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## **Confirmation Decision concerning contraventions of the Roaming Regulations**

Notice given to Lycamobile UK Limited by the Office of Communications (Ofcom) under Regulation 4A of the Mobile Roaming (European Communities) Regulations 2007

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# 1. Overview

Ofcom's Confirmation Decision given to Lycamobile (Lyca) explains how it contravened regulatory obligations by charging some customers more than it should have for roaming in the European Economic Area (EEA) and applied some fair use limits for data roaming that were too low.

The Confirmation Decision also sets out the steps that Lyca has taken and needs to take to comply, and remedy the consequences of the contraventions, and should help clarify the rules for other providers.

## What we have decided – in brief

**We found that from 15 June 2017 to January 2019 Lyca failed to provide 'roam like at home' for some customers roaming in the EEA by levying a surcharge and/or a general charge to enable their service to be used abroad.** Since 15 June 2017, if a provider allows its customers to roam in the EEA it should do so on a roam like at home (RLAH) basis i.e. customers should generally pay no more for using their mobile services when roaming than they would do domestically (calls and texts to non-EEA destinations are not regulated). We found that between 15 June 2017 and 27 August 2017 customers that purchased a pre-paid bundle were only able to roam within the EEA using pay as you go (PAYG) credit, rather than being able to use their bundle allowance, i.e. they were charged a different tariff to what would have been applied domestically. Between 28 August 2017 and January 2019 customers on some pre-paid bundles were able to roam within the EEA by using PAYG credit or by paying for an additional roaming inclusive pre-paid bundle.

**We found that Lyca set some fair use data roaming limits at levels lower than the minimum required by the regulations.** To prevent abusive or anomalous use, providers are allowed to set fair use limits on the amount of data that can be consumed on a RLAH basis. However, the regulations set a minimum level for this limit based on the cost of the tariff. We found that, from 28 August 2017 to February 2019, Lyca set some fair use limits at levels lower than the minimum permitted by the regulations.

**We found that Lyca charged some customers more than the regulations permit once a data roaming limit had been met.** Once a customer reaches a fair use data roaming limit, providers are allowed to apply a capped surcharge for further data use. We found that, from 28 August 2017 to February 2019, once a customer reached their limit, Lyca applied surcharges higher than those permitted by the regulations.

**We are requiring Lyca to make refunds.** Our decision requires Lyca to identify and refund all customers who used additional PAYG credit as a result of Lyca not complying with the regulations. It must also set up a process for customers seeking refunds for any additional roaming inclusive pre-paid bundles purchased to roam/continue to roam as a result of Lyca not complying with the regulations.

**We decided not to impose a penalty on Lyca in this instance.** Based on Lyca's representations, the fact that this is the first time Ofcom has taken formal enforcement action in relation to the roaming regulations, and noting that this case will help clarify the rules for all providers, we have decided not to apply a penalty in this instance.

**This overview is a simplified high-level summary only. The decisions we have taken and our reasoning are set out in the full document.**

## 2. Introduction & summary findings

- 2.1 This decision concerns the failure of Lycamobile UK Limited (Lyca) to comply with Articles 6a, 6b and 6e of Regulation (EU) 531/2012 (Roaming Regulation) and Article 4 of the Commission Implementing Regulation (EU) 2016/2286 (CIR) (together, the Regulations). The Confirmation Decision is at Annex 1.
- 2.2 All communication providers who offer regulated roaming services must comply with the Regulations which set out important consumer protection measures intended to provide a consistent experience for customers roaming throughout the European Economic Area (EEA). This includes, from 15 June 2017, generally, requiring providers to charge customers the same price for calls, text messages and data services as they would pay in the UK (known as ‘roam like at home’ - RLAH)<sup>1</sup> and limiting the fair use policies and the level of any roaming surcharges they may apply.
- 2.3 The Regulations prohibit providers from:
- levying a surcharge in addition to the domestic retail price for regulated roaming services and/or a general charge to enable the service to be used abroad (Article 6a of the Roaming Regulation).
  - applying as part of a fair use policy data roaming limits that are lower than the minimum levels permitted (Article 6b of the Roaming Regulation and Article 4 of the CIR).
  - levying surcharges for regulated roaming services exceeding any limits under a fair use policy that are higher than the maximum surcharge permitted (Articles 6b and 6e of the Roaming Regulation).

### Findings

- 2.4 Having carefully considered Lyca’s representations alongside the information and evidence gathered during our investigation, we have concluded that Lyca has contravened the Regulations. Specifically, we have determined that:
- From 15 June 2017 to January 2019, Lyca contravened Article 6a of the Roaming Regulation by levying a surcharge and/or a general charge in addition to the domestic retail price for regulated roaming services to enable the service to be used abroad.
    - Between 15 June 2017 and 27 August 2017, customers that purchased a pre-paid bundle had to use or purchase separate pay as you go (PAYG) credit in order to be able to roam within the EEA, rather than being able to use their bundle allowance on a RLAH basis; and
    - From 28 August 2017 to January 2019, customers that purchased a non-roaming inclusive pre-paid bundle were able to roam within the EEA either

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<sup>1</sup> Calls and texts to non-EEA destinations are not regulated.

using PAYG credit or by additionally purchasing a roaming inclusive pre-paid bundle.

- From 28 August 2017 to February 2019, Lyca contravened Article 6b of the Roaming Regulation and Article 4 of the CIR by applying data roaming limits under its fair use policy that were lower than the minimum levels permitted.
- From 28 August 2017 to February 2019, Lyca contravened Articles 6b and 6e of the Roaming Regulation by applying surcharges for regulated data roaming services that were higher than the maximum surcharge permitted. Specifically, Lyca's charging policy for customers that roamed after reaching their data roaming limit and before reaching their domestic data allowance, exceeded the limits set in Article 6e(1)(a).

2.5 These contraventions affected Lyca customers over a significant period of time and resulted in those customers having to pay more than they would have had Lyca complied with the Regulations.

### Penalty and remedial steps

2.6 In light of Lyca's representations, the fact that this is the first time Ofcom has taken formal enforcement action in relation to the Regulations, and noting that this case will help clarify the rules for all providers, we have decided not to apply a penalty in this instance.

2.7 In order to comply with Articles 6a, 6b and 6e of the Roaming Regulation and Article 4 of the CIR, Lyca should, to the extent it has not already done so, and within one month from the issuing of this Confirmation Decision, take such steps as are necessary for ensuring that:

- Its non-roaming inclusive pre-paid bundles are compliant with the Roaming Regulation (for example, either by including EEA roaming in inclusive allowances on a RLAH basis, or by restricting customers who take up such bundles to domestic use only).
- Any data roaming limits are set at or above the minimum level permitted.
- Any surcharges for data usage beyond the data roaming limit do not exceed the maximum level permitted.

2.8 To remedy the consequences of the contraventions, we have also determined that, within three months from the issuing of this Confirmation Decision, Lyca should, to the extent it has not already done so:

- Identify and refund all customers who used additional PAYG credit as a result of Lyca not complying with the Regulations.
- Make available and publicise a process for customers seeking refunds for any additional roaming inclusive pre-paid bundle bought in order to roam/continue to roam as a result of Lyca not complying with the Regulations.
- Make available and publicise a process for affected customers who cannot be identified by Lyca to come forward and claim a refund.

2.9 Within three months and one week from the issuing of this Confirmation Decision, Lyca must also confirm to Ofcom that it has issued the refunds set out in the first bullet point in

paragraph 2.8 and provide figures for the total number of customers refunded and the total amount refunded.

## **Ofcom's Confirmation Decision**

- 2.10 Accordingly, we confirm that Lyca has contravened Articles 6a, 6b and 6e of the Roaming Regulation and Article 4 of the CIR. We set out our detailed reasons for these findings in Section 3.
- 2.11 Our decision not to impose a penalty in this instance and the remedial steps Lyca is required to take are set out in Section 4.

## 3. Contravention of the Roaming Regulations

### Introduction

- 3.1 In this section, we set out our reasons for finding that Lyca has contravened the Regulations by:
- levying a surcharge and/or general charge in addition to the domestic retail price for regulated roaming services to enable roaming;
  - applying data roaming limits that were lower than the minimum level permitted; and
  - having in place a charging policy with higher data roaming charges than the maximum surcharge permitted.
- 3.2 We have structured our reasons as follows. We first set out the factual findings we made prior to our provisional decision and our finding that these provisionally amounted to a contravention of the Regulations. We then set out Lyca’s representations about why it considered its approach to be compliant and explain why we have not accepted its arguments. The relevant regulatory framework is set out at Annex 3 to this decision. A summary of Ofcom’s investigation is set out in Annex 4.
- 3.3 In light of the facts gathered and our assessment of Lyca’s representations we confirm that Lyca has contravened the Regulations. The Confirmation Decision is contained in Annex 1.

### Levying a surcharge and/or a general charge

#### Facts

- 3.4 Lyca is a mobile virtual network operator (MVNO) which offers PAYG and pre-paid bundle tariffs. During the period considered by our investigation Lyca applied different roaming terms and conditions to certain pre-paid bundle tariffs. For clarity we set out the evidence separately for the periods before and after Lyca introduced roaming inclusive pre-paid bundles on 28 August 2017.

#### 15 June 2017 to 27 August 2017

- 3.5 Between 15 June 2017 and 27 August 2017, Lyca customers that bought a pre-paid bundle were able to roam within the EEA using PAYG credit, rather than being able to use their bundle allowance on a RLAH basis. Customers would either need to have PAYG credit available or purchase a top-up.
- 3.6 Lyca advised that its customer base *“includes a relatively high proportion of customers from migrant communities”* who have a *“requirement for low-cost international calls to friends and family overseas and EEA roaming services are not necessarily such an important requirement”* to them.<sup>2</sup>

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<sup>2</sup> First Response to question 1.

- 3.7 Lyca stated that during this period “all of Lycamobile’s pre-paid bundles were non-roaming tariffs”.<sup>3</sup> Lyca explained that “The customer can use PAYG for roaming in the EEA whilst their non-roaming bundle is inactive. Once the customer returns to the UK they can resume use of any remaining allowances in their non-roaming bundle.”<sup>4</sup>
- 3.8 During this period the General Terms and Conditions on Lyca’s website stated “**Roaming:** Please note that you will no longer be able to use bundle allowances while roaming. European Union (EU) roaming rates are changing. From 15 June 2017, you will pay the same rates when roaming within the EU as you do at home by PAYG.”
- 3.9 Lyca’s EEA Roaming FUP as at 15 June 2017 and 11 July 2017 stated, “To use our EU roaming services you must first activate your SIM at home and top up with PAYG credit before you travel.”<sup>5</sup>
- 3.10 Table 1 shows that between 15 June 2017 and the end of August 2017, Lyca charged customers on non-roaming inclusive pre-paid bundles £256,730 for PAYG EEA roaming. Lyca did not specify what proportion of these charges related to use beyond an inclusive allowance and, as such, would have been incurred had the same service been used domestically.

**Table 1: Charges applied to customers on non-roaming inclusive pre-paid bundles for EEA roaming on a PAYG basis – 15 June 2017 to 31 August 2017<sup>6</sup>**

	June 2017	July 2017	Aug 2017	Total
Total spent on EEA PAYG roaming	£41,635	£109,366	£105,729	<b>£256,730</b>

- 3.11 During this period Ofcom’s Consumer Contact Team (CCT) received four complaints about Lyca not allowing customers to use their bundle allowance when roaming in the EEA and having to pay PAYG rates. Ombudsman Services<sup>7</sup> also contacted us about a complaint it had received on the same issue. Whilst these are relatively small numbers of complaints, other customers may have been unaware of their rights under the newly amended Regulations or that they could raise their concerns with Ofcom.

### **28 August 2017 to 26 June 2018 (the date of Ofcom’s provisional decision)**

- 3.12 Lyca introduced roaming inclusive pre-paid bundles from 28 August 2017.<sup>8</sup> Lyca’s EEA Roaming FUP as at 10 September 2017 stated “**IMPORTANT:** Some of our prepaid bundles do not include an EU Countries roaming allowance. Before purchasing a bundle, please check that it includes all the services you want to use.”<sup>9</sup>

<sup>3</sup> First Response to question 7.

<sup>4</sup> First Response to question 2.

<sup>5</sup> First Response to question 10.

<sup>6</sup> First Response to questions 4 (annex 2) and 5 (annex 3), as clarified by Lyca’s email of 5 October 2018.

<sup>7</sup> The Alternative Dispute Resolution Scheme that Lyca is a member of.

<sup>8</sup> First Response to questions 2 and 7.

<sup>9</sup> First Response to question 10.



- 3.13 The terms and conditions that Lyca provided as part of its First Response<sup>10</sup> stated that international standard roaming is not included in a customer's inclusive allowance and clause 10.4 stated in relation to roaming *"If you are travelling to any of the country [sic], you will be charged at a Standard International Roaming rate"*.<sup>11</sup>
- 3.14 Lyca's terms and conditions at 11 June 2018 continued to state that international standard roaming was not included in a customer's inclusive allowance and clause 10.4 stated *"Roaming Services: The mobile telephone services that you use when travelling outside the United Kingdom. EEA Roaming services are subject to additional terms and a fair usage policy, see <http://www.lycamobile.co.uk/en/roaming-within-eu-countries/>".* This then linked to Lyca's EEA Roaming FUP published on 10 September 2017 as at paragraph 3.12.
- 3.15 Lyca's First Response, and information from Lyca's website,<sup>12</sup> confirmed that it continued to offer non-roaming inclusive pre-paid bundles.<sup>13 14</sup>
- 3.16 In its First Response Lyca stated that it *"continues to offer pre-paid bundles which do not include EEA roaming services and there is a demand for these products. These non-roaming bundles are available for both existing and new customers to purchase should they wish to do so. Lycamobile's non-roaming bundles are generally either very low-cost bundles [sic] options for customers who do not require EEA roaming services<sup>15</sup>, data only bundles or bundles designed for [sic] primarily for international calls<sup>16</sup>. It would not be possible for Lycamobile to offer these bundles at current prices if these were also to include EEA RLAH roaming services."*<sup>17</sup>
- 3.17 Lyca also advised that customers on non-roaming inclusive pre-paid bundles were not required to opt-in to another tariff to roam in the EEA. If a customer had purchased a non-roaming inclusive pre-paid bundle but wished to roam in the EEA, they had two options: i) since 28 August customers could purchase a roaming inclusive pre-paid bundle, or ii) purchase PAYG credit to use EEA roaming services.<sup>18</sup>
- 3.18 For both of these options Lyca explained that the customer's non-roaming inclusive pre-paid bundle was inactive while roaming, and when they returned to the UK they would automatically resume use of the non-roaming inclusive pre-paid bundle until the allowances had been used up or the bundle validity expired.<sup>19</sup>

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<sup>10</sup> See Annex 4 for details of the investigation we undertook, which includes at A4.10 a description of what the 'First Response' consists of.

