “control measures” and “immediate proportionate measures” also require clarification and justification given that these are not referred to in the Roaming Regulation.
- In BEREC’s view, the objective indicators of a risk of abusive or anomalous use as set out in the draft Implementing Act similarly require a definition including clarifying whether they are intended to indicate where a customer is not periodically travelling and the reference to the possibility of surcharging:
  - The draft provisions leave it up to the operator to decide what “insignificant” means with regard to the share of roaming traffic out of the total traffic of each customer. This is likely to lead to different FUPs by different operators. Furthermore, according to the Council Directive on unfair terms in consumer contracts (93/13/EEC), which finds an ever stricter implementation in some consumer right laws in different Members States, operators are required to apply exact and transparent conditions in their general terms and conditions. This would run counter to the number of FUP that consumers may face.

- “Long inactivity of a given SIM card” is not defined either. Again, the operator has to make clear in its contracts how often a SIM card has to be used (domestically).
- The sequential use of multiple SIM cards may be virtually impossible to detect especially when the subscriber has several SIM cards from different service providers.
- Overall, BEREC considers that it is especially important for the ‘objective indicators’ to be clearly expressed and defined if they are, on their own, to be a basis for surcharging.

Moreover the concept of a FUP was introduced into the Roaming Regulation as a way to allow roaming providers to set a limit beyond which surcharging is permissible. Accordingly, BEREC considers that there needs to be an explicit reference to surcharging in Article 3 and 4 together with, as mentioned above, a justification and definition of any additional control mechanisms also provided for, including the circumstances in which surcharges would apply.

Because of the above mentioned reasons, BEREC is concerned about the risk of a disharmonized application of the FUP in the EEA arising from the current text. As the criteria mentioned in the draft Implementing Act are not clearly defined, each operator would be allowed to include in their contracts their own terms and conditions associated with their FUP, and as a result the implementation of the FUP might not be consistent across Europe. This runs counter to the objective of Article 6 (d) which explicitly states that the Implementing Act should ensure consistent application. BEREC also recognizes that the Implementing Act is the most adequate legal instrument to develop detailed rules on the application of the FUP and on the methodology for assessing the sustainability due to its binding nature. In case that not enough clarity is achieved in the Implementing Acts, the objective of consistent application would be jeopardized. Other possible legal instruments, such as BEREC Guidelines, are a useful tool to enhance consistency and could complement the Implementing Act in specific practical matters but they do not have the same binding force. Further, the Roaming Regulation establishes that these rules should be set by the Implementing Act and not by any other type of rule or guidelines.

BEREC reminds that NRAs shall monitor and supervise compliance with the operators’ FUP, however an unclear and non-exhaustive list of criteria would be likely to make this assignment time consuming and would in the end result in each NRA being responsible for the FUP that are applied in their own country threatening the requirement for consistency in approach.

BEREC is concerned that any FUP defined by those objective indicators alone will not be transparent for end-users. The proposed rules will lead to divergent practices by roaming providers making it difficult for end-users to compare the variety of offers.

BEREC has two other points to raise relating to the enforcement of the draft provisions:

- First, Recital 10 suggests that NRAs should supervise the proportionality of roaming providers’ demands for documentary proof of residency. However the substantive provisions appear not to mention this or say what an NRA should (and can) do in case of a problem here. This could be potentially very time-consuming without further guidance.

- Second, Article 5(4) requires roaming providers to notify NRAs if they find systematic abuse and take measures to ensure “compliance with the conditions of the underlying contract”. BEREC considers that this could benefit from clarifying what underlying contract is referred to and what NRAs would be expected to do following receipt of such a notification. Moreover, it might be more proportionate for NRAs only to be notified of such information if there is a complaint or dispute.

