This document is meant purely as a documentation tool and the institutions do not assume any liability for its contents

►B REGULATION (EC) No 544/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 18 June 2009

amending Regulation (EC) No 717/2007 on roaming on public mobile telephone networks within the Community and Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services

(Text with EEA relevance)

(OJ L 167, 29.6.2009, p. 12)

Amended by:

		Official Journal		
		No	page	date
►M1	Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012	L 172	10	30.6.2012

▼B

REGULATION (EC) No 544/2009 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 18 June 2009

amending Regulation (EC) No 717/2007 on roaming on public mobile telephone networks within the Community and Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee ([1]),

Having consulted the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ([2]),

Whereas:

(1) Regulation (EC) No 717/2007 ([3]) imposed, on an exceptional and temporary basis, limits on the charges that may be levied by mobile operators, at wholesale and retail levels, for the provision of international roaming services for voice calls originating and terminating within the Community. That Regulation also laid down rules aimed at increasing price transparency and improving the provision of information on charges to users of Community-wide roaming services.

(2) The Commission has carried out a review in accordance with Article 11 of Regulation (EC) No 717/2007, where it was required to evaluate whether the objectives of that Regulation had been achieved, to review developments in wholesale and retail charges for the provision to roaming customers of voice and data communications services, including SMS and MMS, and to include, if appropriate, recommendations regarding the need to regulate those services. In its report to the European Parliament and the Council, contained in its Communication of 23 September 2008 on the outcome of the review of the functioning of Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC, the Commission concluded that it was appropriate to extend the validity of Regulation (EC) No 717/2007 beyond 30 June 2010.

([1]) Opinion of 15 January 2009 (not yet published in the Official Journal).
([2]) Opinion of the European Parliament of 22 April 2009 (not yet published in the Official Journal) and Council Decision of 8 June 2009.
([3]) OJ L 171, 29.6.2007, p. 32.

▼B

(3) Furthermore, the Commission found that the scope of Regulation (EC) No 717/2007 should be extended to cover the provision within the Community of SMS and data roaming services. The special characteristics exhibited by the international roaming markets, which justified the adoption of Regulation (EC) No 717/2007 and the imposition of obligations on mobile operators with regard to the provision of Community-wide voice roaming calls, apply equally to the provision of Community-wide SMS and data roaming services. Like voice roaming services, SMS and data roaming services are not purchased independently at national level but constitute only part of a broader retail package purchased by customers from their home provider, thereby limiting the competitive forces at play. Likewise, because of the cross-border nature of the services concerned, national regulatory authorities which are responsible for safeguarding and promoting the interests of mobile customers resident within their territory are not able to control the behaviour of the operators of the visited network, situated in other Member States.

(4) Structural problems relating to roaming services should be easier to solve in a genuine single market for mobile communication services, which is not fully in place at present, but which should be the ultimate aim of any regulatory framework.

(5) For this reason the national regulatory authorities, acting within the European Regulators Group for Electronic Communications Networks and Services (ERG), established by Commission Decision 2002/627/EC ([1]), in its response to the public consultation on the review of Regulation (EC) No 717/2007, once again called on the Commission to act at Community level, both as regards the prolongation of the Regulation and with regard to the regulation of SMS roaming and data roaming services.

(6) Data on the development of prices for Community-wide voice roaming services since the entry into force of Regulation (EC) No 717/2007, including in particular those collected by national regulatory authorities and reported on a quarterly basis through the medium of the ERG, do not provide sufficient evidence to suggest that competition at the retail or wholesale levels is likely to be sustainable from June 2010 onwards in the absence of regulatory measures. Such data indicates that retail and wholesale prices are clustering at or close to the limits set by Regulation (EC) No 717/2007, with only limited competition below those limits.

(7) The expiry in June 2010 of the regulatory safeguards which apply to intra-Community voice roaming services at wholesale and retail levels by virtue of Regulation (EC) No 717/2007 would therefore give rise to a significant risk that the underlying lack of competitive pressures in the voice roaming market and the incentive for mobile operators to maximise their roaming revenues would result in retail and wholesale prices for intra-Community roaming that do not constitute a reasonable reflection of the underlying costs involved in the provision of the service, thereby jeopardising the objectives of Regulation (EC)

([1]) OJ L 200, 30.7.2002, p. 38.

▼B

No 717/2007. Regulation (EC) No 717/2007 should therefore be extended beyond 30 June 2010 for a period of two years in order to ensure the smooth functioning of the internal market by guaranteeing that consumers continue to benefit from the assurance that they will not be charged an excessive price, in comparison with competitive national prices, when making or receiving a regulated roaming call while at the same time leaving sufficient time for competition to develop.