<sup>11</sup> First Response to question 10 (T&Cs 10.3 and 10.4). The date of Lyca's First Response in relation to this question was 4 December 2017 but the T&Cs provided in relation to question 10 were not dated.

<sup>12</sup> As at 18 June 2018.

<sup>13</sup> First Response to question 1.

<sup>14</sup> On 6 June 2018, Lyca continued to offer at least 11 non-roaming inclusive pre-paid bundles.

<sup>15</sup> Footnote: *"For example the "UK Lyca" bundle includes an unlimited amount of calls and SMS to other Lycamobile numbers for just £1.50/month"*

<sup>16</sup> Footnote: *"For example the "Lyca Globe" bundle includes 3000 minutes to selected international destinations, plus unlimited calls and texts to Lyca numbers for £10/month."*

<sup>17</sup> First Response to question 1.

<sup>18</sup> First Response to question 2.

<sup>19</sup> First Response to question 2.

- 3.19 Lyca said “Whilst in the EEA a customer can switch tariffs from PAYG credit to a bundle which includes EEA roaming services by purchasing that EEA roaming inclusive bundle (either online or [sic] using SMS text)” and that “If a customer has 2 bundles activated at the same time the network system applies a rule that any available allowance within the first bundle to expire are the first to be used. If a customer buys both a pre-paid bundle and PAYG credit then the pre-paid bundle is automatically used first.”<sup>20</sup>
- 3.20 Lyca’s April Note<sup>21</sup> set out Lyca’s views on the key differences between PAYG and pre-paid bundle products. Lyca stated: “For the purposes of the Roaming Regulation, Lycamobile UK considers that PAYG and pre-paid bundles are separate products with different validity periods, limitations and features.”
- 3.21 Lyca stated that there was a demand for the type of non-roaming inclusive pre-paid bundles that it continued to offer which, as set out at paragraph 3.16, were generally “very low-cost bundles [sic] options for customers who do not require EEA roaming services, data only bundles or bundles designed for [sic] primarily for international calls”. Lyca stated that “the combination of a non-roaming bundle and PAYG is a very cost-effective solution for certain customers”.<sup>22</sup>
- 3.22 Table 2 shows that between 1 September 2017 and 31 January 2018, Lyca charged customers on non-roaming inclusive pre-paid bundles £91,410 for PAYG EEA roaming. Lyca did not specify what proportion of these charges related to use beyond an inclusive allowance. Customers on non-roaming inclusive pre-paid bundles could also roam by additionally purchasing a roaming inclusive pre-paid bundle, but we do not have details of how many customers did this or how much they spent.

**Table 2: Charges applied to customers on non-roaming inclusive pre-paid bundles for EEA roaming on a PAYG basis – September 2017 to January 2018<sup>23</sup>**

	Sept 17	Oct 17	Nov 17	Dec 17	Jan 18	Total
Total spent on EEA PAYG roaming	£27,795	£18,814	£14,225	£22,823	£7,753	<b>£91,410</b>

- 3.23 Since 1 September 2017, Ofcom’s CCT received four further complaints about Lyca not allowing customers to use their bundle allowance when roaming in the EEA and having to pay PAYG rates.

### **Provisional assessment of whether Lyca’s practice amounted to the levying of a surcharge and/or a general charge**

- 3.24 Between 15 June 2017 and 27 August 2017, Lyca did not offer any roaming inclusive pre-paid bundles. The Roaming Regulation does not oblige mobile providers to offer roaming

<sup>20</sup> First Response to question 2.

<sup>21</sup> See A4.12 for details of the ‘April Note’.

<sup>22</sup> First Response to question 2.

<sup>23</sup> First Response to question 5 (Annex 3) and Second Response to question 12 (Annex 4), as clarified by Lyca’s email of 5 October 2018.

services. However, if they do, they must comply with the Regulations and provide RLAH by default.

- 3.25 During this time Lyca did not prohibit customers with these bundles from roaming, rather it allowed them to roam on a PAYG basis if they topped up or had credit available. This meant that charges came out of any available/purchased PAYG credit rather than the customer's pre-paid bundle allowance as they would have done on a RLAH basis.
- 3.26 Similarly, after 28 August when Lyca introduced roaming inclusive pre-paid bundles, if a customer travelled within the EEA on a non-roaming inclusive pre-paid bundle, Lyca did not prohibit them from roaming. They were able to roam on a PAYG basis or by additionally purchasing a roaming inclusive pre-paid bundle.
- 3.27 A customer using PAYG credit whilst roaming will have incurred costs that would not have been incurred had RLAH been applied by default and they had been able to use their inclusive allowance from their pre-paid bundle.

### Alternative Tariff

- 3.28 As part of our assessment we also considered whether Lyca's practice of allowing customers on a non-roaming inclusive pre-paid bundle to roam on a PAYG basis or by additionally purchasing a roaming inclusive pre-paid bundle, could be considered an alternative tariff under Article 6e(3) of the Roaming Regulation.<sup>24</sup>
- 3.29 We considered that Article 6e(3) requires roaming providers to provide RLAH by default on any tariffs that allow customers to roam in the EEA, but allows those providers to also offer, and allows customers to explicitly choose to switch to, alternative roaming terms that do not affect the non-roaming terms of the overall tariff.
- 3.30 Between 15 June 2017 and 27 August 2017 there were no roaming inclusive pre-paid bundles available to Lyca customers. Lyca did not automatically apply a RLAH tariff to roaming customers with pre-paid bundles from 15 June 2017, and being charged to roam on a PAYG basis was the only option available to such customers. For these reasons we do not consider that what Lyca was offering during this period could be considered an alternative tariff under Article 6e(3) of the Roaming Regulation.<sup>25</sup>
- 3.31 We also gave consideration to the period 28 August 2017 to the date of our provisional decision, and we did not consider that what Lyca offered during this period could be considered an alternative tariff. Lyca was not switching customers between RLAH and alternative roaming terms, with the non-roaming terms unchanged. It was switching customers between a non-roaming inclusive pre-paid bundle and a roaming tariff. Other terms and conditions were also likely to be different, in particular the roaming tariff would often be PAYG.

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<sup>24</sup> See Annex 3 for details of the regulatory framework, including the text of Article 6e(3) of the Roaming Regulation at A3.8.

<sup>25</sup> Lyca stated in a letter to Ofcom dated 18 August 2017 that "Neither pre-paid bundles or PAYG are "Alternative Tariffs" as provided for under Article 6e(3) of the Regulation."

3.32 Furthermore, paragraph 3 of Article 6e of the Roaming Regulation states that *“The roaming provider shall remind those roaming customers of the nature of the roaming advantages which would thereby be lost”* in the case where a customer deliberately chooses an alternative roaming tariff. Lyca confirmed that it did not remind customers of the advantages that would be lost.<sup>26</sup>

### Ofcom’s provisional decision

3.33 Lyca customers can have a non-roaming inclusive pre-paid bundle and a roaming tariff simultaneously on the one SIM card. Ofcom’s view was that the two, combined, form a single arrangement with an individual ‘roaming customer’, who, in accordance with Article 6e(3) of the Roaming Regulation, should be automatically provided with RLAH by default.

3.34 Guideline 189 of the BEREC Guidelines<sup>27</sup> states: *“Switching between tariffs with or without roaming services should follow the same procedures as switching between other ordinary tariffs in the Member State. Only the customer should initiate the switching and should also give active consent prior to any switching taking place. Mechanisms for simple and quick switching between tariffs with or without roaming should not be used to circumvent the Regulation.”*

3.35 Ofcom’s provisional view was that allowing and charging customers on non-roaming inclusive pre-paid bundles to roam on a PAYG basis, or by additionally purchasing a roaming inclusive pre-paid bundle from 28 August 2017, amounted to a circumvention of the RLAH principle and was a breach of the Regulations.

3.36 We therefore considered that we had reasonable grounds to believe that, from 15 June 2017 to the date of our provisional decision, Lyca had contravened and was continuing to contravene Article 6a of the Roaming Regulation<sup>28</sup> by levying a surcharge and/or a general charge in addition to the domestic retail price for regulated roaming services to enable the service to be used abroad. Specifically, we believed that each of the following incidents amounted to a contravention:

- Between 15 June 2017 and 27 August 2017, customers that purchased a pre-paid bundle were able to roam within the EEA using PAYG credit, rather than being able to use their bundle allowance on a RLAH basis; and
- From 28 August 2017 to the date of our provisional decision, customers that purchased a non-roaming inclusive pre-paid bundle were able to roam within the EEA using PAYG credit or by additionally purchasing a roaming inclusive pre-paid bundle, rather than being able to use their bundle allowance on a RLAH basis.

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<sup>26</sup> Second Response to question 9.

<sup>27</sup> See Annex 3 and

[https://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/regulatory\\_best\\_practices/guidelines/7005-berec-guidelines-on-regulation-eu-no-5312012-as-amended-by-regulation-eu-20152120-and-commission-implementing-regulation-eu-20162286-retail-roaming-guidelines](https://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/guidelines/7005-berec-guidelines-on-regulation-eu-no-5312012-as-amended-by-regulation-eu-20152120-and-commission-implementing-regulation-eu-20162286-retail-roaming-guidelines)

<sup>28</sup> See A3.4 of Annex 3 for the text of Article 6a of the Roaming Regulation.

3.37 We considered that this breach was ongoing in relation to customers on one of Lyca’s non-roaming inclusive pre-paid bundles who roam on a PAYG basis or by purchasing an additional roaming inclusive pre-paid bundle.

## Lyca’s Representations

3.38 In its representations Lyca argued that:

- its non-roaming inclusive bundles cannot ever be ‘regulated roaming services’ as they are domestic only.<sup>29</sup> It is only when a customer uses a Lyca service while roaming that they are a ‘roaming customer’ and the Roaming Regulation is engaged;<sup>30</sup>
- the Regulations do not state that a non-roaming inclusive tariff must be RLAH enabled if the SIM can also be used on a different, roaming enabled, tariff.<sup>31</sup> Ofcom has focused on the concept of a ‘single arrangement’ although that wording is not found in the Roaming Regulation;<sup>32</sup>
- the legally correct basis for the application of RLAH is at the level of the individual tariff plan. Ofcom wrongly seeks to amalgamate the provision of services under separate tariffs simply because the customer receives them via a single SIM card;<sup>33</sup>
- Article 6a prohibits Lyca charging any surcharge in addition to the ‘domestic retail price’, and the relevant domestic retail price is that of the roaming-enabled tariff which is being used. Each of Lyca’s roaming-enabled services is offered on a RLAH basis at the same price as the equivalent service offered domestically, in accordance with Article 6a of the Roaming Regulation;<sup>34</sup> and
- there is no general rule against circumvention of the RLAH principle as set out in Article 3(1) CIR.<sup>35</sup> <sup>36</sup> Ofcom has erred in interpreting the BEREC Guidelines as a binding addition to the Regulations and Guideline 189 finds no support in the Roaming Regulation.<sup>37</sup>

3.39 Further, Lyca submitted that its business model differs from the mainstream mobile network operator model,<sup>38</sup> and its current approach suits its customers who want to make low-cost international calls to non-EU destinations rather than roam in the EU.<sup>39</sup> These low-cost rates “*are inherently a feature only made possible in the context of a non-roaming bundle*”,<sup>40</sup> and its precise concern in this regard is that it may be required to make non-EEA international call minutes available on a RLAH basis.<sup>41</sup> Whilst it noted that this was not required by the Regulations, it stated that “*there may be a commercial imperative to do so*

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<sup>29</sup> 4.12 of Lyca’s Representations

<sup>30</sup> 4.10 of Lyca’s Representations

<sup>31</sup> 4.25 of Lyca’s Representations

<sup>32</sup> 4.29 of Lyca’s Representations

<sup>33</sup> 1.4(a)(1) of Lyca’s Representations

<sup>34</sup> 1.4(a) and 4.20 of Lyca’s Representations

<sup>35</sup> 4.50 of Lyca’s Representations

<sup>36</sup> See A3.6 of Annex 3 for the text of Article 3(1) of the CIR.

<sup>37</sup> 4.51 of Lyca’s Representations

<sup>38</sup> 4.40 of Lyca’s Representations

<sup>39</sup> 4.39 of Lyca’s Representations. In its 23 January 2019 letter Lyca stated that “*Currently, around 1 customer in 300 uses PAYG credit in the EEA on a roaming basis whilst also holding a non-roaming bundle*”.

<sup>40</sup> 4.39 of Lyca’s Representations

<sup>41</sup> 2.21 of Lyca’s Representations and its follow up email of 27 September 2018.

