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Wholesale Roaming Markets

Impact Assessment (SWD (2016)201, SWD (2016) 202 (summary) of a Commission 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 (COM (2016)399)

Background

This note seeks to provide an initial analysis of the strengths and weaknesses of the European Commission's [Impact Assessment](#) (IA) accompanying the above proposal, adopted on 15 June 2016 and referred to Parliament's Committee on Industry, Research and Energy.

In 2015, the European Parliament and the Council adopted a [regulation](#) amending the earlier roaming regulation of 2012 which laid down the rules for the setting of cross-border mobile telephone ('roaming') charges within the EU. The new regulation introduced the abolition of retail roaming surcharges as of 15 June 2017.¹ Furthermore, in January 2016, the European Parliament voted again in favour of ending by June 2017 retail roaming charges when travelling in the EU.² The new regulation and the EP resolution state that consumers should pay the same price for calls, texts and mobile data whenever they are travelling periodically in the EU under what has been named a 'Roam Like at Home' (RLAH) regime. However, the 2015 Regulation did not provide for measures on the *wholesale* roaming market, which is a crucial condition for the sustainability of the RLAH regime. Whether European national operators, who are bound to provide roaming services without surcharge as of 2017, will be able to recover the costs of providing regulated, surcharge-free roaming services, will depend on the extent of the competitiveness of their wholesale roaming markets.

The [review](#) of the wholesale roaming markets prepared by the Commission shows that national wholesale roaming markets are not functioning well and need improvement in order for the RLAH regime to operate successfully after 2017. The IA report seeks to offer an analysis of possible options and their impacts, and to explain the choice of the most effective option.

Apart from ensuring a successful establishment of the RLAH regime, the proposed wholesale roaming legislation is also seen by the Commission as a step towards implementing the targets of its 2015 Digital Single Market Strategy.³

¹ Regulation (EU) 2015/2120 of the European Parliament and of the Council of 22 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal services and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union.

² [Towards a Digital Single Market Act](#), European Parliament resolution of 19 January 2016

³ COM (2015) 192

Problem definition

In presenting the problem, namely the imperfect nature of the national wholesale roaming markets, which do not function correctly, the IA reiterates the main finding of the review. As the IA explains, 'in order to ensure that the retail roaming services can be provided at domestic retail prices, [...]it is necessary that wholesale roaming inputs are available at a price that makes generally possible for the visiting (home) operators the provision of the RLAH' (IA, p.12).

The IA identifies the following main causes of market failure:

- the oligopolistic character of national wholesale markets (meaning that, with only three to four mobile network operators per country, depending on the Member State, those operators can heavily influence price and other market factors);
- the bilateral nature of roaming agreements, which puts operators with no or little inbound traffic at a disadvantage when negotiating better conditions than those provided for under the wholesale caps, i.e. the binding maximum wholesale roaming charges prescribed in the existing regulation (IA, p. 14);
- imperfect wholesale roaming substitutes which have not developed beyond niche markets, and exclusion of mobile virtual network operators from wholesale roaming markets.

In defining the problem, the IA attempts to set out the link between drivers, problems and consequences. The distinction between those three elements is not always clear, however. For example, the impact of the RLAH regime, which has not yet been implemented, is already considered to be a driver of the existing market failure of the national wholesale roaming markets. Furthermore, the IA claims that there are three different possible scenarios for how the problem of wholesale market failure could evolve in the future, ranging from 1) customers continuing to pay a roaming surcharge (despite the RLAH regime), 2) the RLAH regime not happening at all, and 3) an implementation of the RLAH regime alongside an increase in domestic retail prices. None of these scenarios improves customers' welfare.

It would have made the ensuing analysis stronger had the IA given a more detailed definition of the causes of the market failure and the consequences that already exist. The IA states repeatedly that the anticipated impact of the future RLAH regime on the market dynamics of wholesale roaming markets is uncertain (IA, pp. 15-16). It is therefore difficult to understand what will affect what; is it, for example, the imposition of the RLAH regime that will impact on the wholesale market, or is it the imperfections of the wholesale market that will affect the wholesale roaming market?

Finally, not all the problems/drivers appear to be addressed in equal detail in the analysis of the policy options, which makes the discussion of options somewhat incomplete.