(8) The obligations laid down in this Regulation should not distort the competitive conditions between mobile operators within the Community and should not introduce any sort of competitive advantage, in particular on the basis of the size, type of roaming traffic or home market of the provider of roaming services.

(9) The levels of the maximum average wholesale charges for regulated roaming calls set by Regulation (EC) No 717/2007 should continue to decrease over the extended duration of the Regulation to reflect decreasing costs, including reductions in regulated mobile termination rates in the Member States, in order to ensure the smooth functioning of the internal market while at the same time continuing to meet the dual objectives of eliminating excessive prices and allowing operators freedom to compete and innovate.

(10) In order to stimulate and strengthen sustainable competition in the various roaming services, national regulatory authorities should monitor whether there is discrimination between large and smaller providers, particularly in relation to the calculation of wholesale prices.

(11) The date in 2009 on which the decrease in the maximum price limits for regulated roaming calls at both wholesale and retail levels takes effect should be brought forward from 30 August to 1 July, in order to ensure consistency with the introduction of the obligations regarding the pricing of regulated SMS messages provided for by this Regulation. In this way, users of both voice and SMS roaming services would be able to benefit from the new tariffs during the period when there is the greatest demand for those services.

(12) Where charge limits are not denominated in euro, the applicable charge limits for the initial limits and the revised values of those limits should be determined in the relevant currency by applying the reference exchange rates published in the *Official Journal of the European Union* on the dates specified in this Regulation. Where there is no publication on the date specified, the applicable reference exchange rates should be those published in the first *Official Journal of the European Union* following that date and containing such reference exchange rates.

▼B

(13) As compliance with the wholesale charge limit established by Regulation (EC) No 717/2007 is measured by reference to the average wholesale price prevailing between any two operators over a 12-month period, it is appropriate to clarify that the period may be shorter, for example where the date of a scheduled decrease in the level of the maximum average wholesale charge occurs before the end of the 12-month period.

(14) The practice by some mobile network operators of billing for the provision of wholesale roaming calls on the basis of minimum charging periods of up to 60 seconds, as opposed to the per second basis normally applied for other wholesale interconnection charges, creates a distortion of competition between these operators and those applying different billing methods and undermines the consistent application of the wholesale price limits introduced by Regulation (EC) No 717/2007. Moreover it represents an additional charge which, by increasing wholesale costs, has negative consequences for the pricing of voice roaming services at retail level. Mobile operators should therefore be required to bill for the wholesale provision of regulated roaming calls on a per second basis.

(15) The maximum levels of the Eurotariff, both for calls made and calls received, should continue to decrease annually during the extended period of validity of Regulation (EC) No 717/2007 in a manner consistent with the decreases required during the initial period of application of that Regulation, to reflect the continuing decreases in domestic mobile prices generally and the continuing decreases in the underlying costs of providing regulated roaming calls. In this way, the continuity in the effects of that Regulation is maintained.

(16) The increased margins between maximum wholesale and retail charges provided for by this Regulation should allow increased scope for operators to compete on price at the retail level, thereby maximising the chances that a properly competitive market will emerge.

(17) Some operators face higher wholesale costs than others due to geographical or other circumstances, such as difficult topography, regions with low population density and large influxes of tourists within short time periods.

(18) The ERG has estimated that the practice of mobile operators of using charging intervals of more than one second when billing for roaming services at retail level has added 24 % to a typical Eurotariff bill for calls made and 19 % for calls received. They also stated that these increases represent a form of hidden charge since they are not transparent to most consumers. For this reason, the ERG recommended urgent action to address the different billing practices at retail level applied to the Eurotariff.

(19) While Regulation (EC) No 717/2007, by introducing a Eurotariff in the Community, established a common approach to ensuring that roaming customers are not charged excessive prices for

▼B

regulated roaming calls, the different billing unitisation practices employed by mobile operators seriously undermines its consistent application. This also means that, despite the Community-wide, cross-border nature of intra-Community roaming services, there are divergent approaches in relation to the billing of regulated roaming calls which distort competitive conditions in the single market.

(20) A common set of rules regarding unitisation of Eurotariff bills at retail level should therefore be introduced in order to further strengthen the single market and provide throughout the Community a common level of protection to consumers of Community-wide roaming services.