*if the bundle is described as being ‘EEA roaming enabled’*”.<sup>42</sup> Lyca submitted that the practical effect of Ofcom’s position would be “to force Lyca to take steps to reduce and limit consumer choice”, resulting in consumer harm.<sup>43</sup>

3.40 Lyca also argued that if, contrary to its submission, the set of services offered on a SIM was a ‘single arrangement’, this arrangement would meet the requirements for an alternative tariff, as permitted by Article 6e(3). It argued that:

- its customers “‘deliberately’ chose that arrangement, given that they converted a PAYG tariff balance and chose to purchase services with their characteristics laid out transparently in Lyca’s commercial terms and conditions”;<sup>44</sup>
- these customers have not switched roaming tariffs as entering into this single arrangement “represents the first roaming tariff that those customers have chosen”;<sup>45</sup> and,
- any obligation to make clear what RLAH advantages would be lost remains untriggered as there has been no switch between different roaming tariffs.<sup>46</sup>

3.41 Lyca stated in its letter of 23 January 2019 that, although it remained of the view that Ofcom’s position “simply limit[s] Lyca’s ability to develop innovative bundle tariffs<sup>1</sup> to offer to customers and the ability of customers to choose combinations of tariffs to suit their requirements” it had enabled all of its “‘mainstream’ domestic focused bundles” with EEA roaming services and, on an interim basis, chosen to “strip out all the services (e.g. data services, Lyca to Lyca on-net calls) in international call bundles which could be used domestically” to make them RLAH compliant.<sup>47</sup>

## Ofcom’s Response

3.42 Under the Roaming Regulation, providers are not precluded from offering domestic-only retail services. We accept that a non-roaming inclusive bundle, when considered in isolation, is not a ‘regulated roaming service’ for the purposes of the Roaming Regulation. However, we remain of the view that if a customer has enabled a non-roaming inclusive bundle and a roaming inclusive product on the same SIM card at the same time, the two products form a single combined arrangement for the provision of mobile services which permits EU-wide roaming. Therefore the customer is a roaming customer<sup>48</sup> for the purposes of the Roaming Regulation and, in accordance with Article 6e(3), Lyca must apply a RLAH tariff set in accordance with Article 6a to that customer by default.

3.43 Under Article 6a, Lyca may not levy a surcharge in addition to the domestic retail price for use of regulated roaming services, nor any general charge to enable the terminal equipment or service to be used abroad. We consider that the relevant domestic retail price is that of the non-roaming inclusive bundle, i.e. the same charging mechanism as that

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<sup>42</sup> Lyca’s email of 27 September 2018.

<sup>43</sup> 3.6(e) and 3.7 of Lyca’s Representations

<sup>44</sup> 4.45(c) of Lyca’s Representations

<sup>45</sup> 4.45(d)(2) of Lyca’s Representations

<sup>46</sup> 4.45(d)(3) of Lyca’s Representations

<sup>47</sup> We note that, as at 20 February 2019, Lyca’s website suggested it had retained services ‘which could be used domestically’ in some of its ‘International’ pre-paid bundles, but these bundles had been made roaming inclusive.

<sup>48</sup> See A3.5 of Annex 3 for the meaning of ‘roaming customer’

applied to the customer for calls made, SMS messages sent, and data consumed in the UK. In requiring its customers to purchase an additional, roaming inclusive product, Lyca has contravened Article 6a by levying a surcharge and/or general charge to enable the service to be used abroad.

- 3.44 This view is supported by the BEREC Roaming Guidelines. Guideline 188 notes:
- “...the Roaming Regulation does not oblige operators to offer roaming services in their tariff plans. However, according to Article 6a Roaming Regulation, roaming providers may not levy any general charge to enable the terminal equipment or service to be used abroad, that is, providers shall not offer roaming options (against a general charge) separately in addition to subscriptions without roaming (see Guideline 9). If the operator decides to offer roaming in a tariff plan, they have the full requirements according to chapters B, C and D.”*
- 3.45 Guideline 9 further considers ‘general charges’, which are not defined in the Roaming Regulation. It understands the prohibition on general charges to mean *“roaming providers cannot add a direct or indirect/quasi surcharge for enabling roaming in the EEA”*. This approach to the prohibition on general charges seems clearly to encompass Lyca’s charging of additional roaming rates to customers using non-roaming inclusive bundles.
- 3.46 Lyca is correct that the Guidelines are not binding, but Ofcom is required to take utmost account of them.<sup>49</sup> Furthermore, we must take a purposive approach to interpreting the Roaming Regulation, which has the ultimate aim of eliminating the difference between domestic and roaming charges within the EEA.
- 3.47 We acknowledge Lyca’s representation that any contravention was not *“deliberate or reckless”*,<sup>50</sup> however, in our view, Lyca’s approach amounted to a circumvention of the Roaming Regulation and the principle of RLAH. Its practice of switching customers, with an active non-roaming inclusive bundle, to a roaming-inclusive tariff in order to roam, is addressed by Guideline 189, as set out in paragraph 3.34 above.
- 3.48 We accept that Lyca’s pre-paid bundles are atypical. We also note its submission that its approach suited its customers who want to make low-cost international calls to non-EU destinations rather than to roam in the EU.<sup>51</sup> However, if combining non-roaming enabled and roaming enabled pre-pay services in this way were permissible, it could potentially undermine inclusion of roaming in standard post-pay services, as providers would understand they could combine non-roaming pay-monthly contracts with bolt-on PAYG roaming enabled services.
- 3.49 Finally, we do not consider that the ‘single arrangement’ could be considered an alternative tariff within the meaning of the Regulations because:
- between 15 June and 27 August 2017, buying additional PAYG credit and using that credit to roam on PAYG rates (which were higher than the in-bundle charges) was the only option available to customers with pre-paid bundles; and,

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<sup>49</sup> Article 3(3) of Regulation (EC) No 1211/2009

<sup>50</sup> 1.8 of Lyca’s Representations

<sup>51</sup> As noted, whilst Lyca stated that there may be a commercial imperative to do so, the Regulations do not require non-EEA minutes and texts to be made available on a RLAH basis.

- between 28 August 2017 and January 2019, Lyca was not switching customers between RLAH and alternative roaming terms with the non-roaming terms unchanged. It was switching customers between a non-roaming inclusive pre-paid bundle and a roaming inclusive product. Other terms were also likely to be different.

## Confirmation Decision

3.50 Having considered Lyca's Representations and the facts gathered during our investigation, we confirm that the obligation to provide RLAH by default extended to Lyca's non-roaming inclusive bundles where Lyca had allowed those customers to purchase roaming capability on a separate tariff which they could combine on the same SIM with their non-roaming inclusive bundle.

3.51 Lyca is entitled to:

- provide non-roaming inclusive bundles to its customers where these are intended for domestic use only; and
- provide RLAH-compliant roaming inclusive bundles and PAYG products.

However, where a customer is permitted to combine non-roaming inclusive and roaming-enabled products on a single SIM, they are a roaming customer for the purposes of the Roaming Regulation and benefit from the RLAH rules. Lyca has therefore breached the Regulations.

## Applying data roaming limits that are lower than the minimum permitted

### Facts

3.52 During our Initial Assessment we engaged with Lyca about our concerns regarding the data roaming limits it had applied to its roaming inclusive pre-paid bundles. Lyca confirmed that it had calculated its data roaming limits based on Article 4(3) of the CIR.<sup>52 53</sup>

3.53 In an email dated 11 September 2017 we highlighted to Lyca that Article 4(3) of the CIR relates to pre-paid tariff plans<sup>54</sup> and encouraged it to review its data roaming limit calculations in line with Article 4(2) of the CIR,<sup>55</sup> which relates to open data bundles.<sup>56</sup> We also referred Lyca to Guideline 60 of the BEREC Guidelines. Lyca subsequently confirmed

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<sup>52</sup> Lyca email dated 8 September 2017.

<sup>53</sup> See A3.15 of Annex 3 for the text of Article 4(3) of the CIR.

<sup>54</sup> Article 2(2)(d) of the CIR states *“pre-paid tariff plan’ means a tariff plan under which mobile retail services are provided upon deduction of credit made available by the customer to the provider on a per-unit basis, in advance of consumption, and from which a customer may withdraw without penalty upon exhaustion or expiry of credit”*.

<sup>55</sup> See A3.12 of Annex 3 for the text of Article 4(2) of the CIR.

<sup>56</sup> Article 2(2)(c) of the CIR states *“open data bundle’ means a tariff plan for the provision of one or more mobile retail services which does not limit the volume of mobile data retail services included against the payment of a fixed periodic fee, or for which the domestic unit price of mobile data retail services, derived by dividing the overall domestic retail price, excluding VAT, for mobile services corresponding to the entire billing period by the total volume of mobile data retail services available domestically, is lower than the regulated maximum wholesale roaming charge referred to in Article 12 of Regulation (EU) No 531/2012”*.



that it would be recalculating its data roaming limits in accordance with Article 4(2) of the CIR.<sup>57</sup>

3.54 Lyca's First Response included a table showing the minimum data roaming limits applied across its roaming inclusive pre-paid bundles at six date points: 29 August 2017, 5 September 2017, 12 September 2017, 13 September 2017, 17 November 2017 and 27 November 2017.<sup>58</sup> A summary and our analysis of this information can be found in the table at Annex 5.

3.55 Lyca offers roaming inclusive pre-paid bundles with and without a domestic 'bonus' data allowance. We consider these separately below.

### Roaming inclusive pre-paid bundles without a domestic 'bonus' data allowance

3.56 Lyca acknowledged that data roaming limits lower than those required by Article 4(2) of the CIR were applied to some of its roaming inclusive pre-paid bundles that did not have a 'bonus' data allowance and stated "*When Lycamobile firs [sic] launched EU roaming inclusive pre-paid bundles it applied a lower data cap due to Lycamobile's understanding that, as a provider of pre-paid tariffs with no long term commitment, it was entitled to set EEA roaming data limits using the calculation for pre-paid tariffs set out in Article 4(3) of the CIR. I am advised that there was also some impact on the roaming data caps which was due to a different euro-sterling exchange rate being used in the calculation referred to in point 4 above (in place of the ECB rate at 1 May 2017). Lycamobile is investigating whether any customers were adversely affected by lower data limits for the entire period 28 August 2017 to 17 November 2017 and will compensate any customers who were disadvantaged by this.*"<sup>59</sup>

3.57 Lyca confirmed that between 28 August 2017 and 13 April 2018 a total of 55 customers reached a data roaming limit that was lower than the minimum permitted by the Regulations. Of these 55 customers, 32 did not continue to roam. The remaining 23 customers continued to roam on a PAYG basis or by purchasing a roaming inclusive pre-paid bundle. Of the 7 customers that purchased a roaming inclusive pre-paid bundle, some may also have roamed on a PAYG basis.<sup>60</sup>

3.58 Lyca confirmed that the associated costs to customers that continued to roam using PAYG credit totaled £272.15 and Lyca had refunded this to the affected customers by applying PAYG credit to their accounts.<sup>61</sup>

3.59 Lyca also confirmed that the cost of the seven new bundles that customers bought to continue roaming totaled £99.80.<sup>62</sup> Lyca proposed to provide these customers with a new bundle free of charge but asked for confirmation from Ofcom that this approach was appropriate.<sup>63</sup> In an email to Lyca dated 27 April 2018 we stated "*Whilst Ofcom is not able*

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<sup>57</sup> Lyca email dated 12 September 2017.

<sup>58</sup> First Response to question 18.

<sup>59</sup> First Response to question 18.

<sup>60</sup> Second Response to questions 1 and 2 (annex 2).

<sup>61</sup> Second Response to questions 3 and 4.

<sup>62</sup> Second Response to question 2 (annex 2).

<sup>63</sup> Second Response to question 4.

*to confirm or approve such proposals, we would ask you to consider whether some affected customers may prefer a different form of redress. For example, some affected customers may have since moved their custom away from Lycamobile, and a refund may be more suitable than a new bundle.”*

### **Roaming inclusive pre-paid bundles with a domestic ‘bonus’ data allowance (‘2GB + 1GB’)**

- 3.60 The table of data roaming limits provided by Lyca in its First Response showed a number of roaming inclusive pre-paid bundles where the domestic data allowance was ‘2GB + 1GB’ and the data roaming limit was 2GB. In its Second Response,<sup>64</sup> Lyca stated *“The schedule includes certain bundles where at that time Lycamobile offered a free bonus data allowance e.g. (+1GB) in addition to the standard bundle allowance. The extra data was a time limited free bonus and there was no charge for it. The free bonus data was not available for use when roaming in the EEA. [There is a drop-down menu on the website “+more” which provides details of the EEA roaming data allowance for each bundle.] This extra data was subject to the same validity period as the bundle (usually 30 days).”*<sup>65</sup>
- 3.61 Lyca confirmed that between 28 August 2017 and 13 April 2018 no customer who roamed whilst on a ‘2GB + 1GB’ bundle reached the 2GB data roaming limit.<sup>66</sup>
- 3.62 On 18 June 2018 Lyca’s website showed that it still provided ‘2GB + 1GB’ bundles with a data roaming limit of 2GB.

## **Provisional assessment of whether Lyca had contravened the Regulations by setting data roaming limits lower than permitted**

### **Roaming inclusive pre-paid bundles without a domestic ‘bonus’ data allowance**

- 3.63 As shown in the table at Annex 5, when Lyca first introduced roaming inclusive pre-paid bundles on 28 August 2017, all of the data roaming limits were lower than those permitted by Article 4(2) of the CIR. We raised our concerns in early September 2017 as part of an Initial Assessment of its data roaming limits. Lyca then amended some of its data roaming limits in September. However, as shown in Annex 5, the majority were still lower than permitted until 17 November 2017.<sup>67</sup>

### **Roaming inclusive pre-paid bundles with a domestic ‘bonus’ data allowance (‘2GB + 1GB’)**

- 3.64 As set out above, Lyca confirmed that for these roaming inclusive pre-paid bundles, the ‘+1GB’ was a free bonus data allowance not available for use when roaming in the EEA.

