Formal comments of the EDPS on the draft Commission Implementing Regulation laying down detailed rules on the application of fair use policy and on the methodology for assessing the sustainability of the abolition of retail roaming surcharges and on the application to be submitted by a roaming provider for the purposes of that assessment

On 8 December 2016 we received a request for comments under Regulation (EC) No 45/2001 on the draft "Commission Implementing Regulation laying down detailed rules on the application of fair use policy and on the methodology for assessing the sustainability of the abolition of retail roaming surcharges and on the application to be submitted by a roaming provider for the purposes of that assessment" ("the Proposal").

We welcome the consultation of the EDPS at this stage of the "comitology" procedure. We refer to previous informal consultations of the EDPS (on 18 and 23 September 2016) and particularly welcome the Commission's proactive approach to addressing the potential data protection implications of this file.

The Proposal lays down rules to ensure the consistent implementation of a "fair use policy" that roaming providers may apply to the consumption of regulated retail roaming services provided at the applicable domestic retail price in accordance with Article 6b of Regulation (EU) No 531/2012[1] ("the basic act"). That provision allows roaming providers to apply a "fair use policy" in order to prevent "*abusive or anomalous usage of regulated retail roaming services by roaming customers, such as the use of such services by roaming customers in a Member State other than that of their domestic provider for purposes other than periodic travel*".

According to the Proposal[2], "roaming like at home" (i.e. at domestic price) will be available to customers who are normally resident in or have stable links entailing a frequent and substantial presence in the Member State of the roaming provider. Consequently, in order to apply the "fair use policy", roaming providers "*may need to determine the normal place of residence of their roaming customers or the existence of such stable links*"[3].

The present comments focus exclusively on data protection implications of Section II "*Fair use policy*" as proposed by the Commission. We did not conduct a comprehensive assessment of the various policy options potentially available to implement Article 6b of the basic act. The Commission's assessment of the Proposal with respect to proportionality and necessity as compared to other possible options was not considered.

We note that, as Article 4(1) and recital 10 make clear, any processing of personal data for the purposes of providing *"proof of normal residence in the Member State of the roaming provider or of other stable links with that Member State entailing a frequent and substantial*

[1] Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union, OJ L 172, 30.6.2012, p. 10, as last amended by Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015, OJ L 310, 26.11.2015, p. 1.
[2] Article 3(1) of the Proposal.
[3] Recital 10 of the Proposal.

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presence on its territory" is an option available to the roaming provider, and not a mandatory requirement applicable in all cases.

We understand that it is not the Commission's intention to introduce a general identification or registration obligation for SIM card purchases across the EU. We note that introducing such an obligation - in addition to raising serious policy considerations - would require at least a clear legal basis in a legislative instrument, i.e. the basic act (as opposed to an implementing act).

The Proposal will entail the processing of personal data of customers by roaming providers for at least two sets of purposes:

(i) personal data provided as proof of normal residence or stable links (Article 4(1) and recital 10); and
(ii) personal data processing in the context of the control mechanism related to potential "abusive or anomalous" usage of roaming (Article 4(4) of the Proposal).

In this context, we would like to point out that personal data processed by the roaming providers must be limited to what is necessary in relation to the stated purpose of enforcing the "fair use policy" ("data minimisation") and they should be processed for that purpose only ("purpose limitation").

Article 4(6) and recital 40 of the Proposal provide crucial guarantees in that they confirm that the data protection legislation, i.e. Directive 95/46/EC, Directive 2002/58/EC and their national implementing measures, as well as the General Data Protection Regulation (EU) 2016/679 ("GDPR"; as from 25 May 2018) will be fully applicable to the processing of personal data in the context of the Proposal. We also welcome the fact that recital 40 makes explicit reference to the principles of necessity and proportionality.

We would like to stress that, in relation to point (i) above in particular, personal data can only be kept in a form which permits identification of the individual for as long as necessary for the purpose for which it was collected (cf. principle of "storage limitation", Article 5(1)(c) GDPR). Consequently, the possibility for the roaming provider to ask its customer to provide evidence of normal evidence or stable links should not be interpreted as allowing the provider to store or otherwise retain (copies of) the personal data provided beyond the point of sale. A record of the verification performed at the point of sale would normally be sufficient. It is also important to stress that that the possibility to lawfully use ID cards in this context would depend on the national law transposing Article 8(7) of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

Recital 10 refers to "reasonable evidence" to be provided "under the supervision of the national regulatory authority". In order to be fully effective, this reference to supervision should also be included in the operative part of the text.

In relation to point (ii) above, we welcome the fact that Article 4(4) and recitals 11 and 17 stipulate that the processing of traffic data will be limited to data which can lawfully be processed by the provider pursuant to Article 6 of the Directive 2002/58/EC on privacy and electronic communications[4]. This concerns in particular traffic data necessary for the purposes of subscriber billing and interconnection payments which can be processed only up to the end of the period during which the bill may lawfully be challenged or payment pursued[5].

[4] OJ L 201, 31.7.2002, p. 37, as amended.
[5] Article 6(2) of Directive 2002/58/EC.

We would like to emphasise that this limitation also applies to the use by roaming providers of "objective indicators" under Article 4(4) of the Proposal, to the extent such indicators entail the processing of roaming customers' traffic data. Consequently, where traffic data are processed in this context, the indicated period of time of "at least four months" during which such indicators may be observed may not exceed the maximum limit stipulated in Article 6(2) of Directive 2002/58/EC.

Brussels, 14 December 2016

(**signed**)

Giovanni Buttarelli