To conclude, BEREC is of the opinion, that clear definitions are needed in the Implementing Act. Establishing a regulatory roaming system without clear definitions for a FUP “stable links”, “insignificant amount” or “long inactivity of a SIM card” and without appropriate measures at wholesale level, might negatively impact domestic and visited markets:

- risk of domestic price increases and/or reductions in domestic bundles offered to all customers including those who do not travel at all (distributional effect),
- risk of distortion of competition,
- negative impact on investment,
- a high number of applications for the sustainability mechanism,
- change of domestic pricing schemes (e.g. withdrawal of high end or unlimited offers),
- the withdrawal of roaming services from cheaper tariffs,
- uncertainty on how the FUP can be applied among regulators, operators and consumers, combined with the potential complexity of the proposed arrangements.

In addition, with the proposed FUP it is expected that traffic increases significantly, which means that visited operators, in order to maintain an adequate quality of service, need to make additional investments in their networks. Furthermore, in the absence of effective appropriate measures at the wholesale level, there is the need to protect visited networks from permanent roaming through a thorough assessment of the wholesale market, as mentioned in section 1.3.

BEREC offers its support to the EC to ensure that the Implementing Act provides for consistent practices across the Member States, and wishes to draw the EC’s attention to the necessary improvements of the draft proposal presented in this document.

### III. SUSTAINABILITY MECHANISM

The Roaming Regulation provides for those operators that are not able to recover their overall actual and projected costs from the overall actual and projected revenues from the provision of regulated retail roaming services, a possibility to apply a surcharge with a view to ensure the sustainability of the domestic charging model. In order to ensure a consistent implementation of the methodology to assess the sustainability of the abolition of the domestic charging model, the EC shall, after consulting BEREC, adopt Implementing Act. This chapter provides BEREC's comments on the main elements that the EC is proposing for the Implementing Act.

#### 3.1. Main elements of the EC proposal

The main elements of the EC proposal for the implementing acts on the methodology to assess the sustainability of RLAH can be summed up as follows:

##### Timing and provision of data

- The assessment should be based on an analysis of the sustainability of RLAH for a period of 12 months.
- The operator shall provide at least 45 days of data that covers volumes at the applicable domestic retail price by default over all tariff plans of roaming customers. The operator shall derive the projected volumes for the rest of the 12-month period according to a specific methodology proposed by the EC.
- Any data shall be based on financial accounts. Adjustments according to volume estimates may be needed.
- 

##### Costs of providing regulated retail roaming services

- The operator shall take into account the roaming specific costs, which consist of the actual costs for the purchase of wholesale roaming access and the roaming-specific retail costs.
- With regard to the actual costs incurred for the purchase of wholesale roaming access, 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 (i.e. the sum of the payments to counterparts for the unbalanced roaming wholesale traffic)..
- In relation to roaming-specific retail costs, operators may take into account
  - the costs for operating and managing roaming activities,
  - data-clearing and payment costs,
  - contract negotiation and agreement costs and
  - costs sustained in order to comply with the requirements for the provision of retail roaming services laid down in Articles 14 and 15 of the Roaming Regulation, taking into account the applicable FUP adopted by the operator.

- The operator should only allocate a proportion of the total amount of these costs to regulated retail roaming services according to a methodology set out in the draft Implementing Act of the EC.

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

- The sustainability application may include in the costs a proportion of joint and common costs for the provision of mobile retail services, only in proportion to the ratio of overall traffic of the 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.

#### Revenues from the provision of regulated retail roaming services

- The sustainability application may take into account only revenues deriving directly from traffic of mobile retail services originated in a visited Member State, and a proportion of overall revenues from the sale of mobile retail services based on fixed periodic charges.
- The revenues deriving directly from traffic of mobile retail services originated in a visited Member State shall include
  - any retail charge levied pursuant to Article 6e of the Roaming Regulation for traffic exceeding any FUP applied by the operator,
  - any revenues from alternative regulated roaming services pursuant to Article 6e (3) of the Roaming Regulation,
  - 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.
- In the event of bundled sale of mobile retail services with other services and/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), otherwise the determination should be based on the price of services with the same characteristics on a stand-alone basis.
- The allocation of the overall revenues from mobile retail services to regulated retail roaming services should be based on the methodology described in the Annex of the draft Implementing Act of the EC.