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<sup>64</sup> See A4.12 for details of what the ‘Second Response’ consists of.

<sup>65</sup> Second Response to question 7.

<sup>66</sup> Second Response to question 8 (annex 3).

<sup>67</sup> We note that, at 1 February 2019, Lyca’s website advertised one roaming inclusive pre-paid bundle (UK Plan GIGA) with a data roaming limit lower than permitted. It is unclear when this limit was first introduced, but we note that it would have been compliant prior to the regulated maximum wholesale roaming charge decreasing on 1 January 2019, as provided for by Article 12(1) of the Roaming Regulation.

- 3.65 Guideline 52 of the BEREC Guidelines states *“When an operator provides additional additions e.g. in terms of volume to the customer (e.g. specific promotions), the customer shall be able to consume this allowance under the same conditions as at home.”*
- 3.66 Therefore, to meet the requirements of the Regulations, the ‘+1GB’ bonus data allowance should be available to customers when roaming in the EEA i.e. the customer should be able to use the full 3GB (2GB + 1GB) subject to any data roaming limit.
- 3.67 Lyca stated that, between 28 August 2017 and 13 April 2018, no customers reached the lower data limit of 2GB and therefore, between those dates, customers were not affected by this breach.
- 3.68 On 18 June 2018 Lyca’s website showed three roaming inclusive pre-paid plans that had a domestic data allowance of ‘2GB + 1GB’ and a data roaming limit of 2GB. These were UK Plan L, Value Saver and Global Saver. The first two indicated that the promotional bonus data was only valid until 28 February 2018 and 31 March 2018 respectively, but both were still being advertised. Global Saver did not indicate an end date for the validity of the promotional bonus data.

### Ofcom’s provisional decision

- 3.69 Our provisional view was that, from 28 August 2017 to the date of our provisional decision, we had reasonable grounds to believe that Lyca had contravened and continued to contravene Article 4(2) of the CIR by applying data roaming limits under its FUP that were lower than the minimum level permitted.
- 3.70 In the case of roaming inclusive pre-paid bundles without a domestic ‘bonus’ data allowance we considered that, between 28 August 2017 and 16 November 2017, some data roaming limits were not compliant. On 17 November 2017 all data roaming limits were made compliant with the Regulations.
- 3.71 In the case of roaming inclusive pre-paid bundles that include a ‘free bonus data allowance’ we considered that Lyca continued to breach the Regulations by applying a data roaming limit that was lower than the minimum permitted.

### Lyca’s Representations

- 3.72 Lyca submits that its pre-paid bundles make services available upon the deduction of credit on a per-unit basis (i.e. per a specific number of GB, not on a per month or other basis),<sup>68</sup> and that its roaming-enabled pre-paid bundles are therefore pre-paid tariff plans as defined in Article 2(2)(d) of the CIR.<sup>69</sup> As such it considers that it can apply a data roaming limit (as an alternative to requiring proof of normal residence) under Article 4(3) of the CIR.<sup>70</sup>

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<sup>68</sup> 5.14(b) of Lyca’s Representations

<sup>69</sup> 5.13 of Lyca’s Representations

<sup>70</sup> 5.15 of Lyca’s Representations

- 3.73 Lyca also argued that, even on Ofcom’s case, Lyca’s conduct did not amount to a material contravention: 23 customers were affected, resulting in £371.95 in incorrect charges; the customers have been identified and sums re-credited; and since 17 November 2017 Lyca has applied data roaming limits consistent with Ofcom’s “preferred reading of the CIR.”<sup>71</sup>
- 3.74 In an email of 27 February 2019 Lyca stated that it had removed all data roaming limits from its roaming inclusive pre-paid bundles on 12 February 2019.

### Ofcom’s Response

- 3.75 Lyca’s pre-paid bundles give customers a fixed number of calls, texts and/or data in exchange for an up-front lump sum payment, valid for 30 days.<sup>72</sup> Pre-paid bundles differ from a standard PAYG service, in that the customer’s usage is not deducted from their remaining credit but rather the bundle of services is available for use on a use-it-or-lose-it basis during the period of validity. The ‘credit’ available to the customer is the remaining volume of unused calls/texts/data in the bundle they purchased rather than a monetary value of PAYG credit.
- 3.76 We do not agree that Lyca’s roaming-enabled pre-paid bundles can be considered pre-paid tariff plans within the specific meaning of the CIR. In our view, the reference in the definition in Article 2(2)(d) to provision “upon deduction of credit made available by the customer... on a per-unit basis” implies a standard PAYG service where a customer loads a certain amount of money onto their account and credit is deducted in monetary terms for each unit of service which is consumed. This is not how Lyca’s pre-paid bundles operate.
- 3.77 Under Article 4(3) of the CIR, in the case of pre-paid tariff plans, the roaming provider may set a data roaming limit “equivalent to at least the volume obtained by dividing the overall amount... of the remaining credit available and already paid by the customer to the provider, at the moment of commencing roaming, by the regulated maximum wholesale roaming charge...”. This also suggests PAYG, and that ‘credit’ is an amount of money rather than a volume of service.
- 3.78 Our view is also supported by the BEREC Guidelines. Guideline 59 cites the definition in Article 2(2)(d) and states “Therefore, only tariffs offered to pre-paid customers that are charged per unit are pre-paid tariffs. Post-paid per-unit tariffs do not fall under this definition.”
- 3.79 Guideline 60 goes on to say that “Other types of tariffs offered to pre-paid customers, such as tariffs that include a bundle of retail mobile services, should not be considered as pre-paid tariffs for the purposes of the CIR. For example, in the case of such tariffs, the operator may determine if they can be considered open data bundles.”
- 3.80 Any data roaming limit applied to Lyca’s pre-paid bundles must, therefore, be calculated in line with the calculation for open data bundles in Article 4(2) of the CIR.

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<sup>71</sup> 1.4(d) of Lyca’s Representations

<sup>72</sup> 2.8(b) of Lyca’s Representations and Lyca’s email of 27 September 2018.

## Confirmation decision

- 3.81 Having considered Lyca’s Representations, we do not consider that Lyca can rely on Article 4(3) of the CIR to justify lower data roaming limits than would apply under Article 4(2). We therefore confirm that Lyca breached the Regulations.

## Levying surcharges higher than the maximum permitted

### Facts

- 3.82 In the Second Notice we asked Lyca what happened, between 28 August 2017 and the date of the Second Response, to customers with a roaming inclusive pre-paid bundle where the data roaming limit was lower than the domestic data allowance, who reached the data roaming limit and wanted to continue data roaming. We asked Lyca to confirm if customers were charged to continue data roaming once the data roaming limit was met, and if so, what charges were applied between the data roaming limit and the domestic data allowance.
- 3.83 For example, Lyca’s First Response stated that Lyca’s UK Plan Ultra had a domestic data allowance of 15GB and a data roaming limit of 6.5GB. In this example we were asking Lyca to confirm what happens when a customer reaches 6.5GB and wants to continue data roaming, and if they are charged to continue data roaming after 6.5GB, what rate are they charged until they reach 15GB.<sup>73</sup>
- 3.84 Lyca stated *“When a customer reaches the limit of the bundle roaming data allowance (whether this is the same as the domestic data allowance or a roaming allowance set in accordance with CIR Article 4(2)) Lycamobile will issue an SMS text to notify them that their bundle data allowance has been exhausted... When the customer has exhausted their bundle’s EEA data roaming allowance the customer will no longer be able to use roaming data services, until they purchase an additional data roaming allowance – either by purchasing a further bundle or PAYG credit.”*<sup>74</sup>
- 3.85 Lyca also stated<sup>75</sup> *“If a customer purchases an EEA roaming bundle, they will pay the price for that bundle. If the customer purchases PAYG, they will be charged at standard PAYG domestic rates which is currently £0.12/Mb.”*

### Provisional assessment of whether Lyca had contravened the Regulations by levying surcharges higher than the maximum permitted

- 3.86 Article 6b(2) of the Roaming Regulation states that *“Article 6e shall apply to regulated retail roaming services exceeding any limits under any fair use policy”*.

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<sup>73</sup> First Response to question 18.

<sup>74</sup> Second Response to question 5

<sup>75</sup> Second Response to question 5

- 3.87 Between 28 August 2017, when Lyca introduced roaming inclusive pre-paid bundles, and 31 December 2017, Article 6e set out that the maximum surcharge that could be applied for data use in excess of a data roaming limit was £0.0078 per MB (including VAT).<sup>76</sup> From 1 January 2018 to 31 December 2018 this maximum surcharge was £0.006 per MB (including VAT).<sup>77 78</sup>
- 3.88 As such, customers that exceeded their data roaming limit should have been charged a maximum of £0.0078 per MB (up to 31 December 2017), or £0.006 per MB (from 1 January 2018 to 31 December 2018) to continue roaming until the domestic data allowance was reached. However, in the Second Response Lyca confirmed that between 28 August 2017 and 13 April 2018, customers would have been charged PAYG rates of £0.12 per MB, or the cost of a new roaming inclusive pre-paid bundle, in order to continue roaming once the data roaming limit had been reached.<sup>79</sup>
- 3.89 We considered that this charging policy contravened the Regulations as the level of the charge for roaming between the data roaming limit and the domestic data allowance was higher than the maximum surcharge permitted by the Regulations. We did not have the information to quantify exactly how many customers were subject to these surcharges but noted that any customer charged PAYG rates by Lyca will have experienced harm. Some customers may also have been deterred from using data in excess of their data roaming limit due to the higher charge of £0.12 per MB, which between 1 January 2018 and 31 December 2018 was 20 times the maximum surcharge permitted by the Roaming Regulation (£0.006 per MB including VAT).

### Ofcom's provisional decision

- 3.90 For the reasons set out above, we considered that from 28 August 2017 to the date of our provisional decision, we had reasonable grounds to believe that Lyca had contravened and was continuing to contravene Articles 6b and 6e of the Roaming Regulation by having in place a charging policy with higher data roaming charges than the maximum surcharge permitted.
- 3.91 Specifically, Lyca's charging policy for customers that roamed after reaching their data roaming limit and before reaching their domestic data allowance, exceeded the permitted limits set in Article 6e(1)(a).<sup>80</sup>

### Lyca's Representations

- 3.92 In its representations Lyca argued that it did not apply surcharges but a data roaming limit that could not be exceeded under any circumstances.<sup>81</sup> Once the limit was reached, the

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<sup>76</sup> €7.70 per GB (excluding VAT), with an OJEU conversion rate of £0.84520 (of 2 May 2017) for every €1.

<sup>77</sup> €6.00 per GB (excluding VAT) from 1 January 2018, with an OJEU conversion rate of £0.84520 (of 2 May 2017) for every €1.

<sup>78</sup> From 1 July 2018 the maximum data surcharge remained £0.006 per MB (including VAT) following an updated OJEU conversion rate (of 30 April 2018) of £0.87960 for every €1.

<sup>79</sup> Second Response to question 5.

<sup>80</sup> See A3.19 of Annex 3 for the text of Article 6e(1)(a) of the Roaming Regulation.

<sup>81</sup> 6.13 of Lyca's Representations

service was no longer available and it considered that the contract for providing data roaming had been fulfilled.<sup>82</sup> Any remaining allowance would be made available again once the consumer returned to the UK,<sup>83</sup> and if the customer wished to continue using data whilst roaming then the customer had the option of purchasing another roaming inclusive pre-paid bundle or PAYG credit.<sup>84</sup>

- 3.93 Lyca argued that provision in the Regulations for surcharging is phrased in permissive terms and that it is permitted to stop providing services as an alternative. It considers that this is expressly contemplated<sup>85</sup> by BEREC Guideline 86 which states (emphasis added by Lyca):

*“For example a pre-paid customer has a remaining credit of 50 Euro (excl. VAT) when first starting to roam in a Member State of the EEA. The pre-paid tariff of the given customer includes a data unit price of 0.5 Euro cents (excl. VAT) per MB. In this example, the customer would be able to consume up to 10 GB of data domestically. Assuming a wholesale data cap of 7.7 Euro per GB, **the roaming provider may limit data roaming volumes for this customer** to 6.49 GB in accordance with Article 4 (3). In this case, the roaming customer may consume up to 6.49 GB of data at the domestic retail prices. It that is the case, it would be debited by the amount of 32.45 Euro for that consumption of data roaming services (6.49 GB multiplied by 5 Euro per GB is equal to 32.45 Euro). For any consumption of data roaming exceeding 6.49 GB, the roaming provider may apply roaming surcharges.”*

- 3.94 Lyca submitted that it has no means of surcharging its customers,<sup>86</sup> unless a customer has a PAYG credit balance,<sup>87</sup> and so Ofcom’s interpretation of the Regulations would force it to allow customers to consume data at the domestic retail price beyond the data roaming limit, where no such obligation exists.
- 3.95 In its 23 January 2019 letter, Lyca “*confirmed its intent*” to allow customers to continue roaming use beyond the data roaming limit and up to the domestic limit, applying a surcharge no greater than the maximum permitted by Article 6e, if a customer holds PAYG credit to pay the surcharge. If a customer does not have PAYG credit available, “*then they will not be able to roam beyond the fair use limit to the domestic allowance.*”
- 3.96 As noted in paragraph 3.74, on 27 February 2019 Lyca stated that it had removed all data roaming limits from its roaming inclusive pre-paid bundles on 12 February 2019.