Objectives of the legislative proposal

The *general* policy objective is 'to enable European citizens to access mobile services at domestic prices when periodically travelling abroad in the EU' (IA, p.20). The two *specific* objectives of the proposal are i) to ensure cost recovery at wholesale level, while preserving incentives to invest in visited networks and avoiding distortion of domestic competition in the visited markets, and ii) to enable the sustainable abolition of retail roaming surcharges for all, or virtually all, operators in the EU, while avoiding distortions on the home markets (IA, p.21). Both distortions could make the provision of RLAH structurally unsustainable.⁴

⁴ For more details regarding wholesale roaming market distortions, see Schrefler L. [The Review of the wholesale roaming markets and the Roaming Regulation](#), Briefing, EPRS, 2016, p. 6

Overall, the objectives appear to be consistent with the problem definition. *Operational* objectives for the preferred option are not presented in the IA, contrary to the recommendations of the Commission's Better Regulations Guidelines.

Range of options considered

The IA considers the following four options in order to achieve the policy objectives. The IA explains that three other options were discarded, including such options as lifting (removing) wholesale roaming caps; setting new, lower, EU-wide wholesale roaming caps allowing additional seasonality mark-up; and creating a 'spot market' (IA, pp. 22-24). The retained options are:

Option 1 (baseline scenario): no action at EU level.

This option means that the abolition of the roaming surcharges would not take effect on 15 June 2017. Instead, a transitional regime would apply whereby operators would continue applying a retail roaming surcharge. In this case, the EU would fail to achieve the end of roaming surcharges in 2017.

Option 2: set EU-wide wholesale roaming caps after 15 June 2017 at the same level as the Roaming Regulation currently in force.

This option implies that the same wholesale roaming caps would apply after 15 June 2017 as those set in the current regulation.

Option 3: set EU-wide wholesale roaming caps after 15 June 2017 at a lower level than in the Roaming Regulation currently in force, but compatible with the recovery of the costs of providing wholesale roaming services, including a relevant share of joint and common costs, in all Member States.

This option implies that EU-wide wholesale roaming caps would be set at lower levels than in the current regulation. Under this option, the Commission estimates the costs for a hypothetical efficient operator in the higher-costs Member States, using a variety of evidence sources. The EU-wide caps would be set above those costs.

Option 4: set country-specific wholesale roaming caps after 15 June 2017 at a cost-oriented level based on a common cost model.

Under this option, national regulating authorities are requested to estimate the costs of providing wholesale roaming services for a hypothetical operator in their respective countries using the generic cost model. The national cost estimates produced are used to set, at national level, cost-oriented, country-specific wholesale roaming caps with an appropriate return on investment. The national cost estimates of each national regulator are peer-reviewed by the Commission. If, in a given Member State, the Commission finds the cost estimates of the national regulatory authority to be inconsistent with the methodology set out by the Commission, the latter may oppose the caps proposed by the regulators and impose alternative caps based on the cost estimate found for countries of a similar cost level according to the cost model.

The IA proposed additional measures to Options 2 and 4 which consist of a possibility to 'opt out' of the regulated caps regime if both parties to the roaming agreement agree on a specific contract. According to the IA, this option gives more negotiating flexibility to operators and at the same time enables them to explore specific agreements 'which are currently disincentivised by the possibility for one of the contracting parties to have recourse to the legal wholesale caps ex post in contrast with initial contractual commitments: under this additional measure, neither party would be entitled to revert to the cap once the agreement outside the cap has been contractually

established' (IA, p. 23). All four options appear to be clearly defined and, taken together, represent a rather broad range of possible measures.

The options are compared against the criteria of 'effectiveness, efficiency, stakeholders' views and coherence'. With the exception of stakeholders' views, which are explained in greater detail, the IA does not elaborate on the definitions of these criteria. The preferred option is Option 3, which the Commission considers as the one that 'best fulfils the policy objectives' (IA, p. 54).

Scope of the Impact Assessment

The IA provides an assessment of each policy option. The scope of the analysis is limited squarely to the extent to which the options achieve the objective of the current regulation, namely to enable the abolition of retail roaming surcharges from 15 June 2017, while at the same time making sure the visited network operators will be able to recover the costs of providing roaming services without surcharge. For this reason, apparently, the bulk of the analysis of the impacts of options is conducted with consideration of the following criteria: RLAH objective, cost recovery at wholesale level, risk of unwanted permanent roaming and other abuses of roaming access. The methodology for this part of the impact assessment is explained in Annex 4 of the IA.

As for other criteria pertaining to administrative impacts, the IA provides a qualitative assessment with consideration of administrative burdens for public authorities, regulatory steps to be completed, challenges of monitoring and enforcement. Lastly, the IA checks how the options differ in terms of their impact on the completion of the Digital Single Market and users' benefits from the digital economy.