#### Assessing the sustainability of the domestic charging model

- The operator shall estimate the net margin on regulated retail roaming services ("roaming margin"). If the negative roaming retail net margin is equivalent to 5% or more of its mobile services margin, the NRA may conclude that the sustainability of the domestic charging model would be undermined.
- The costs and revenues from alternative tariffs should be included within the "roaming margin".
- NRAs should, nevertheless, reject the application where certain circumstances make it unlikely that the sustainability of the domestic charging model would be undermined. Such circumstances include situations in which



- 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;
- the degree of competition in domestic markets means that there is capacity to absorb reduced margins;
- the application of a more restrictive FUP, still in compliance with the Regulation, would reduce the roaming retail margin to less than 5%.

### **3.2. BEREC comments on the proposals of the EC**

BEREC analysed the EC draft Implementing Act with regard to the sustainability mechanism and welcomes the EC's proposal to set more detailed rules for NRAs that allow a harmonized application of the procedure on the sustainability of RLAH across the EEA.

First of all, BEREC would like to highlight that the opinion in hand is based on the aim to design an applicable and feasible sustainability mechanism, which is of higher importance in the initial stages of operation of the "Roam like at Home" pricing mechanism, but which might be of lower importance later, when the markets are better adjusted to the changes in the regulatory environment.

BEREC would like to note that if complexity of the mechanism creates barriers to its applicability, there is a significant risk of undermining the requirement of Article 6d (3) by not taking into account, when adopting Implementing Acts, any observable risk that roaming at domestic retail prices would appreciably affect the evolution of such prices. BEREC considers that the regulation of the roaming market should not lead to negative impacts on domestic markets or services, and therefore, it is highly important that the sustainability mechanism is efficient, but at the same time sufficiently easy to apply by NRAs and operators.

Bearing this in mind, BEREC agrees with the EC's proposal on the following aspects:

- Time frame for assessment and duration of exemption: BEREC agrees with the EC that the period for which NRAs should assess an operator's sustainability and the duration of the exemption of RLAH should be 12 months<sup>8</sup>. Any authorization an NRA grants an operator to apply additional surcharges based on its sustainability assessment shall only be valid for 12 months and has to be updated annually.
- Domestic margin: BEREC supports the approach taken by the EC to use the EBITDA margin for defining the domestic margin.
- Burden of proof: BEREC agrees with the EC that the burden of proof is on the operators, meaning that if they are not able to provide all the necessary data and proof that the provision of regulated roaming services without any surcharge on the domestic prices has a negative effect on the domestic charging model, the NRAs cannot authorize such an application.

---

<sup>8</sup> However, the duration of 12 months is not clearly laid out in the draft Implementing Act of the EC

- Costs: the EC proposes to take the costs that are required for assessing the sustainability of the domestic charging model from the operators' account, which is supported by BEREC.
- Allocation keys: BEREC agrees with the allocation keys based on average wholesale roaming price paid by the operator for unbalanced traffic proposed by the EC. .

Nevertheless, in BEREC's view some aspects are not yet considered by the EC and on other aspects, BEREC is presenting alternative approaches on how to define the methodology for assessing the sustainability of RLAH. Furthermore, BEREC believes that there are certain outstanding issues that need further clarification in the Implementing Act in order to contribute to a harmonized application of the methodology.

### **3.2.1. Requirement of actual RLAH data**

According to the EC "the best approach would be an obligation to operators to provide at least 45 days of actual RLAH data by default over all tariff plans for roaming customers" in the application to be submitted to NRAs.

Article 6c (1) of the Roaming Regulation, as amended, sets out the conditions for allowing derogation from the RLAH regime:

- specific and exceptional circumstances;
- ensuring the sustainability of an operator's domestic charging model;
- when a roaming provider is not able to recover its overall actual and projected costs of providing regulated roaming services in accordance with Articles 6a (Abolition of retail roaming surcharges) and 6b (Fair use), from its overall actual and projected revenues from the provision of such services.