## Our Response

- 3.97 Lyca is correct that provision in the Regulations for surcharging is phrased in permissive terms. Providers may apply surcharges once a fair use limit is reached but, in our view, the alternative to surcharging is to continue to allow consumption of roaming services at the

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<sup>82</sup> 6.5 of Lyca’s Representations

<sup>83</sup> 6.10 of Lyca’s Representations

<sup>84</sup> 6.6 of Lyca’s Representations

<sup>85</sup> 6.23 of Lyca’s Representations

<sup>86</sup> 6.13 of Lyca’s Representations

<sup>87</sup> Lyca’s letter of 23 January 2019

- domestic retail price until the full domestic allowance has been consumed, not terminating service.
- 3.98 Article 6b of the Roaming Regulation provides that any FUP shall enable customers to consume volumes of regulated roaming services at the ‘applicable domestic retail price’ that are consistent with their tariff plans. Article 6e (which sets the maximum surcharges) “*shall apply to regulated retail roaming services exceeding any limits under any fair use policy*”. The limit is placed on consumption at the domestic retail price, not on consumption itself.
- 3.99 Similarly, Articles 4(2) and 4(3) of the CIR set out how to calculate the volume of data roaming services that a customer must be able to consume ‘at the domestic retail price’. In the same way, Article 15(2a) of the Roaming Regulation<sup>88</sup> requires a roaming provider to send a notification when the applicable fair use volume of a regulated roaming service is fully consumed, indicating “*the surcharge that will be applied to any additional consumption of regulated data roaming services...*”.
- 3.100 BEREC Guideline 86, referred to by Lyca, refers to the volume the customer can consume ‘at the domestic retail prices’. Moreover, Guideline 85 makes clear that the example relates to pre-paid tariff plans and we have concluded at paragraph 3.81 that Lyca’s pre-paid bundles are not pre-paid tariff plans as defined in the CIR.
- 3.101 The Regulations do not stipulate that service may not be terminated but, given the significance of doing so, we would expect express provision to be made in the Regulations if this were permissible. By comparison Article 15(3) of the Roaming Regulation, which provides for a financial or volume cut-off limit to prevent bill shock, requires notification at 80% and, when the limit is reached, notification of the procedure to follow if the customer wishes to continue provision of the service.
- 3.102 Lyca submits that it has no means of surcharging its customers, and so a strict application of the Regulations forces it to allow customers to consume data at the domestic retail price beyond the data roaming limit. We acknowledge that it is difficult to apply Articles 6b and 6e to a pre-paid bundle if there is neither PAYG credit nor a post-pay billing mechanism available. We have therefore considered how we should take these circumstances into account when applying the Regulations.
- 3.103 Article 6d(5) of the Roaming Regulation requires National Regulatory Authorities (NRAs) to take “*utmost account of relevant objective factors specific to the Member State concerned and of relevant objective variations between roaming providers*” when monitoring and supervising the application of fair use policies and sustainability measures.<sup>89</sup> Having regard to Lyca’s representations, Ofcom acknowledges that there is a difference between the ability of UK post-paid providers of open data bundles to apply a surcharge for use beyond a data roaming limit and that of pre-paid providers of such bundles. For example, UK pre-paid providers often do not require customers to register billing or bank account details to

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<sup>88</sup> See A3.24 of Annex 3 for the text of Article 15(2a) of the Roaming Regulation.

<sup>89</sup> See A3.21 of Annex 3 for the text of Article 6d(5) of the Roaming Regulation.



access their service.<sup>90</sup> They also have little control over whether a customer would apply PAYG credit to their account to pay any roaming surcharges. By comparison, post-paid providers will either hold bank details or have an established mechanism to bill for any additional out-of-bundle use, and providers of pre-paid tariff plans<sup>91</sup> can remove surcharges from any remaining credit.<sup>92</sup>

3.104 Taking account of these variations, we consider that pre-paid providers, when offering open data bundles, may:

- apply a fair use data limit in line with Article 4(2) of the CIR;
- apply a capped surcharge for use in excess of this limit, on a per-kilobyte basis, in line with Article 6e(1) of the Roaming Regulation;
- where a mechanism to pay a surcharge has been put in place (e.g. via PAYG credit), prevent customers from exceeding this limit unless the customer pays the surcharge.

3.105 Where a pre-paid provider of open data bundles accordingly opts to prevent customers from exceeding a fair use data limit unless a surcharge is paid (and, where appropriate, PAYG credit is made available for this purpose), we consider that it should make this clear in the notifications sent to customers in line with Article 15(2) (the ‘Welcome Notification’)<sup>93</sup> and Article 15(2a) (the ‘Fair Use Notification’) of the Roaming Regulation.

3.106 Where a provider of pre-paid open data bundles has not made available a mechanism for surcharging on a per-kilobyte basis, we do not consider it permissible to prevent customers from accessing their full domestic allowance whilst roaming in the EEA. This is because the alternative to surcharging is to allow consumption of roaming services at the domestic retail price until the full domestic allowance has been consumed.

3.107 For the avoidance of doubt, the approach described in paragraph 3.104 may only be applied by a provider of a pre-paid open data bundle, for the reasons set out in paragraph 3.103.

3.108 As noted, the surcharge Lyca has applied to customers for data use beyond a data roaming limit has significantly exceeded the maximum surcharge permitted by the Regulations. Indeed, since 1 January 2019 the maximum surcharge for data has been £0.0047 per MB (including VAT),<sup>94</sup> meaning that Lyca’s standard PAYG rate for data (which, as at 20 February 2019 continued to be £0.12 per MB) was 25 times the maximum surcharge permitted.

## Confirmation decision

3.109 Having considered Lyca’s Representations, we maintain our view that by requiring customers to purchase a further bundle or pay its standard PAYG rate for data in order to continue roaming after reaching their bundle’s data roaming limit, but before consuming

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<sup>90</sup> We note that consumers in some countries are required to register certain details to obtain a service.

<sup>91</sup> As defined in Article 2(2)(d) of the CIR.

<sup>92</sup> The data roaming limit in Article 4(3) of the CIR being derived from the “*remaining credit available and already paid by the customer to the provider, at the moment of commencing roaming*”.

<sup>93</sup> See A3.23 of Annex 3 for the text of Article 15(2) of the Roaming Regulation.

<sup>94</sup> €4.50 per GB (excluding VAT) from 1 January 2019, with an OJEU conversion rate (of 30 April 2018) of £0.87960 for every €1.

the full domestic allowance, Lyca has imposed charges that exceed the maximum surcharges permitted by the Roaming Regulation. Lyca has therefore breached the Regulations.

## 4. Remedial steps and penalty

### Introduction

- 4.1 In this section we set out the steps we provisionally determined Lyca should take to remedy the consequences of the contraventions, their representations on these steps, and our decision. We also set out our decision not to impose a penalty.

### Actions required of Lyca

#### Provisional decision

- 4.2 Ofcom's provisional decision was that Lyca should, within one month from the issuing of any Confirmation Decision, and to the extent that it had not already done so, ensure that i) its non-roaming inclusive pre-paid bundles, ii) its data roaming limits, and iii) its surcharges for use between a data roaming limit and a customer's remaining domestic allowance were all compliant.
- 4.3 Ofcom also proposed that Lyca should, within three months from the issuing of any Confirmation Decision:
- a) Identify and refund all customers affected by the contraventions; and,
  - b) Facilitate any affected customer not already identified to come forward and claim a refund.

#### Lyca's representations

- 4.4 In its representations<sup>95</sup> Lyca submitted that if Ofcom were to issue a Confirmation Decision confirming its provisional findings *"then the most reasonable and proportionate approach to this matter would be that:*
- (a) Lyca would refund customers and make adjustments to its services...; and*
  - (b) No penalty would be imposed."*
- 4.5 It did, however, state that Ofcom's provisional view on the harm caused by requiring customers on non-roaming inclusive pre-paid bundles to pay PAYG rates or purchase an additional roaming inclusive pre-paid bundle in order to roam *"discounts the other service allowances and benefits that each customer received within their non-roaming bundle (such as a high volume of international calls) which would not have been included in a roaming bundle."*<sup>96</sup>
- 4.6 Further, in its letter of 23 January 2019, Lyca stated in relation to refunding those customers that *"Any compensation [refund] calculation would need to take into account an artificial and complicated counter-factual scenario where the customer purchases a roaming included bundle (and so should be refunded for any PAYG roaming costs) but then*

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<sup>95</sup> 8.9 of Lyca's Representations

<sup>96</sup> 8.12 of Lyca's Representations

*may have to pay more for their international call usage above a revised and lower allowance. The costs of those international calls which would need to be re-charged to the customer, and the cost of each call will depend on the call destination and the price which applied at that time for that particular call.”*

- 4.7 Further it stated that *“This would necessitate a highly complex calculation for each individual customer based on a hypothetical. However, the process of identifying affected customers and vetting claims could be very onerous and contentious.”*
- 4.8 In relation to additional charges caused by data roaming limits lower than those permitted, Lyca’s letter of 23 January 2019 advised that those customers had *“already been compensated”*. For surcharges levied that were higher than the maximum permitted, Lyca said that it reserved its position on whether refunds were appropriate pending clarification of Ofcom’s reasoning.
- 4.9 On 4 March 2019 Lyca advised that its *“current thinking”* was that it intended to refund customers who had paid PAYG charges in order to roam whilst on a non-roaming inclusive pre-paid bundle or to continue using data between a data roaming limit and their domestic data allowance. It also intended to refund customers who had bought an additional roaming inclusive pre-paid bundle for these purposes, but to apply criteria to determine if customers were eligible for such compensation. Lyca intended to issue refunds through the application of PAYG credit or replacement bundles.

### **Ofcom’s response**

- 4.10 Ofcom does not accept that refunding customers affected by the levying of a surcharge and/or a general charge would require a calculation that takes account of a ‘complicated counter-factual scenario’. Identifying those customers who paid PAYG rates in order to roam, and the amount paid, is unlikely to prove complicated.<sup>97</sup> Further, for customers who purchased an additional roaming inclusive pre-paid bundle, any refund calculation should be based on the bundles as purchased by the customer at the time. We do not consider that it would be acceptable to calculate refunds based on any revisions Lyca may choose or has chosen to implement when making the relevant non-roaming enabled bundles compliant with the Regulations.
- 4.11 Where a customer did purchase an additional roaming enabled bundle, we acknowledge that calculating costs associated specifically with roaming may not be straight forward if the customer also used that bundle domestically. However, we also note that some customers may have had little, if any, domestic use from the additional bundle purchased as they will have been able to use the remainder of their non-roaming inclusive pre-paid bundle upon returning to the UK. We would therefore expect Lyca to adopt a pragmatic approach to refunds in order to ensure that any harm caused is remedied, while avoiding complicated calculations or criteria that may obstruct a customer from obtaining a refund.

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<sup>97</sup> Lyca previously identified the amount spent on EEA PAYG roaming between June 2017 and January 2018 by customers with non-roaming inclusive pre-paid bundles (see 3.10 and 3.22). Further, it was able to identify and refund those customers who used PAYG credit to continue data roaming after they reached a data roaming limit lower than permitted by the Regulations (see 3.58).

For example, for some customers Lyca may choose to refund the full cost of the roaming enabled pre-paid bundle purchased or, similarly, and where considered beneficial by the customer, Lyca may choose to provide a new bundle free of charge as proposed (see 4.9). We would be concerned if Lyca applied criteria that prevented affected customers from receiving a refund.

- 4.12 In relation to those customers affected by data roaming limits lower than permitted, we acknowledge that Lyca has already made refunds to some customers, but also note that it continued to advertise offers with non-compliant limits at 18 June 2018 and 1 February 2019.
- 4.13 In respect of surcharges levied that were higher than the maximum permitted, Ofcom's decision and reasoning on this matter is set out in Section 3. Identifying and refunding those customers who paid standard PAYG rates for use between a fair use data limit and their remaining domestic allowance is unlikely to prove complicated. Further, we expect that Lyca could adopt an approach similar to that suggested in 4.11 to remedy any harm experienced by customers who purchased an additional roaming inclusive pre-paid bundle in order to continue data roaming.
- 4.14 Finally, we acknowledge that providing refunds through the application of PAYG credit or additional bundles may be appropriate for some affected customers, but others may prefer a different form of redress. For example, some customers may have since moved their custom away from Lyca, and a monetary refund may be more suitable than PAYG credit or a new bundle.

### **Ofcom decision**

- 4.15 Having considered the points set out in Lyca's Representations and letter of 23 January 2019 we confirm that, to the extent that it has not already taken them, the steps Lyca must take to comply with the Regulations and remedy the consequences of the contraventions are to:
- a) Ensure that:
- its non-roaming inclusive pre-paid bundles are compliant with the Roaming Regulation, for example, either by including EEA roaming in inclusive allowances on a RLAH basis, or by restricting customers who take up such bundles to domestic use only.
  - any data roaming limits for roaming inclusive pre-paid bundles are set at or above the minimum level permitted.
  - any surcharges do not exceed the maximum level permitted.
- b) Identify and refund all customers:
- with non-roaming inclusive pre-paid bundles who were charged PAYG rates for accessing roaming services.
  - who were on a roaming inclusive pre-paid bundle (including those with a domestic 'bonus' allowance) and paid PAYG rates after reaching a data roaming limit lower than the minimum permitted.

- who were on a roaming inclusive pre-paid bundle and were charged PAYG rates that exceeded the maximum surcharge permitted for using data in excess of a fair use data roaming limit.
- c) Make available and publicise a process for customers to seek refunds in relation to any additional roaming inclusive pre-paid bundle they purchased in order to:
- access roaming services whilst on a non-roaming inclusive pre-paid bundle.
  - continue data roaming after reaching a data roaming limit lower than the minimum permitted.
  - continue data roaming between a fair use data roaming limit and their remaining domestic data allowance.
- d) Make available and publicise a process for affected customers who cannot be identified by Lyca to come forward and claim a refund.
- 4.16 Lyca must implement the steps in paragraph 4.15(a) within one month from the issuing of this Confirmation Decision, and paragraphs 4.15(b), (c) and (d) within three months from the issuing of this Confirmation Decision.
- 4.17 Within three months and one week from the issuing of this Confirmation Decision, Lyca must provide Ofcom with confirmation that it has refunded all customers identified in accordance with paragraph 4.15(b) and provide figures for the total number of customers refunded and the total amount refunded.