(21) Providers of regulated roaming calls at the retail level should therefore be required to bill their customers on a per second basis for all calls subject to a Eurotariff, subject only to the possibility to apply a minimum initial charging period of no more than 30 seconds for calls made. This will enable operators to cover any reasonable set-up costs and to provide flexibility to compete by offering shorter minimum charging periods. However, no minimum initial charging period is justified in the case of Eurotariff calls received, as the underlying wholesale cost is charged on a per second basis and any specific set-up costs are already covered by mobile termination rates.

(22) Customers should not have to pay for receiving voice mail messages in a visited network, as they cannot control the duration of such messages. This should be without prejudice to other applicable voice mail charges, for example charges for listening to such messages.

(23) As regards SMS roaming services, the market data collected by the ERG and the Commission since the entry into force of Regulation (EC) No 717/2007 have demonstrated that a situation persists across the Community in which wholesale charges for these services have remained broadly stable and have no meaningful relationship with underlying costs. As is the case for voice roaming services, there appear to be insufficient competitive pressures on operators to reduce wholesale prices. Retail prices for SMS roaming services have also, with no clear justification, remained broadly stable, subject to high margins and priced significantly above equivalent domestic SMS services.

(24) Just as is the case for voice roaming calls, there is a significant risk that imposing wholesale pricing obligations alone would not result automatically in lower rates for retail customers. On the other hand, action to reduce the level of retail prices without addressing the level of the wholesale costs associated with the provision of these services could prejudice the position of some operators, in particular smaller operators, by increasing the risk of price squeeze.

▼B

(25) Furthermore, because of the particular structure of the roaming market and its cross-border nature, the 2002 regulatory framework has not provided national regulatory authorities with suitable tools to address effectively the competitive problems underlying the high level of wholesale and retail prices for regulated roaming SMS services. This fails to ensure the smooth functioning of the internal market and should be corrected.

(26) The ERG also stated in its response to the Commission's public consultation on the review of the operation of Regulation (EC) No 717/2007 that it considered that regulation of SMS roaming was necessary, at both wholesale and retail levels, in order to bring prices more into line with costs and with domestic prices. It considered that arrangements analogous to those for voice roaming would be suitable. More specifically, the ERG recommended introducing a cap on the average wholesale rate charged by any one operator to any other operator for SMS roaming, and amending the Eurotariff obligation to include an offer of SMS roaming at a rate no greater than a specified maximum cap.

(27) Regulatory obligations should therefore be imposed with regard to regulated roaming SMS services at wholesale level, in order to establish a more reasonable relationship between wholesale charges and the underlying costs of provision, and at retail level to protect the interests of roaming customers.

(28) These regulatory obligations should take effect as soon as possible, while allowing the operators concerned a reasonable period to adapt their prices and service offers to ensure compliance.

(29) The most effective and proportionate approach to regulating the level of prices for regulated roaming SMS messages at wholesale level is the setting at Community level of a maximum average charge per SMS sent from a visited network. The average wholesale charge should apply between any pair of mobile operators within the Community over a specified period.

(30) The wholesale price limit for regulated roaming SMS should include all costs incurred by the provider of the wholesale service, including, *inter alia*, origination, transit and the unrecovered cost of termination of roaming SMS messages on the visited network. Wholesale providers of regulated roaming SMS services should therefore be prohibited from introducing a separate charge for the termination of roaming SMS messages on their network, in order to ensure the consistent application of the rules established by this Regulation.

(31) The most effective and proportionate approach to regulating the level of prices for Community-wide roaming SMS messages at the retail level is the introduction of a requirement for mobile operators to offer their roaming customers a Euro-SMS tariff

▼B

which does not exceed a specified maximum price limit. The Euro-SMS tariff should be set at a level which guarantees a sufficient margin to operators while also more reasonably reflecting the underlying retail costs.

(32) This regulatory approach should ensure that retail charges for regulated roaming SMS messages more accurately reflect the underlying costs involved in the provision of the service than has previously been the case. The maximum Euro-SMS tariff that may be offered to roaming customers should therefore reflect a reasonable margin over the costs of providing a regulated roaming SMS service, whilst allowing operators the freedom to compete by differentiating their offerings and adapting their pricing structures to market conditions and consumer preferences. This regulatory approach should not apply to value-added SMS services.

(33) Roaming customers should not be required to pay any additional charge for receiving a regulated roaming SMS or voicemail message while roaming on a visited network, since such termination costs are already compensated by the retail charge levied for the sending of a roaming SMS or voicemail message.

(34) A Euro-SMS tariff should automatically apply to any new or existing roaming customer who has not deliberately chosen or does not deliberately choose a special SMS roaming tariff or a package for roaming services including regulated roaming SMS services.