The EC seems to have concluded that these requirements entail providing at least 45 days of actual RLAH data by default for all tariff plans for roaming customers. BEREC notes that the requirements referred to above do not necessarily mandate having actual RLAH data, but "actual and projected" costs and revenues of services provided in accordance with the RLAH regime (Articles 6a and 6b). Providing the required data entails in any case calculations and the use of projected costs and revenues as well since the derogation could be accepted for 12 months (as the EC services have suggested).

Furthermore, BEREC believes that acquiring actual RLAH data by default for all tariff plans could have severe impacts on operators. In most cases an operator would be forced to take an undefined risk for at least 45 days in order to prove that its domestic pricing model does not allow sustainable RLAH pricing. In practice, operators would have to offer RLAH for longer than 45 days by default for all tariff plans, because NRAs also need some time to authorise the surcharge which can, in the worst-case scenario, take up to three months. Even if an operator supplies actual RLAH for a period of 45 days, this might not adequately reflect the actual impact because of seasonal variations. Some operators do not enable roaming services in all their tariff plans.

In addition, an operator would have to decrease roaming prices in accordance with the Roaming Regulation (stop using surcharges within the FUP) and be prepared to increase them (applying again a surcharge at a level that allows operators to recover costs) in less

than a few months, which would presumably be a commercially harmful practice and problematic taking into account contractual requirements for the customers.<sup>9</sup> In addition, from a consumer perspective, it might not be understandable for them as to why they could use RLAH services for the first few months, but then be faced with price increases for roaming services once the NRAs authorize possible surcharges.

In case the sustainability mechanism was not a feasible option for operators, it is likely that they would take other measures to secure sustainability (such as raising domestic prices, which would be an undesirable solution for all end-users, in particular for those that do not use roaming services at all<sup>10</sup>, or stop offering retail roaming services for certain domestic tariffs). BEREC would like to reiterate that the fundamental aim of the Regulation is to set up a new pricing mechanism for international roaming without distorting the domestic and visited markets (Article 1 (2) of the Regulation (EU) 2015/2120).<sup>11</sup>

To conclude, in BEREC's view, when applying for the derogation, it would be sufficient for operators to provide actual data from the previous year (RLAH+ data) and projected data showing how RLAH would impact the volumes and revenues and prove that RLAH would undermine their domestic charging model.

### 3.2.2. Timing for application

According to the Roaming Regulation (as amended):

"In the event that the legislative act to be adopted following the proposal referred to in Article 19(2) of Regulation (EU) No 531/2012 is applicable on 15 June 2017, point 5 of Article 7 of this Regulation, as regards Articles 6a to 6d of Regulation (EU) No 531/2012 [--] shall apply from that date."

BEREC understands that the derogation can be accepted at the earliest on 15 June 2017. However, it remains debatable whether an operator can submit its application prior to that date in order to reduce the risk of distortions to the domestic market and the domestic pricing mechanism.

BEREC considers that the Implementing Acts are the right place to clarify the timing question. BEREC believes that the intention of the legislator is to allow an operator to make use of the derogation from 15 June 2017 in case the implementation of RLAH would otherwise distort that operator's domestic pricing mechanism. With reference to the previous chapter, BEREC reiterates the intention of this Article, and hence requests that any

<sup>9</sup> Such contractual issues would in some Member States require an extraordinary right to cancel contracts.

<sup>10</sup> According to Eurostat data the percentage of residents that do not travel at all is 70% on EU average. The % of residents that travel takes into account only registered trips for personal purposes (no business trips) and at least one overnight stay.

<sup>11</sup> There is a CJEU case which states that "even though it has a broad discretion, the Community legislature must base its choice on objective criteria". The judgement follows: "in assessing the burdens associated with various possible measures, it must examine whether objectives pursued by the measure chosen are such as to justify even substantial negative economic consequences for certain operators" (Case C-58/08, para 53). In other words, if regulation causes or may cause substantial negative economic consequences, it should be proportional to the objectives pursued.

mechanism suggested should be feasible and practical to implement in order to avoid domestic price increases or other distortions to the domestic markets.

### 3.2.3. Scope to be assessed

The EC has concluded that the provisions setting out the sustainability mechanism should include the costs and revenues for the provision of alternative roaming tariffs (in accordance with Article 6e) since alternative tariffs are regulated roaming services as well.