## Consideration of whether to impose a penalty

- 4.18 In light of Lyca's representations, the fact that this is the first time Ofcom has taken formal enforcement action in relation to the Regulations, and noting that this case will help clarify the rules for all providers, we have decided not to apply a penalty in this instance.

# A1. Confirmation Decision given to Lycamobile UK Limited of contravention of Regulation (EU) 531/2012 and Commission Implementing Regulation (EU) 2016/2286 under Regulation 4A of the Mobile Roaming (European Communities) Regulations 2007

## Regulation 4A of the Mobile Roaming (European Communities) Regulations 2007

- A1.1 Regulation 4A of the Mobile Roaming (European Communities) Regulations 2007 (UK Regulations) provides for the Office of Communications (Ofcom) to issue a decision (a Confirmation Decision) confirming the imposition of requirements on a person where that person has been given a notification under Regulation 3 of the UK Regulations, Ofcom has allowed that person an opportunity to make representations about the matters notified, and the period allowed for the making of representations has expired. Ofcom may not give a Confirmation Decision to a person unless, after considering any representations, it is satisfied that the person has, in one or more of the respects notified, been in breach of an obligation specified in the notification under Regulation 3.
- A1.2 A Confirmation Decision:
- a) must be given to the person without delay;
  - b) must include the reasons for the decisions;
  - c) may require immediate action by the person to comply with requirements of a kind mentioned in regulation 3(2)(d) or (e) or may specify a period within which the person must comply with those requirements; and
  - d) may require the person to pay:
    - i. the penalty specified in the notification under regulation 3; or
    - ii. such lesser penalty as Ofcom consider appropriate in light of the person's representations or steps taken by the person to comply with the obligation or remedy the consequences of the breach, and
  - e) may specify the period within which the penalty is to be paid.

## Regulations

- A1.3 All communication providers who offer regulated roaming services must comply with the Roaming Regulation and Commission Implementing Regulation (EU) 2016/2286 (the CIR).

The Regulations set out important consumer protection measures intended to provide a consistent experience for customers roaming throughout the European Economic Area (EEA). This includes, from 15 June 2017, generally, requiring providers to charge customers the same price for calls, text messages and data services as they would pay in the UK and limiting the fair use policies and the level of any roaming surcharges they may apply.

## Article 6a of the Roaming Regulation

A1.4 Article 6a of the Roaming Regulation requires:

*“With effect from 15 June 2017, provided that the legislative act to be adopted following the proposal referred to in Article 19(2) is applicable on that date, roaming providers shall not levy any surcharge in addition to the domestic retail price on roaming customers in any Member State for any regulated roaming calls made or received, for any regulated roaming SMS messages sent and for any regulated data roaming services used, including MMS messages, nor any general charge to enable the terminal equipment or service to be used abroad, subject to Articles 6b and 6c.”*

## Article 6b of the Roaming Regulation and Article 4(2) of the CIR

A1.5 Article 6b of the Roaming Regulation requires that:

*“1. Roaming providers may apply in accordance with this Article and the implementing acts referred to in Article 6d a ‘fair use policy’ to the consumption of regulated retail roaming services provided at the applicable domestic retail price level, 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.*

*Any fair use policy shall enable the roaming provider’s customers to consume volumes of regulated retail roaming services at the applicable domestic retail price that are consistent with their respective tariff plans.*

*2. Article 6e shall apply to regulated retail roaming services exceeding any limits under any fair use policy.”*

A1.6 Article 4(2) of the CIR specifies how the minimum data roaming limit should be calculated for an open data bundle. It requires that:

*“Without prejudice to any applicable domestic volume limit, in the case of an open data bundle, the roaming customer shall be able to consume when periodically travelling in the Union a volume of data roaming retail services at the domestic retail price equivalent to at least twice the volume obtained by dividing the overall domestic retail price of that open data bundle, excluding VAT, corresponding to the entire billing period by the regulated maximum wholesale roaming charge referred to in Article 12 of Regulation (EU) No 531/2012.*

*In the event of bundled sale of mobile retail services with other services or terminals, the overall domestic retail price of a data bundle shall be determined, for the purposes of*



*Article 2(2)(c) and of this paragraph, by taking into account the price applied to the separate sale of the mobile retail services component of the bundle, excluding VAT, if available, or the price for the sale of such services with the same characteristics on a stand-alone basis.”*

## Article 6e of the Roaming Regulation

A1.7 Article 6e contains a number of requirements, including the following under paragraph (1):

*“Without prejudice to the second subparagraph, where a roaming provider applies a surcharge for the consumption of regulated retail roaming services in excess of any limits under any fair use policy, it shall meet the following requirements (excluding VAT):*

*(a) any surcharge applied for regulated roaming calls made, regulated roaming SMS messages sent and regulated data roaming services shall not exceed the maximum wholesale charges provided for in Articles 7(2), 9(1) and 12(1), respectively;”*

A1.8 Article 12(1) states *“With effect from 15 June 2017, the average wholesale charge that the visited network operator may levy on the roaming provider for the provision of regulated data roaming services by means of that visited network shall not exceed a safeguard limit of EUR 7,70 per gigabyte of data transmitted. That maximum wholesale charge shall decrease to EUR 6,00 per gigabyte on 1 January 2018, to EUR 4,50 per gigabyte on 1 January 2019, to EUR 3,50 per gigabyte on 1 January 2020, to EUR 3,00 per gigabyte on 1 January 2021 and to EUR 2,50 per gigabyte on 1 January 2022. It shall, without prejudice to Article 19, remain at EUR 2,50 per gigabyte of data transmitted until 30 June 2022.”*

## Subject of this Confirmation Decision

A1.9 This Confirmation Decision is addressed to Lycamobile UK Limited (Lyca), whose registered company number is 05903820. Lyca’s registered office is 3<sup>rd</sup> Floor Wallbrook Building, 195 Marshall Wall, London, E14 9SG.

## Notification given by Ofcom under Regulation 3 of the UK Regulations

A1.10 On 26 June 2018, Ofcom gave a notification under Regulation 3 of the UK Regulations (the Regulation 3 Notification) to Lycamobile as Ofcom had provisionally determined that there were reasonable grounds for believing that Lyca had contravened and continued to contravene Articles 6a, 6b and 6e of the Roaming Regulation and Article 4 of the CIR.

A1.11 The Regulation 3 Notification also specified the steps we considered should be taken by Lycamobile to comply.

A1.12 The Regulation 3 Notification allowed Lycamobile the opportunity to make representations to Ofcom about the matters set out.

## Confirmation Decision under Regulation 4A of UK Regulations

- A1.13 Lycamobile provided its written representations on 14 September 2018<sup>98</sup> (Written Representations) and oral representations on 28 September 2018 (Oral Representations). Together these representations are referred to as the Representations.
- A1.14 Ofcom has carefully considered Lycamobile's Representations and all the relevant evidence and, having done so, is satisfied that Lycamobile has contravened the Regulations. Specifically:
- a) From 15 June 2017 to January 2019 Lyca contravened Article 6a of the Roaming Regulation by levying a surcharge and/or a general charge in addition to the domestic retail price for regulated roaming services to enable the service to be used abroad.
    - i) Between 15 June 2017 and 27 August 2017, customers that purchased a pre-paid bundle had to use or purchase separate pay as you go (PAYG) credit in order to be able to roam within the EEA, rather than being able to use their bundle allowance on a RLAH basis; and
    - ii) Between 28 August 2017 and January 2019, customers that purchased a non-roaming inclusive pre-paid bundle were able to roam within the EEA either using PAYG credit or by additionally purchasing a roaming inclusive pre-paid bundle.
  - b) From 28 August 2017 to February 2019 Lyca contravened Article 6b of the Roaming Regulation and Article 4 of the CIR by applying data roaming limits under its fair use policy (FUP) that were lower than the minimum levels permitted.
  - c) From 28 August 2017 to February 2019, Lyca contravened Articles 6b and 6e of the Roaming Regulation by applying surcharges for regulated data roaming services that are higher than the maximum surcharge permitted. Specifically, Lyca's charging policy for customers that roamed after reaching their data roaming limit and before reaching their domestic data allowance, exceeded the limits set in Article 6e(1)(a).
- A1.15 Accordingly, Ofcom has decided to give Lycamobile a Confirmation Decision confirming the imposition of requirements on Lycamobile in respect of its contraventions of Articles 6a, 6b and 6e of the Roaming Regulation and Article 4 of the CIR. We have decided not to impose a penalty on Lycamobile in respect of these contraventions.
- A1.16 The reasons for Ofcom's decision are set out in the document to which this Confirmation Decision is annexed.

## Actions required by Lycamobile UK Limited

- A1.17 To the extent it has not already taken them, in order to comply with Articles 6a, 6b and 6e of the Roaming Regulation and Article 4 of the CIR, Lyca should:
- a) Within one month of this Confirmation Decision, ensure that:

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<sup>98</sup> Lyca provided clarifications to its written representations on 27 September and 3 October 2018.

- Its non-roaming inclusive pre-paid bundles are compliant with Article 6a of the Roaming Regulation, for example, either by including EEA roaming in inclusive allowances on a 'roam like at home' basis, or by restricting customers who take up such bundles to domestic use only.
  - any data roaming limits for roaming inclusive pre-paid bundles are set at or above the minimum level permitted under Article 4 of the CIR.
  - any surcharges do not exceed the maximum level permitted by Article 6e(1)(a).
- b) Within three months of this Confirmation Decision, identify and refund all customers:
- with non-roaming inclusive pre-paid bundles who were charged PAYG rates for accessing roaming services.
  - who were on a roaming inclusive pre-paid bundle (including those with a domestic 'bonus' allowance) and paid PAYG rates after reaching a data roaming limit lower than the minimum permitted.
  - who were on a roaming inclusive pre-paid bundle and were charged PAYG rates that exceeded the maximum surcharge permitted for using data in excess of a fair use data roaming limit.
- c) Within three months of this Confirmation Decision, make available and publicise a process for customers to seek refunds in relation to any additional roaming inclusive pre-paid bundle they purchased in order to:
- access roaming services whilst on a non-roaming inclusive pre-paid bundle.
  - continue data roaming after reaching a data roaming limit lower than the minimum permitted.
  - continue data roaming between a fair use data roaming limit and their remaining domestic data allowance.
- d) Within three months of this Confirmation Decision, make available and publicise a process for affected customers who cannot be identified by Lyca to come forward and claim a refund.
- A1.18 Within three months and one week of this Confirmation Decision, Lyca must provide Ofcom with confirmation that it has refunded all customers identified in accordance with paragraph A1.17(b) and provide figures for the total number of customers refunded and the total amount refunded.
- A1.19 The duty to comply with any requirement imposed by a Confirmation Decision is enforceable in civil proceedings by Ofcom for an injunction, for specific performance or any other appropriate remedy or relief.<sup>99</sup>

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<sup>99</sup> Regulation 4A(6) of the UK Regulations.

## Interpretation

A1.20 Words or expressions used in this Confirmation Decision have the same meaning as in the Roaming Regulation, the CIR or the UK Regulations except as otherwise stated in this Confirmation Decision.



**Gaucho Rasmussen**

**Competition and Consumer Enforcement Director,**

**as final decision maker for Ofcom**

**8 March 2019**

## A2. Glossary

“**CIR**” – Commission Implementing Regulation (EU) 2016/2286

“**EEA**” – the European Economic Area

“**FUP**” – fair use policy

“**Lyca**” – Lycamobile UK Limited, whose registered company number is 05903820.

“**Non-roaming inclusive pre-paid bundle**” – a bundle offered by Lycamobile that does not include EEA roaming in inclusive allowances.

“**PAYG**” – pay as you go

“**the Regulations**” – the Roaming Regulation and CIR

“**RLAH**” – roam like at home i.e. customers generally pay no more for using their service when roaming than they would do domestically (calls and texts to non-EEA destinations are not regulated).

“**Roaming inclusive pre-paid bundle**” – a bundle offered by Lycamobile that includes European Economic Area (EEA) roaming in inclusive allowances.

“**Roaming Regulation**” – Regulation (EU) 531/2012 as amended by Regulation (EU) 2015/2120 and Regulation (EU) 2017/920

“**UK Regulations**” - Mobile Roaming (European Communities) Regulations 2007 (S.I. 2007/1933 as amended by S.I. 2009/1591, S.I. 2012/1809, S.I. 2013/822 and S.I. 2014/2715).

## A3. The regulatory framework

### Policy objectives

- A3.1 All communication providers who offer regulated roaming services to customers are subject to a range of regulatory requirements including those set out in the Roaming Regulation<sup>100</sup> and the CIR<sup>101</sup> (the ‘Regulations’).
- A3.2 The Regulations set out important consumer protection measures intended to provide a consistent roaming experience for customers travelling across the European Economic Area (EEA) including:
- from 15 June 2017, generally, requiring providers to charge customers the same price for calls, text messages and data services as they would pay in the UK (known as ‘roam like at home’ – RLAH) and limiting the fair use policies and the level of any roaming surcharges they can apply.
  - requiring roaming providers to inform customers about their roaming terms and conditions including any fair use policies and roaming surcharges.
- A3.3 These protections help to ensure consumers:
- can use their mobile service for periodic travel in the EEA in the same way as they would at home.
  - understand the costs of roaming and can make better informed choices about their roaming provider and tariff as well as better monitor and control their expenditure.
  - are protected against excessive roaming charges and unexpectedly high bills and can therefore roam with greater confidence.