(35) In order to ensure end-to-end connectivity and interoperability for roaming customers of regulated roaming SMS services, national regulatory authorities should intervene in a timely manner where a terrestrial mobile network operator established in one Member State complains to its national regulatory authority that its subscribers are unable to send or receive regulated roaming SMS messages to or from subscribers of a terrestrial mobile network located in another Member State as a result of a failure of the two operators concerned to conclude an agreement. Such intervention should be in accordance with the provisions of Article 5 of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) ([1]) and on a coordinated basis, and in accordance with the provisions of Article 8(1) of Regulation (EC) No 717/2007 and Article 21 of Directive 2002/21/EC ([2]).

(36) An SMS message is a Short Message Service text message and is clearly distinct from other messages such as MMS messages or e-mails. In order to ensure that the Regulation is not deprived of its effectiveness and that its objectives are fully met, any changes to the technical parameters of a roaming SMS message which would differentiate it from a domestic SMS message should be prohibited.

([1]) OJ L 108, 24.4.2002, p. 7.
([2]) OJ L 108, 24.4.2002, p. 33.

▼B

(37) Data collected by national regulatory authorities indicate that average wholesale charges for data roaming services levied by visited network operators from roaming customers' home providers appear to be on a downward trend, although high prices for wholesale data roaming services persist.

(38) The high level of retail prices for data roaming services continues to be of concern and indicates that competition in these services is still not sufficient. However, unlike voice and SMS roaming services, competitive constraints exist at retail level, as roaming customers have alternative means of accessing data services when abroad, such as public wireless access to the Internet, without associated numbering constraints. It would therefore be premature at this stage to regulate prices at the retail level. Furthermore, any roaming network connection should be established with the user's consent. Accordingly, there should be no roaming data downloading, including software updating and e-mail retrieval, without the user's prior consent or request, unless the user has indicated that he does not wish to enjoy such protection.

(39) Home providers should not charge the roaming customer for any regulated data roaming service, unless and until the roaming customer accepts the provision of the service.

(40) However, measures should be introduced to improve the transparency of retail prices for data roaming services, in particular to eliminate the problem of 'bill shock' which constitutes a barrier to the smooth functioning of the internal market, and to provide roaming customers with the tools they need to monitor and control their expenditure on data roaming services. Equally, there should be no obstacles to the emergence of applications or technologies which can be a substitute for, or alternative to, roaming services, such as WiFi, Voice over Internet Protocol (VoIP) and Instant Messaging services. Consumers should be provided with this information, thereby allowing them to make an informed choice.

(41) In particular, mobile operators should provide their roaming customers with personalised tariff information on the charges applicable to those customers for data roaming services every time they initiate a data roaming service on entering another Member State. This information should be delivered to their mobile telephone or other mobile device in the manner best suited to its easy receipt and comprehension.

(42) In order to facilitate customers' understanding of the financial consequences of the use of regulated data roaming services and to permit them to monitor and control their expenditure, the home provider should give examples for data roaming applications, such as e-mail, picture and web-browsing, by indicating their approximate size in terms of data usage.

▼B

(43) In addition, in order to avoid bill shocks, mobile operators should define one or more maximum financial and/or volume limits for their outstanding charges for data roaming services, expressed in the currency in which the roaming customer is billed, and which they should offer to all their roaming customers, free of charge, with an appropriate notification when this limit is being approached. Upon reaching this maximum limit, customers should no longer receive and be charged for those services unless they specifically request continued provision of those services in accordance with the terms and conditions set out in the notification. Roaming customers should be given the opportunity to opt for any of these maximum financial or volume limits within a reasonable period or to choose not to have such a limit. Unless customers state otherwise, they should be put on a default limit system.

(44) These transparency measures should be seen as minimum safeguards for roaming customers, and should not preclude mobile operators from offering their customers a range of other facilities which help them to predict and control their expenditure on data roaming services. For example, many operators are developing new retail flat rate roaming offers which permit data roaming for a specified price over a specified period up to a 'fair use' volume limit. Likewise operators are developing systems to enable their roaming customers to be updated on a real-time basis on their accumulated outstanding data roaming charges. To ensure the smooth functioning of the internal market, these developments on the domestic markets should be reflected in the harmonised rules.