The Roaming Regulation sets out a common approach on regulated roaming services defined in Article 2 of the Roaming Regulation.

For example, a 'regulated roaming call' is defined as "a mobile voice telephony call made by a roaming customer, originating on a visited network and terminating on a public communications network within the Union or received by a roaming customer, originating on a public communications network within the Union and terminating on a visited network".

'Regulated roaming services' refer to the scope of the Roaming Regulation in general. Alternative tariffs are not excluded from the scope of the Roaming Regulation, but they form an exception with regard to the regulated maximum prices. Therefore, a reference to the definition of "regulated roaming services" as such is not relevant when assessing which roaming pricing mechanisms (i.e. which regulated roaming services) shall be taken into account in the sustainability assessment.

Instead, the scope of the sustainability assessment is set out clearly in the Roaming Regulation (as amended) with reference to the following provisions:

- Article 6c (1) refers to "circumstances [--] where a roaming provider is not able to recover its overall actual and projected costs of providing regulated roaming services in accordance with Articles 6a and 6b, from its overall actual and projected revenues from the provision of such services".
  - Article 6e is not included in the scope of the assessment.
- According to Article 6e (3), an alternative tariff is "other than one set in accordance with Articles 6a, 6b, 6c and paragraph 1 of this Article".
  - Article 6e (3) regarding alternative tariffs explicitly limits its application outside Article 6c (Article 6c refers to "Sustainability of the abolition of retail roaming surcharges").

Therefore, BEREC concludes that the alternative tariffs are not within the scope of the sustainability mechanism set out in Articles 6c and 6d of the Roaming Regulation and therefore costs and revenues derived from these offers should not be considered in the application for the sustainability mechanism.

### 3.2.4. Sustainability

The EC proposes to calculate a sustainability percentage by dividing the (negative) roaming margin with the EBITDA from the sale of mobile services other than retail roaming services provided within the Union and if this percentage is at least 5% an operator could use the

sustainability derogation. According to the EC (recital 28) 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 in order to be regarded as having the effect of undermining the sustainability of the operator's domestic charging model. This percentage (5%) balances the risk of domestic waterbed effects and the risk of too many derogations under the sustainability mechanism that would impede the "natural diffusion of RLAH offers". Using this approach, the EC estimates that only 2% of operators would have a negative sustainability percentage of 5% or more and thus be eligible for the sustainability derogation.

The EC estimates that only 88% of operators will have a positive sustainability percentage but its approach would only allow 2% of operators to recover their losses from the provision of regulated roaming services. 4% of operators would have a negative sustainability percentage between 3 % and 5%, but would not be eligible. In this regard, BEREC points out that the percentages of operators with negative margins might be underestimated, as the EC's calculations mainly include MNO data (including those having large footprints). The MVNOs and resellers that replied to BEREC's questionnaire might be underrepresented, hence the effect on MVNOs, which usually have higher wholesale roaming costs as they hardly obtain discounts and usually offer low-end tariff plans, are likely not to be adequately reflected in the calculations. Furthermore, it is not clear how the aforementioned numbers were calculated and if the roaming consumption limits from the initial proposal for a FUP still are the basis for these calculations. If this is the case, the calculations should be updated by taking into account the new FUP provisions.

Table 1: Percentage of operators that would obtain sustainability derogation at different sustainability percentage levels given the wholesale price caps proposed by the EC

	Sustainability %			
	Positive margin, no derogation needed	Negative 1 %	Negative 3 %	Negative 5 %
% of operators	88 %	8 %	6 %	2 %

BEREC agrees that the most practical way to assess sustainability is to calculate a sustainability percentage as the EC proposes. However, the proposed threshold of 5%, in BEREC's view, is quite high and might therefore not fulfil the target to ensure that domestic charging models are not undermined.