### Prohibition on levying surcharges or general charges for roaming

- A3.4 The Roaming Regulation prohibits providers from levying a surcharge in addition to the domestic retail price for regulated roaming services and/or a general charge to enable the mobile service to be used when roaming. Article 6a of the Roaming Regulation requires:
- “With effect from 15 June 2017, provided that the legislative act to be adopted following the proposal referred to in Article 19(2) is applicable on that date, roaming providers shall not levy any surcharge in addition to the domestic retail price on roaming customers in any Member State for any regulated roaming calls made or received, for any regulated roaming SMS messages sent and for any regulated data roaming services used, including MMS messages, nor any general charge to enable the terminal equipment or service to be used abroad, subject to Articles 6b and 6c.”*
- A3.5 Article 2(2) of the Roaming Regulation states that:

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<sup>100</sup> Regulation (EU) 531/2012, as amended by Regulations (EU) 2015/2120 and (EU) 2017/920.

<sup>101</sup> Commission Implementing Regulation (EU) 2016/2286 adopted in accordance with Article 6d of the Roaming Regulation.

*“‘roaming provider’ means an undertaking that provides a roaming customer with regulated retail roaming services;” (Article 2(2)(a))*

*“‘roaming customer’ means a customer of a roaming provider of regulated roaming services, by means of a terrestrial public mobile communications network situated in the Union, whose contract or arrangement with that roaming provider permits Union-wide roaming;” (Article 2(2)(g))*

*“‘domestic retail price’ means a roaming provider’s domestic retail per-unit charge applicable to calls made and SMS messages sent (both originating and terminating on different public communications networks within the same Member State), and to data consumed by a customer; in the event that there is no specific domestic retail per-unit charge, the domestic retail price shall be deemed to be the same charging mechanism as that applied to the customer for calls made and SMS messages sent (both originating and terminating on different public communications networks within the same Member State), and data consumed in that customer’s Member State”. (Article 2(2)(r))*

A3.6 Article 3(1) of the CIR further sets out the basic principle of RLAH, stating:

*“A roaming provider shall provide regulated retail roaming services at domestic price to its roaming customers who are normally resident in or have stable links entailing a frequent and substantial presence in the Member State of that roaming provider while they are periodically travelling in the Union.”*

A3.7 The BEREC Guidelines,<sup>102</sup> which are designed to explain the Regulations and which national regulatory authorities must take into utmost account, state:

*“With the abolition of retail roaming surcharges in the Union, the same tariff conditions apply for the use of mobile services while roaming abroad in the Union and at home (i.e. in the country of the mobile subscription of the customer), subject to the conditions set out in a FUP [fair use policy]. Accordingly, wherever regulated roaming services are offered, the implementation of “Roam Like At Home” (RLAH) allows the customer to use services while travelling in other EEA Member States in the same way as in their home country, i.e. that RLAH tariff effectively includes roaming services in the domestic bundle.” (Guideline 8)*

*“According to Article 6 a Roaming Regulation, roaming providers are not allowed to levy any general charge to enable roaming services to be used abroad. BEREC understands this provision to mean that roaming providers cannot add a direct or indirect/quasi surcharge for enabling roaming in the EEA. An example of an indirect/quasi surcharge for enabling roaming would be if two otherwise identical tariff plans of a roaming provider differ only in the fixed periodic fee and the ability to roam with the roaming-enabled plan being more expensive than the non-roaming-enabled plan...” (Guideline 9)*

*“BEREC considers that the Roaming Regulation does not oblige operators to offer roaming services in their tariff plans. However, according to Article 6a Roaming Regulation, roaming providers may not levy any general charge to enable the terminal equipment or service to*

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<sup>102</sup> [https://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/regulatory\\_best\\_practices/guidelines/7005-berec-guidelines-on-regulation-eu-no-5312012-as-amended-by-regulation-eu-20152120-and-commission-implementing-regulation-eu-20162286-retail-roaming-guidelines](https://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/guidelines/7005-berec-guidelines-on-regulation-eu-no-5312012-as-amended-by-regulation-eu-20152120-and-commission-implementing-regulation-eu-20162286-retail-roaming-guidelines)

*be used abroad, that is, providers shall not offer roaming options (against a general charge) separately in addition to subscriptions without roaming (see Guideline 9). If the operator decides to offer roaming in a tariff plan, they have the full requirements according to chapters B, C and D.” (Guideline 188)*

- A3.8 The Roaming Regulation does not oblige all mobile service providers to offer regulated roaming services. However, if they do, they must comply with the Regulations and provide RLAH by default. They can also choose to offer alternative tariffs to customers but these should only be provided to customers that have deliberately chosen such a tariff. The provider must make clear to these customers what RLAH advantages they would lose by switching to an alternative tariff. Article 6e(3) of the Roaming Regulation requires that:

*“Roaming providers may offer, and roaming customers may deliberately choose, a roaming tariff other than one set in accordance with Articles 6a, 6b, 6c and paragraph 1 of this Article, by virtue of which roaming customers benefit from a different tariff for regulated roaming services than they would have been accorded in the absence of such a choice. The roaming provider shall remind those roaming customers of the nature of the roaming advantages which would thereby be lost.*

*Without prejudice to the first subparagraph, roaming providers shall apply a tariff set in accordance with Articles 6a and 6b, and paragraph 1 of this Article to all existing and new roaming customers automatically.*

*Any roaming customer may, at any time, request to switch to or from a tariff set in accordance with Articles 6a, 6b, 6c and paragraph 1 of this Article. When roaming customers deliberately choose to switch from or back to a tariff set in accordance with Articles 6a, 6b, 6c and paragraph 1 of this Article, any switch shall be made within one working day of receipt of the request, shall be free of charge and shall not entail conditions or restrictions pertaining to elements of the subscriptions other than roaming. Roaming providers may delay a switch until the previous roaming tariff has been effective for a minimum specified period not exceeding two months.”*

- A3.9 The BEREC Guidelines state:

*“BEREC considers that Article 6 e (3) Roaming Regulation gives any roaming provider the option to offer, and any customer the option to deliberately choose, a roaming tariff other than RLAH. If roaming customers explicitly decide to opt for an alternative tariff, they have to be informed (e.g. via SMS, via the monthly bill, etc.) about the nature of the roaming advantages which would thereby be lost. Alternative tariffs could be bundles of roaming services for a per-unit price, fixed periodic roaming tariffs, roaming allowances covering countries other than EEA countries, etc. (Guideline 90)*

*According to Article 6 e (3) subparagraph 3 Roaming Regulation, an alternative tariff cannot entail conditions or restrictions pertaining to elements of the subscription other than roaming. In other words, the alternative tariff may only affect the conditions of the roaming service offer within and outside the Union, and shall not affect other elements of the subscription (e.g. the price of the domestic subscription, other offers within the subscription such as for example handset subsidies, domestic service allowances, etc.). If the “alternative tariff” changed the conditions of the domestic tariff, the corresponding*



*conditions of the RLAH-tariff would also change and this would not be compliant with Article 6e (3) subparagraph 3 and Article 6a Roaming Regulation. A declaration of the domestic tariff as an "alternative tariff" does not change the principle of RLAH."* (Guideline 91)

*"Switching between tariffs with or without roaming services should follow the same procedures as switching between other ordinary tariffs in the Member State. Only the customer should initiate the switching and should also give active consent prior to any switching taking place. Mechanisms for simple and quick switching between tariffs with or without roaming should not be used to circumvent the Regulation."* (Guideline 189)

- A3.10 Article 6c(1) of the Roaming Regulation also allows for a roaming provider to apply to a national regulatory authority for authorisation to apply a surcharge in specific and exceptional circumstances if it is not able to recover its *"overall actual or projected costs of providing regulated roaming services in accordance with Articles 6a and 6b"*.

### **Data roaming limit**

- A3.11 To protect against excessive or abusive use of roaming services, providers are allowed to put in place a fair use policy (FUP). As part of a FUP, they can apply a data roaming limit provided this meets a minimum level set under the Regulations. The data roaming limit is intended to allow customers to be able to use data when roaming in a similar way to how they do at home. Article 6b of the Roaming Regulation provides that:

*"1. Roaming providers may apply in accordance with this Article and the implementing acts referred to in Article 6d a 'fair use policy' to the consumption of regulated retail roaming services provided at the applicable domestic retail price level, 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.*

*Any fair use policy shall enable the roaming provider's customers to consume volumes of regulated retail roaming services at the applicable domestic retail price that are consistent with their respective tariff plans.*

*2. Article 6e shall apply to regulated retail roaming services exceeding any limits under any fair use policy."*

- A3.12 Article 4(2) of the CIR specifies how the minimum data roaming limit for an open data bundle should be calculated. It requires that:

*"Without prejudice to any applicable domestic volume limit, in the case of an open data bundle, the roaming customer shall be able to consume when periodically travelling in the Union a volume of data roaming retail services at the domestic retail price equivalent to at least twice the volume obtained by dividing the overall domestic retail price of that open data bundle, excluding VAT, corresponding to the entire billing period by the regulated maximum wholesale roaming charge referred to in Article 12 of Regulation (EU) No 531/2012.*

*In the event of bundled sale of mobile retail services with other services or terminals, the overall domestic retail price of a data bundle shall be determined, for the purposes of Article 2(2)(c) and of this paragraph, by taking into account the price applied to the separate sale of the mobile retail services component of the bundle, excluding VAT, if available, or the price for the sale of such services with the same characteristics on a stand-alone basis.”*

A3.13 Article 2(2)(c) of the CIR states:

*“‘open data bundle’ means a tariff plan for the provision of one or more mobile retail services which does not limit the volume of mobile data retail services included against the payment of a fixed periodic fee, or for which the domestic unit price of mobile data retail services, derived by dividing the overall domestic retail price, excluding VAT, for mobile services corresponding to the entire billing period by the total volume of mobile data retail services available domestically, is lower than the regulated maximum wholesale roaming charge referred to in Article 12 of Regulation (EU) No 531/2012;”*

A3.14 Guideline 52 of the BEREC Guidelines states that:

*“When an operator provides additional add-ons e.g. in terms of volume to the customer (e.g. specific promotion), the customer shall be able to consume this allowance under the same conditions as at home.”*

A3.15 Article 4(3) of the CIR specifies how the minimum data roaming limit for pre-paid tariff plans should be calculated. It requires that:

*“In the case of pre-paid tariff plans, as an alternative to the fair use policy requirement in paragraph 1, the roaming provider may limit the consumption of data roaming retail services within the Union at the domestic retail price to volumes equivalent to at least the volume obtained by dividing the overall amount, excluding VAT, of the remaining credit available and already paid by the customer to the provider, at the moment of commencing roaming, by the regulated maximum wholesale roaming charge referred to in Article 12 of Regulation (EU) No 531/2012.”*

A3.16 Article 2(2)(d) of the CIR states:

*“‘pre-paid tariff plan’ means a tariff plan under which mobile retail services are provided upon deduction of credit made available by the customer to the provider on a per-unit basis, in advance of consumption, and from which a customer may withdraw without penalty upon exhaustion or expiry of credit;”*

A3.17 Guideline 59 of the BEREC Guidelines states that:

*“According to Article 2 (2) (d) CIR a pre-paid tariff plan means a tariff plan under which mobile retail services are provided upon deduction of credit made available by the customer to the provider on a per-unit basis, in advance of consumption, and from which a customer may withdraw without penalty upon exhaustion or expiry of credit. Therefore, only tariffs offered to pre-paid customers that are charged per unit are pre-paid tariffs. Post-paid per-unit tariffs do not fall under this definition.”*

A3.18 Guideline 60 of the BEREC Guidelines continues:

*“Other types of tariffs offered to pre-paid customers, such as tariffs that include a bundle of retail mobile services, should not be considered as pre-paid tariffs for the purposes of the CIR. For example, in the case of such tariffs, the operator may determine if they can be considered open data bundles.”*

## Data surcharges for use in excess of data roaming limits

A3.19 Providers can apply a surcharge to use of regulated data roaming services exceeding any data roaming limit. The Regulations limit the level of the surcharge that can be applied. Article 6b(2) of the Roaming Regulation (see paragraph A3.11 above) makes clear that Article 6e applies. Article 6e(1)(a) of the Roaming Regulation requires that:

*“Without prejudice to the second subparagraph, where a roaming provider applies a surcharge for the consumption of regulated retail roaming services in excess of any limits under any fair use policy, it shall meet the following requirements (excluding VAT):*

*(a) any surcharge applied for regulated roaming calls made, regulated roaming SMS messages sent and regulated data roaming services shall not exceed the maximum wholesale charges provided for in Articles 7(2), 9(1) and 12(1), respectively;”<sup>103</sup>*

A3.20 Paragraph 3 of Article 6e(1) of the Roaming Regulation sets out how surcharges for regulated data roaming services should be charged. It states:

*“Roaming providers shall charge their customers for the provision of regulated data roaming services on a per-kilobyte basis, except for MMS messages, which may be charged on a per-unit basis.”*

A3.21 Article 6d(5) of the Roaming Regulation states that:

*“The national regulatory authority shall strictly monitor and supervise the application of the fair use policy and the measures on the sustainability of the abolition of retail roaming surcharges, taking utmost account of relevant objective factors specific to the Member State concerned and of relevant objective variations between roaming providers. Without prejudice to the procedure set out in Article 6c(3), the national regulatory authority shall in a timely manner enforce the requirements of Articles 6b and 6c and the implementing acts adopted pursuant to paragraph 1 of this Article. The national regulatory authority may at any time require the roaming provider to amend or discontinue the surcharge if it does not comply with Article 6b or 6c. The national regulatory authority shall inform the Commission annually concerning the application of Articles 6b and 6c, and of this Article.”*

A3.22 Guideline 55 bullet point 2 of the BEREC Guidelines states:

*“Open data bundles for which the minimum roaming data allowance is lower than the domestic data allowance: In this scenario the roaming customer shall be able to consume*

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<sup>103</sup> Articles 7(2), 9(1) and 12(1) set out the maximum average wholesale charge for regulated roaming calls made, regulated roaming SMS messages sent and regulated data roaming services respectively. The relevant exchange rates for converting these charges to GBP are determined by Article 1(6) of the Roaming Regulation. For regulated data roaming services, between 1 July 2017 and 31 December 2017 the maximum wholesale charge was £6.50 per GB (exc. VAT). Between 1 January 2018 and 31 June 2018 it was £5.07 per GB (exc. VAT). Between 1 July 2018 and 31 December 2018 it was £5.27 per GB (exc. VAT). Since 1 January 2019 it has been £3.95 per GB (excluding VAT).