(45) Moreover, the persistence of high wholesale charges for data roaming services is primarily attributable to high wholesale prices charged by operators of non-preferred networks. Such charges are caused by traffic steering limitations which leave operators with no incentive to reduce their standard wholesale prices unilaterally since the traffic will be received irrespective of the price charged. This results in an extreme variation in wholesale costs. In some cases the wholesale data roaming prices applicable to non-preferred networks are 30 times higher than those applied to the preferred network. These excessively high wholesale charges for data roaming services lead to appreciable distortions of competitive conditions between mobile operators within the Community which undermine the smooth functioning of the internal market. They also constrain the ability of home providers to predict their wholesale costs and therefore to provide their customers with transparent and competitive retail pricing packages. In view of the limitations on the ability of national regulatory authorities to deal with these problems effectively at national level, a wholesale price limit on data roaming services should apply. The wholesale price limit should be set at a safeguard level well above the lowest wholesale prices currently available in the market, to enhance competitive conditions and permit the development of a competitive trend in the market, while ensuring the better functioning of the internal market for the benefit of consumers. By eliminating the excessive wholesale data roaming charges that

▼B

persist in certain cases in the market, this safeguard level should prevent, throughout the period of application of Regulation (EC) No 717/2007, the emergence of distortions or restrictions on competition between mobile operators.

(46) In order to reflect developments in the market, and the applicable regulatory framework for electronic communications, it is necessary to refer to 'public communications networks' instead of 'public telephony networks'. For the sake of consistency Article 1(5) of Directive 2002/21/EC should be amended accordingly.

(47) Since the objectives of this Regulation, namely to amend Regulation (EC) No 717/2007 and Directive 2002/21/EC in order to maintain and further develop a common set of rules to ensure that users of public mobile communications networks when travelling within the Community do not pay excessive prices for Community-wide roaming services (be it in respect of voice calls, SMS messages or data transmissions), thereby contributing to the smooth functioning of the internal market, while achieving a high level of consumer protection and safeguarding competition between mobile operators, cannot be sufficiently achieved by the Member States in a secure, harmonised and timely manner and can therefore, by reason of the scale and effects of the proposed action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

(48) This common approach should nevertheless be maintained for a limited time period but may, in the light of a review to be carried out by the Commission, be further extended or amended or be replaced by alternative regulatory options, on the basis of appropriate recommendations from the Commission.

(49) The Commission should review the effectiveness of Regulation (EC) No 717/2007 as amended by this Regulation in light of its objectives and the contribution to the implementation of the regulatory framework and the smooth functioning of the internal market. In this context, the Commission should consider the impact on the competitive position of mobile communications providers of different sizes and from different parts of the Community, the developments, trends and transparency in retail and wholesale charges, their relation to actual costs, the extent to which the assumptions made in the impact assessment that accompanied this Regulation have been confirmed and the costs of compliance of operators and the impact on the investments. The Commission should also, in the light of technological developments, consider the availability and quality of services which are an alternative to roaming (such as VoIP).

▼B

(50) Prior to the abovementioned review, and in order to ensure the continuous monitoring of roaming services in the Community, the Commission should prepare an interim report to the European Parliament and the Council which includes a general summary of the latest trends in roaming services and an intermediary assessment of the progress towards achieving the objectives of Regulation (EC) No 717/2007 as amended by this Regulation and of the possible alternative options for achieving these objectives.

(51) Before making appropriate recommendations, the Commission should also assess whether the regulation of roaming services could be appropriately covered within the regulatory framework for electronic communications. It should thoroughly assess alternative methods of achieving the objectives of Regulation (EC) No 717/2007, such as:

— dealing with the problems at wholesale level, by introducing an obligation to provide reasonable and fair access on a non-discriminatory basis and/or on equitable reciprocal conditions,

— having an approach based on achieving prices and conditions for roaming customers similar to the competitive prices and conditions prevailing within the market of the visited network, including the possibility for the customer to obtain different prices from different operators in the market of the visited network,

— addressing problems in the framework of Community competition law,

In particular, the Commission should, in consultation with a body of European regulators for electronic communications, investigate and assess the competitive structure of the mobile market which leads to uncompetitive roaming prices, and should report to the European Parliament and Council its conclusions and proposals to address structural problems in mobile markets, in particular barriers to entry and expansion.

(52) Regulation (EC) No 717/2007 and Directive 2002/21/EC should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

▼M1

———————

▼B

Article 2

Amendment to Directive 2002/21/EC

Article 1(5) of Directive 2002/21/EC is replaced by the following:

‘5. This Directive and the Specific Directives shall be without prejudice to any specific measure adopted for the regulation of international roaming on public mobile communications networks within the Community.’.

▼B

Article 3

Entry into force

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

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