BEREC considers that the consequences for both consumers and operators of setting a threshold which is too high may potentially be riskier than setting a threshold that is too low. A proportion which is too low could affect consumers by making it easier for operators to apply a surcharge. But as this surcharge should secure cost recovery, roaming customers will anyway only pay the effective cost to operators for the services that they consume. A threshold which is too high could impact the affected operators but also potentially their customers by jeopardizing the domestic charging model. This could lead to waterbed effects of increases in domestic prices which would affect not only customers who use roaming services, but all customers. A high threshold also carries the risk that operators exclude

roaming services from domestic subscriptions where the provision of regulated roaming services results in losses which the operator is not allowed to recover.

Using economic theory, the EC finds that waterbed effects are more likely the greater the degree of competition. The EC concludes that there is a reduced risk of waterbed effects from the introduction of RLAH since not all retail mobile markets currently function under perfect competition. In BEREC's view, the EC underestimates the risk of waterbed effects. BEREC would like to note that operators in the most competitive domestic markets would be most at risk of experiencing negative roaming margins with the introduction of roaming at domestic prices. In addition, these operators would be most likely to increase domestic prices as a consequence of roaming losses according to the economic theory presented by the EC.

### **3.3. Outstanding issues**

#### **3.3.1. Level of the surcharge**

The proposal of the EC currently does not include any procedure on how to define the level of the surcharge. In order to allow a consistent implementation in the EEA, BEREC suggests including some provisions on how to define the level of the surcharges to allow operators flexible implementation of the surcharges (e.g. only on defined services or tariffs), bearing in mind, that the surcharge is to be set at a level that allows operators to recover their costs for providing retail roaming services.

The Regulation does not provide a clear statement about the maximum level of the surcharge. However, in BEREC's view it makes sense to cap the surcharge by the maximum wholesale roaming charges set out in Art 7(2), 9(1) and 12(1) as the wholesale caps are considered the upper limit for the current surcharges. According to Article 6c(1) the surcharge shall be applied only to the extent necessary to recover the costs of providing regulated retail roaming services *having regard to the applicable maximum wholesale charges*. The link between the surcharge and the wholesale caps confirmed in the Regulation is justifiable. A risk of waterbed effects concerns situations where the operator faces a cost recovery problem (see Recital 23). The major part of the costs of providing retail roaming services consists of wholesale payments. Since the aim is to recover all relevant costs of providing regulated retail roaming services and operators are usually negotiating wholesale agreements below the maximum wholesale caps, the wholesale caps would, in BEREC's view, be an appropriate cap for the surcharge.

#### **3.3.1. Level of the assessment**

In BEREC's view, the Implementing Act should address the issue of the level to which the NRA has to conduct the analysis of sustainability. In BEREC's opinion the assessment should be done at an operator level, meaning that all services in accordance with Art 6a and 6b are to be taken into account by NRAs.

## ANNEX 1 – Analysis of travel patterns

The distribution of the number of days per trip provided in Figure 2 below is asymmetrical, meaning that shorter trips with less than about 15 consecutive nights dominate the travelling patterns among residents going abroad inside the EEA (in fact, trips with 29 nights or more represent less than 2%, trips with more than 91 nights represent around 0.1%). To get closer to the actual travelling patterns in the Member States, one has to make an estimate. Based on the numbers presented above four additional factors should be taken into account:

- Same-day trips: Same-day trips as well as non-registered trips are not included in Figure 2. According to Eurostat data, one can assume one same-day visit abroad for each overnight trip abroad in the EU on average. Many of the same-day visits abroad are frontier workers commuting every day (0.4% of the EU population).
- Number of trips per EU traveller: Data presented in Figure 2. Does not take into account, how often trips of each length are made by individual residents, furthermore not every overnight trip is actually registered, so they do not present the total number of days spent abroad. The statistical uncertainty is therefore rather high. From the data on number of trips presented by the EC, one can derive an average of 1.04 trips per inhabitant who travelled abroad. BEREK notes, however, that this is a statistical average.
- Professional trips: Professional trips are not included in Figure 2. However, according to the EC based on Eurostat statistics the share of business trips can be assumed to be on average 14% of the total number of trips abroad (the range is between 6% and 29% depending on the country of origin).
- Share of population that does not travel: Figure 2 only presents data for residents who travel at least once a year. However, according to Eurostat data presented by the EC only 30% of EU residents made at least one trip of at least one overnight stay abroad for personal purposes in 2014. Even if this number does not take into account business trips and same-day trips, it shows that there is a large share of the population that does not travel abroad at all. Taking into account business trips and same-day trips, the share of the travelling population could in some cases double (60%). BEREK suggests that taking into account the non-travelling share of the population is especially important in light of risks of distortion of competition and investment incentives in domestic and visited markets (such as waterbed effects).

