Draft implementing act on fair use policy and sustainability mechanism: non-paper on outstanding issues raised by COCOM

9 November 2016

In the light of the last COCOM meeting on 19 October 2016, where solutions were explored to address the outstanding issues raised by Member States on the draft implementing act and the comments received from Member States in writing since then, and view of the next COCOM meeting on 11 November 2016, the Commission services would like to submit the following concrete points to the consideration of Member States. Member States are also invited to submit other concrete solution(s), possibly in the form of draft legal text, if they think that this can more appropriately address the issue in question.

1) **Sustainability mechanism: data to be submitted in the application for the derogation**

We propose that, in alternative to a minimum of 45 days of actual RLAH data, the data to be submitted in the application for the derogation could be based on:

a) RLAH+ consumption data, since it is expected that RLAH volumes will only be greater

b) extrapolation of domestic consumption actual data to roaming consumption in the RLAH regime;

c) actual RLAH consumption data from a subset (not necessarily all) of existing RLAH-enabled domestic tariff plans provided they cover a substantial part of the customer base prior to June 2017;

According to its specific situation, the operator considering such an application could base the application on one or more of the types of data mentioned above.

2) **Sustainability mechanism: timing of applications**

As regards the timing of applications, and the fact that the legislative provision creating the sustainability derogation mechanism only becomes applicable on 15 June 2017, reference could be made (e.g. in a recital) to the possibility of exchanges between the operator considering such an application and the NRA, with relevant information and documentation, which could happen before the start of RLAH on 15 June 2017. If adequate data are provided in such contacts, the application could then be formally filed by the operator on 15 June 2017 and the authorisation potentially granted by the NRA the same day.

3) **Fair use policy: stable links**

The concept of stable link could be made more precise by clarifying (e.g. in the relevant recital) that it should be considered to relate to situations in which the customer spends an amount of time in the country in question which is similar to the residence criterion. Stable links with a Member State entailing frequent and substantial presence on its territory could be indicated, non-exhaustively, to arise from a full-time and durable employment relationship, including that of frontier workers; durable contractual relations entailing a similar degree of physical presence of a self-employed person; participation in full-time recurring courses of study; or from other situations, such as those of posted workers or retired persons, whenever they involve an analogous level of territorial presence.
4) **Fair use policy: minimum alert period**

A minimum alert period of 14 days could be provided for before surcharges are applied, in order to protect the user. During that period, the user can contest the abuse. In absence of contestation, surcharges could be applied from the date of alert. Specific provisions might apply for pre-paid or data limitations on open bundles.

5) **Fair use policy: primacy of evidence (residence or traffic-based indicators)**

It could be clarified that traffic-based evidence over a relevant time period prevails relative to formal evidence of residence, either in case of conflict of evidence (traffic indicators and documentary evidence) or where operators or customers would prefer to avoid burdensome documentary checks, because the central concept of periodic travel outside one's "home" country would thereby be linked to a material rather than a formal concept of residence (or stable link).

6) **Fair use policy: pre-paid cards**

Two alternative safeguards could be imagined to permit operators to control the specific abuse risks associated with pre-paid cards, in alternative/addition to residence documentary checks:

   a) a RLAH volume limit linked to credit made available by the user on the pre-paid card, such as the volume that can be bought at the level of the wholesale roaming data cap by the credit available on the pre-paid card.

   b) a fidelity requirement, by mandating for instance a minimum domestic consumption on a pre-paid SIM card before benefitting from RLAH on that card.

7) **Fair use policy: unlimited or quasi-unlimited data bundles**

A RLAH volume limit could exceptionally be foreseen for domestic bundles including unlimited or quasi-unlimited data allowances ("open" data bundles) in order to address the specific abuse risks associated with those. The proposed limit could be based on the volume of data that the overall retail price of the bundle in question can buy at the level of the wholesale roaming data cap.

Such a volume limit would be directly related to the tariff plan of the user in line with the Roaming Regulation, which refers to FUP usage consistent with the domestic tariff plan. In addition, it would build in a self-adjusting mechanism to the final level of the wholesale roaming price data cap.

8) **Fair use policy: specifying further objective indicators**

In order to protect customers against imposition of surcharges based on relatively short observation periods of the balance of domestic and roaming usage or presence, a minimum time window of observation could be better defined. The observation period shall be sufficiently long to cover the periodic travel patterns of the EU citizens. The Commission is of the opinion that this observation window should extend to a number of billing periods.

In any case, a minimum observation period of 4 months should be envisaged, over which domestic consumption or domestic presence should prevail, in keeping with the overall principle of residential, or stable link, presence in the Member State of the operator.
For the purpose of monitoring presence, any day when a customer is logged on to the domestic network would be counted as a day of domestic presence of that customer.

Either prevailing domestic consumption or prevailing domestic presence during the defined observation period would be considered as a proof of non-abusive and non-anomalous usage of regulated retail roaming services.

Such observation periods would be recurring, i.e. for any given period of the duration of the defined observation window, prevalent domestic usage or presence of the customer would be considered as proof of the non-abusive character of any RLAH roaming during the period.

The references to other indicators (of long inactivity or sequential use of SIM cards) could be removed.