In the words of the IA, Option 1 meets the objective of cost recovery at wholesale level, but does not deliver the policy objective set in the current regulation to enable RLAH in the EU from 15 June 2017. The consumer welfare gain to be provided by the RLAH would be entirely missed (IA, p.52).

Under Option 2, the objective of abolishing the roaming retail surcharge will be met; however, a sizeable share of operators (up to 20%) would not be able to sustain their domestic charging model with the current level of wholesale roaming caps. As a result, the consumer welfare gain will be missed for a high proportion of consumers.

Option 3 would allow to benefit from the RLAH consumer welfare gain. In comparison with Option 2, the lower cap level of Option 3 reduces considerably the proportions of consumers that would not benefit from RLAH.

Finally, Option 4 presents important risks as regards cost recovery as well as the risk of de facto regulating national wholesale markets. It also implies considerable implementation challenges, complexities and costs that none of the other options implies (p. 54 of IA). Under Option 4, the proportion of consumers that would have sustainable RLAH is relatively similar to that under Option 3.

The IA does not assess in any detail the *social* and *environmental* impacts, nor does it explain why they were not included in the report; as a result, the scope of the IA is remarkably limited. To some extent, the analysis presented in the IA can be considered as pertaining to *economic* impacts, although it covers only a few aspects. While it is understandable that the scope is intrinsically linked to, and limited by, the main policy objectives, it would have been helpful if the analysis of options had been broader, notably in order to address the above impacts which are normally to be covered in an IA, according to the Commission's own Better Regulation Guidelines.

Subsidiarity / proportionality

The proposal is based on Article 114 TFEU and refers to the conditions of the functioning of the internal market for roaming services. The Commission explains that Member States were unable to autonomously improve these conditions, in particular high wholesale prices, due to the cross-border nature of the roaming market. The IA concludes that 'a European approach would also avoid that individual Member States take divergent approaches

for dealing with the problem of high wholesale prices' (IA, p.19). The IA refers to the 2010 decision of the European Court of Justice which considered that wholesale regulation of the roaming markets is compliant with the subsidiarity principle.⁵

As far as proportionality is concerned, the proposed regulation is said 'not to go beyond what is necessary to ensure the general policy objective,' which means that operators would not be required to provide services below their costs (IA, p.19). The IA also states, however, that compliance with the proportionality principle does not preclude some operators from possibly experiencing negative economic consequences in specific cases, explaining that, in such cases, the negative consequences are indeed justified and necessary in order to achieve the objective pursued. A more detailed definition of policy objectives, and in particular the elaboration of a series of *operational* objectives, could perhaps have shed more light on the balance between possible negative consequences and the achievement of the objectives, a crucial element for assessing the proportionality of the proposal.

No reasoned opinions had been received from national parliaments at the time of writing. The deadline for the national parliaments to submit their opinions is 19 September 2016.

Budgetary or public finance implications

The Explanatory Memorandum of the proposal indicates that there are no implications for the EU budget and the IA executive summary states that it will not have an impact on national public administrations (Executive Summary, p.3).

SME test / Competitiveness

The IA does not analyse impacts on SMEs when comparing options. Annex 3 of the IA mentions SMEs as one of the actors not directly affected by the proposed legislation as it concerns only the wholesale side of the market. In the words of the IA, SMEs are indirectly affected since the proposal enables abolition of retail roaming surcharges. This is stated to have significant positive impact on SMEs since the bills for mobile services will decrease, although obviously only for those who travel within the EU frequently.

Simplification and other regulatory implications

The Explanatory Memorandum of the proposal indicates that its overall goal is to enable the abolition of retail roaming surcharges for EU operators, for which the proposal offers amendments to the corresponding provisions laid down in the existing Roaming Regulation. The proposal is therefore meant to complete the rules on roaming, in particular with regard to wholesale roaming markets. It is difficult to say (and the IA does not dwell on this explicitly) whether the proposed regulation will lead to simplification or is rather meant to enable a sustainable transition to the RLAH regime prescribed by the existing regulation.

The proposal is also coherent with the Commission's Digital Single Market Strategy whereby 'regulating wholesale roaming markets with a view to enabling the abolition of roaming surcharges [...] helps develop a strong, competitive and dynamic telecoms sector, and helps create the right conditions for developing advanced digital networks and services which support all sectors of the economy, including small and medium-size enterprises' (Explanatory Memorandum of the proposal and p. 13 of IA).