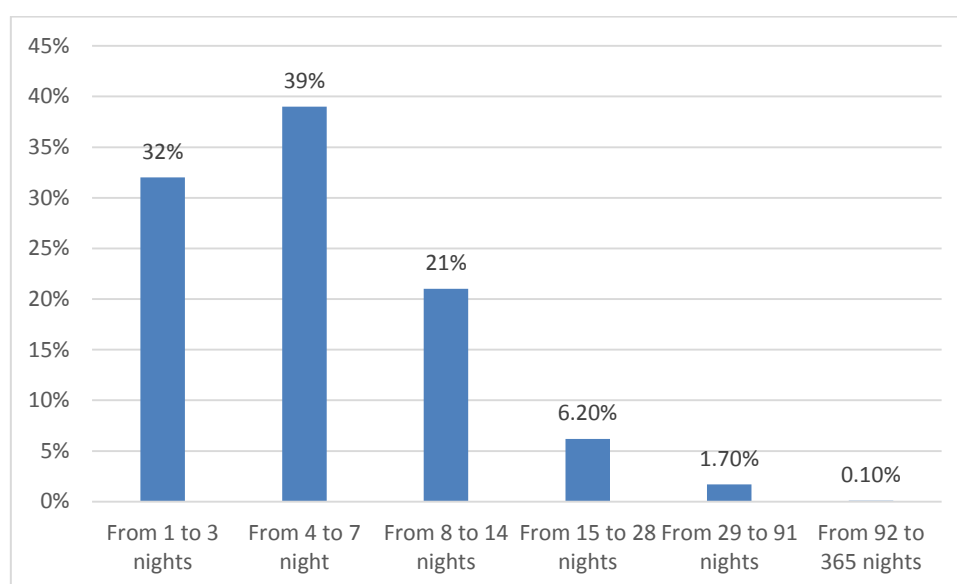


Figure 2: Number of trips of at least one overnight stay abroad within the EEA of EU residents by duration of stay as % of total number of trips abroad within the EEA, 2014. Source: EC data based on Eurostat<sup>12</sup>.

<sup>12</sup> According to the EC, the data that best approaches this distribution of total number of days spent abroad by an EU resident per year is provided by the Flash Eurobarometer 432. This data shows the number of holiday trips away from home by duration of stay. However, Eurobarometer data has three major limitations: firstly, it does not take into account same-day trips, secondly, it only takes into account personal travel, and thirdly, it does not differentiate between domestic trips and trips abroad. See EC Request for BEREC opinion from 20 June 2016.



## ANNEX 2 – Technical comments on the draft text

BEREC thoroughly analyzed the draft text proposed by the EC and would like to share some concerns of technical and wording nature with the EC.

### *Recitals*

(29) Seems to contradict Article 10(2). Recital 29 states that waterbed effects are less likely in more competitive markets whereas Article 10(2) (b) stipulates that it is unlikely that domestic prices will rise if “the degree of competition on domestic markets means that there is capacity to absorb reduced margins” - i.e. less competitive markets.

### *Article 2 Definitions*

2. (c) ‘mobile service margin’: BEREC is of the opinion that further clarification is needed: Should operators supply the margin from EBITDA (total of the company), or should they subtract the roaming margin (however this would not include depreciation).

### *Article 6*

*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*

It would be helpful, if a template or a summary table would be annexed to the Regulation to facilitate matters and for clarification.

1. With regard to “the actual average pattern of consumption of domestic mobile services” it would be helpful if the time frame to take into consideration would be clarified further, e.g. the previous 12 months. Since financial accounts apply to financial years, then it would be practical if the new updates of the applications would be applied to financial years too.

2. Financial commitments are used for committing large expenses in the future and they are included as liabilities on the balance sheet. Thus, it might cause difficulties to use financial commitments as a proof for revenue projections.

3. Article 6(3) requires roaming providers to provide all necessary data used to determine the “mobile services margin” - which we understand as the margin from services other than EU roaming. Should there not be a similar requirement on operators to provide all necessary data used to determine the overall actual and projected costs and revenues of providing regulated roaming services in the relevant period?

It should be made clear that, as a roaming provider’s sustainability application relates to a 12-month period, any authorization that it obtains from an NRA to apply a surcharge will automatically expire at the end of that 12-month period (unless of course the operator re-applies and gets a fresh authorization to apply a surcharge from the NRA).

*Article 7**Determination of roaming-specific costs for the provision of regulated retail roaming services*

The Roaming Regulation is very clear that overall actual and projected costs from roaming can be considered by NRAs in a sustainability assessment. However, Articles 7(1) and 7(2) only refer to “the actual costs” of purchasing wholesale roaming access and “the actual costs incurred”, without acknowledging that projected costs can be used.

2. A further clarification of “other roaming providers” is needed.

*Article 8**Allocation of retail joint and common costs to the provision of regulated retail roaming services*

1. (e) This Article is concerned with joint and common costs across all mobile retail services in general (i.e. domestic and roaming costs), we wonder whether the reference to costs “associated with roaming services” should be removed.

*Article 9**Determination of revenues from the provision of regulated retail roaming services*

3. It should be clarified what applies if a stand-alone basis is not available for all components.

4. In the first line ‘mobile retail prices’ should be replaced by ‘mobile retail services’.

*Article 10**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*

A proper consideration of these types of complex issues may take an NRA in excess of the statutory one-month (or extended three-month) deadline. Indeed, even if we are just doing a ‘black and white’ assessment of whether an operator will recover its costs and whether its cost/revenue assumptions are consistent with the methodology in the Implementing Act, the timeframe is tight.

According to article 10 point 2 NRAs shall refuse the surcharge in 3 mentioned cases. This part of the proposal is needed to include some guidelines or a methodology on how can the NRAs examines these cases. This is not an easy task.

According to article 10 point 3 NRAs shall determine the amount of the ascertained negative margin (which is the base of calculating the surcharge) that may be recovered through the

application. This part of the proposal is needed to include some guidelines or a methodology about the following.

1. The amount of the recovered margin. One possible solution is that the recovered margin would equal to the calculated negative margin reduced by the 5% of the domestic margin.
  2. Even though if the recovered margin is calculated it is not clear how can the surcharges for minutes, SMS and data be calculated one by one. A separate annex is needed for this.
2. Although an operator with a negative EBITDA may be an extraordinary scenario, a provision for operators with negative EBITDA would cover all possible circumstances. Presumably, if an operator has both negative EBITDA and negative roaming margin, it will be authorized to add a surcharge.
3. (b) See comment about Recital 28.
4. 10(1). Instead of writing “where the negative roaming retail net margin of the applicant is equivalent to 5 % or more of its mobile services margin” it seems more appropriate to write “where the absolute value of the negative roaming retail net margin of the applicant is equivalent to 5 % or more of its mobile services margin”

#### *Article 11*

*Monitoring of FUP 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*

BEREC questions if there is a mandate to include such a provision in the Implementing Act. Furthermore, in our point of view such provisions are already included in the Roaming Regulation.

#### *ANNEX I*

It should be added that this calculation has to be done for each service (minutes, SMS, data). A definition for “j” is missing.

#### *ANNEX II*

1) A definition of the ‘price paid’ is needed (unit price? price for unbalanced traffic, average price). Summing up unit prices for different services (e.g. price of one minute and one SMS) doesn’t make sense. In addition BEREC would ask the EC to further clarify the formula (e.g. is the “i” in the formula needed, what does it stand for,...)

5) It is suggested to revise the term "retail domestic revenue" to "mobile retail services revenues".