Quality of data, research and analysis

The IA report is based on several pieces of research mostly conducted in-house (in cooperation with the Joint Research Centre) or commissioned externally. In 2015, the Commission and the Body of European Regulators for Electronic Communications (BEREC) gathered data and conducted analysis of wholesale and retail roaming markets including an assessment of the sustainability of the RLAH. The IA provides a methodology for this

⁵ European Court of Justice in Case C-58/08: Judgement of the Court (Grand Chamber) of 8 June, 2010, paragraph 77.

assessment (IA, Annex 4). Moreover, an external study was commissioned in order to assess the level of costs incurred by visited network operators to provide wholesale roaming services.⁶ The body of research presented appears to be solid and comprehensive although it is not always clear which findings were used in the elaboration of which options. Furthermore, the technical language of the IA makes it difficult to understand the reasoning and evidence behind the analysis.

Stakeholder consultation

The Commission organised a 12-week public consultation between 29 November 2015 and 18 February 2016. The consultation targeted the main stakeholders: mobile operators, national regulators, relevant public authorities as well as civil society organisations, businesses and citizens at large. A total of 92 replies were received. According to the IA, all relevant sectors were represented and respondents came from 25 Member States and Norway. Most of the telecom sector in the EU and Norway was covered.

The preferred option (EU-wide wholesale roaming caps) is supported by a large majority (73%) of the respondents. The IA notes that, while the majority supports this measure, the operators were divided as to what would be the most appropriate level of the EU-wide caps. 58% of the responding operators supported the option of reducing wholesale roaming caps. They also believe that the method of calculating an EU unit price should be simple and transparent and that all operators should be subject to the same price cap (IA, p. 75).

Stakeholders (national regulators, operators and trade associations) were also consulted by means of a workshop organised by the Commission in January 2016 in Brussels. In addition, the Commission prepared a special test exercise for 20 national regulators. Only the results from the public consultations are presented in the IA, while the results of the additional exercises are said to have been used by an external contractor in preparation of a special study. It is not clear, however, how the results of the public consultation and the findings of the study were used in the analysis of the policy options for the legislative proposal.

Monitoring and evaluation

The IA identifies five main indicators to assess the specific measures included in the proposed legislation, namely the number of sustainability requests submitted by operators to national regulators, the total inbound and outbound roaming traffic per quarter, the average wholesale prices and volumes for traffic, the number and main features of capacity based wholesale contracts, and the effectiveness of appropriate contractual wholesale remedies. These indicators will be used in a biannual report, which the Commission is currently required to submit under the existing regulation. It is envisaged that the next biannual report, due in 2018, one year after the abolition of the roaming retail charges, will provide only partial data for review. The monitoring indicators contained in the proposal are similar to those listed in the IA (Explanatory Memorandum, p.8).

Commission Regulatory Scrutiny Board

The Commission's Regulatory Scrutiny Board (RSB) delivered a [positive opinion](#) on the draft IA on 13 April 2016. It nevertheless made several important recommendations for improvement regarding better explanation of the problem, the definition of the baseline scenario, clarification of the policy options - in particular the sustainability and feasibility of the options - as well as the comparison of the options. Some of these recommendations appear to have been taken into account in the final IA, although the problem could still have been defined more clearly and better linked to the complexities of the policy context.

Coherence between the Commission's legislative proposal and IA

The legislative proposal appears to follow the findings and analysis presented in the IA.

⁶ SMART 2015/006 'Assessment of the cost of providing wholesale roaming services in the EU', TERA Consultants.

Conclusions

The IA may well have been prepared in some haste, given that the RLAH regime is supposed to be introduced in less than a year. However, overall, it is of reasonable quality and presents a good overview and comparison of policy measures. One weakness of the analysis is that it does not go beyond the main objective, namely to enable cost recovery for the operators after the abolition of roaming charges. While this is understandable, given that the proposal is an amendment of the existing legislation, the final analysis could usefully have been broadened to include other possible economic, social and environmental impacts. This would have allowed the IA to better match the analysis with the complexity of the problem highlighted in the introduction.

This note, prepared by the Ex-Ante Impact Assessment Unit for the European Parliament's Committee on Industry, Research and Energy (ITRE), analyses whether the principal criteria laid down in the Commission's own Better Regulation Guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal. It is drafted for informational and background purposes to assist the relevant parliamentary committee(s) and Members more widely in their work.

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