*roaming volumes at the domestic retail price to at least the roaming data allowance (calculated in accordance with Article 4 (2) CIR) which in these cases will be lower than the domestic data allowance of the open bundle. After the roaming data allowance is exceeded, operators may apply a surcharge in addition to the domestic price until the domestic limit has been reached. After the domestic data allowance and the roaming data allowance are exceeded, operators may apply a surcharge in addition to the domestic out-of-bundle price. The sum of the domestic price plus the surcharge shall not be higher than the regulated retail roaming caps according to Article 6 e (1) (see Guideline 72)."*

- A3.23 Article 15(2) of the Roaming Regulation sets out notification requirements for when a roaming customer first begins using regulated data roaming services (the 'Welcome Notification'). It states:

*"An automatic message from the roaming provider shall inform the roaming customer that the latter is using regulated data roaming services, and provide basic personalised tariff information on the charges (in the currency of the home bill provided by the customer's domestic provider) applicable to the provision of regulated data roaming services to that roaming customer in the Member State concerned, except where the customer has notified the roaming provider that he does not require that information.*

*That basic personalised tariff information shall include information on:*

*(a) any fair use policy that the roaming customer is subject to within the Union and the surcharges which apply in excess of any limits under that fair use policy; and*

*(b) any surcharge applied in accordance with Article 6c.*

*The information shall be delivered to the roaming customer's mobile device, for example by an SMS message, an e-mail or a pop-up window on the mobile device, every time the roaming customer enters a Member State other than that of his domestic provider and initiates for the first time a data roaming service in that particular Member State. It shall be provided free of charge at the moment the roaming customer initiates a regulated data roaming service, by an appropriate means adapted to facilitate its receipt and easy comprehension.*

*A customer who has notified his roaming provider that he does not require the automatic tariff information shall have the right at any time and free of charge to require the roaming provider to provide this service again."*

- A3.24 Article 15(2a) of the Roaming Regulation sets out notification requirements for when a roaming customer fully consumes any fair use volume (the 'Fair Use Notification'). It states:

*"The roaming provider shall send a notification when the applicable fair use volume of regulated data roaming service is fully consumed or any usage threshold applied in accordance with Article 6c is reached. That notification shall indicate the surcharge that will be applied to any additional consumption of regulated data roaming services by the roaming customer. Each customer shall have the right to require the roaming provider to stop sending such notifications and shall have the right, at any time and free of charge, to require the roaming provider to provide the service again."*

## A4. Ofcom's Investigation

### Engagement with Lyca before the investigation

- A4.1 On 3 May 2017, prior to the amendments to the Roaming Regulation coming into force, we had a telephone conference with representatives of Lyca, including Lycamobile Group's CEO Chris Tooley, to discuss the upcoming changes. At the meeting we made clear the need to provide a RLAH tariff by default come 15 June 2017. In response to concerns Lyca raised about the cost implications and financial viability of offering RLAH, we noted there was provision in the Roaming Regulation to apply for a sustainability exemption should Lyca consider it necessary.<sup>104</sup> Lyca chose not to make an exemption application.<sup>105</sup>
- A4.2 On 4 May 2017 Lyca sent an email setting out its intended approach come 15 June 2017 (which was different to the approach it subsequently adopted). We responded on 11 May 2017 setting out our concerns and again referred it to the Regulations, including Articles 6a and 6e(3) of the Roaming Regulation which require RLAH to be applied automatically to all existing and new roaming customers. We also referred to relevant paragraphs of the BEREC Guidelines.<sup>106</sup>
- A4.3 Later, on 22 May 2017, we wrote to Lyca (and other providers) highlighting the upcoming changes to the Regulations and the importance of complying.

### Opening the investigation and scope

- A4.4 On 14 June 2017, Lyca notified Ofcom of its roaming FUP as required by Article 5(2) of the CIR. Upon review of this policy we identified several concerns, including whether Lyca was applying a surcharge and/or a general charge to allow roaming. On 4 August 2017, we opened an Initial Assessment into Lyca's compliance with the Regulations.
- A4.5 During our Initial Assessment we had extensive correspondence with Lyca,<sup>107</sup> setting out our concerns and giving an opportunity for it to detail why it considered itself to be compliant, or how it intended to address those concerns. Whilst some concerns were addressed, others were not. Further concerns about data roaming limits and surcharges were also identified during the assessment.
- A4.6 After considering the information received during the assessment, and in light of our Enforcement Guidelines,<sup>108</sup> on 20 October 2017, we opened an investigation into Lyca's compliance with the Regulations. We stated<sup>109</sup> our investigation would examine whether

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<sup>104</sup> As provided for by Article 6c (see Paragraph A3.10).

<sup>105</sup> Russ Ede, Global Head of Commercial Operations for Lyca, confirmed this in an email to Brian Potterill, Competition Policy Director at Ofcom, on 12 May 2017.

<sup>106</sup> Paragraphs 9, 87 and 188.

<sup>107</sup> We wrote to Lyca on 4 occasions and also had a phone conversation to help clarify our concerns.

<sup>108</sup> Ofcom, *Enforcement Guidelines*, 28 June 2017, available [here](#).

<sup>109</sup> [https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/open-cases/cw\\_01207](https://www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/open-cases/cw_01207)

there were reasonable grounds to believe that Lyca had failed/was failing to comply with the Regulations by:

- levying a surcharge in addition to the domestic retail price for regulated roaming services and/or a general charge to enable the services to be used abroad;
- levying surcharges for regulated roaming services used that are higher than the maximum surcharge allowed;
- in requiring SIM cards to be first used in the home country, applying as part of a fair use policy a control mechanism to prevent anomalous use of regulated roaming services based on an objective indicator not provided for by the Regulations; and/or
- applying as part of a fair use policy data roaming limits that are lower than the minimum levels permitted.

A4.7 On 30 April 2018, we informed Lyca that we had decided not to continue our investigation into whether requiring SIM cards to be first used in the home country is a breach of the Regulations.<sup>110</sup> We explained that we had made no findings on this issue and reserved our position. This document does not, therefore, consider this matter.

## Information gathering

A4.8 We issued three formal notices to Lyca under Regulation 2B of the UK Regulations requiring it to provide information to us for the purposes of our investigation.

### First information notice

A4.9 The information notice we issued to Lyca on 6 November 2017 (First Notice) required it to provide information about Lyca's non-roaming inclusive and roaming inclusive pre-paid bundles offered to customers from 15 June 2017 including:

- the applicable terms and conditions for customers with non-roaming inclusive and roaming inclusive pre-paid bundles for roaming in the EEA;
- the number of customers on non-roaming inclusive and roaming inclusive pre-paid bundles;
- the number of customers that roamed in the EEA on a pay as you go (PAYG) basis whilst on a non-roaming inclusive pre-paid bundle and the associated costs;
- details of the data roaming limits for pre-paid bundles and how they were calculated;
- the number of customers exceeding a data roaming limit and the costs of any surcharges they paid to continue using data when roaming in the EEA; and

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<sup>110</sup> In the letter, we also informed Lyca that we had decided not to continue our investigation into whether Lyca was levying surcharges for regulated roaming SMS services used that are higher than the maximum surcharge permitted by the Regulations. However, on the basis of information Lyca had provided, we noted that we were continuing to investigate Lyca's surcharges for regulated roaming data services.

- details of any actions taken or planned by Lyca, including customer refunds, relating to the issues being considered in the investigation.

A4.10 We received Lyca's response to the First Information Notice on 27 November, 4 December and 7 December 2017 (First Response).<sup>111</sup>

## Second information notice

A4.11 We issued a second information notice to Lyca on 22 March 2018 (Second Notice). This requested further information on:

- the number of customers that roamed in the EEA on a PAYG basis whilst on a non-roaming inclusive pre-paid bundle and the associated costs;
- what happened to customers that reached Lyca's data roaming limits including any associated costs to continue to roam within the EEA; and
- the calculation and payment of refunds by Lyca to customers exceeding the data roaming limits.

A4.12 Lyca responded to the Second Notice on 13 April 2018 (Second Response).<sup>112</sup> On 19 April 2018, Lyca submitted a note setting out its views on the differences between its PAYG and pre-paid bundle products (April Note).

## Third information notice

A4.13 We issued a third information notice to Lyca on 30 April 2018 requesting Lyca's relevant turnover for 1 April 2017 to 31 March 2018 (Third Notice).

A4.14 Lyca responded to the Third Notice on 4 May 2018 (Third Response).<sup>113</sup>

## Notification under Regulation 3 of the Mobile Roaming (European Communities) Regulations 2007

A4.15 On the basis of the information gathered above, we provisionally determined that we had reasonable grounds for believing that Lyca had contravened and was continuing to contravene Articles 6a, 6b and 6e of the Roaming Regulation and Article 4 of the CIR. We set this out in the Regulation 3 Notification that we issued to Lyca on 26 June 2018.

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<sup>111</sup> Following a review of the First Response, on 29 November 2017, 7 March, 28 September and 8 October 2018 we requested clarification from Lyca on aspects of its response. Lyca responded on 7 December 2017, 16 March 2018, 3 October, 5 October and 10 October 2018. The First Response consists of both Lyca's original responses and its follow up responses.

<sup>112</sup> Following a review of the Second Response, on 13 and 20 April, 28 September and 8 October 2018 we requested clarification from Lyca on aspects of its response. Lyca responded on 19 April, 24 April, 3 October, 5 October and 10 October 2018. The Second Response consists of both Lyca's original response and its follow up responses.

<sup>113</sup> Following a review of the Third Response, on 9 May, 24 May, 8 June and 15 June 2018 we requested clarification from Lyca on the turnover data provided and how it had calculated relevant turnover. Lyca responded on 16 May, 7 June, 8 June and 15 June 2018. The Third Response consists of both Lyca's original response and its follow up responses.

A4.16 The Regulation 3 Notification set out the steps that we provisionally concluded Lyca should take to comply with the requirements of the Regulations and remedy the consequences of the contraventions. Lyca was given the opportunity to make written and/or oral representations on the notified matters.

### Lyca's Representations

A4.17 Lyca provided its Written Representations on the notified matters on 14 September 2018,<sup>114</sup> and made Oral Representations (together 'Lyca's Representations') on 28 September 2018. The final transcript of the Oral Representations was provided to Lyca on 4 October 2018.

A4.18 On 13 December 2018 Ofcom held a state of play meeting with Lyca to set out its position regarding the three potential breaches, in light of Lyca's representations, and to give Lyca an opportunity to set out in writing the actions it had taken or intended to take to come into compliance. Lyca responded on 23 January 2019, with follow up emails on 27 February 2019 and 4 March 2019.

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<sup>114</sup> Following a review of the Written Representations, on 21 September and 28 September 2018 we requested clarification from Lyca on aspects of its representations. Lyca responded on 27 September and 3 October 2018. The Written Representations consist of both Lyca's original representations and its follow up responses.



## A5. Minimum data roaming limits applied by Lyca across its roaming inclusive pre-paid bundles<sup>115</sup>

Roaming inclusive pre-paid bundle	Price	Domestic data allowance	Open bundle? <sup>116</sup>	Minimum data roaming limit (GB) <sup>117</sup>	Limit at 29 Aug 17	Limit at 5 Sept 17	Limit at 12 Sept 17	Limit at 13 Sept 17	Limit at 17 Nov 17	Limit at 27 Nov 17
UK PlanS	£7.40	500MB	N	n/a	500MB	500MB	500MB	500MB	500MB	500MB
UK PLAN S	£7.50	500MB	N	n/a	500MB	500MB	500MB	500MB	500MB	500MB
UK PlanM	£9.90	2GB	Y	2.535326	1.5GB	1.5GB	2GB	2GB	2GB	2GB
UK PLAN M	£10.00	2GB	Y	2.560935	1.5GB	1.5GB	2GB	2GB	2GB	2GB
UK PlanL	£11.80	2GB + 1GB	Y	3.021903	2GB	2GB	2GB	2GB	2GB	2GB
UK Plan L	£12.00	2GB + 1GB	Y	3.073122	2GB	2GB	2GB	2GB	2GB	2GB
UK Plan L	£12.00	2GB + 1GB	Y	3.073122	2GB	2GB	2GB	2GB	2GB	2GB
UK PlanL	£12.00	2GB + 1GB	Y	3.073122	2GB	2GB	2GB	2GB	2GB	2GB
Uk Plan Super	£14.80	6GB	Y	3.790184	2GB	2GB	3.5GB	3.5GB	4GB	4GB
UK Plan Super	£15.00	6GB	Y	3.841402	2GB	2GB	3.5GB	3.5GB	4GB	4GB
Uk Plan super SA	£15.00	6GB	Y	3.841402	2GB	2GB	3.5GB	3.5GB	4GB	4GB
UK Plan Super Online	£15.00	6GB	Y	3.841402	2GB	2GB	3.5GB	3.5GB	4GB	4GB
UK Plan Super POSA	£15.00	6GB	Y	3.841402	2GB	2GB	3.5GB	3.5GB	4GB	4GB
UK Plan Mega	£19.80	11GB	Y	5.070651	3GB	3GB	4.75GB	4.75GB	5.5GB	5.5GB

<sup>115</sup> Dark grey shading indicates a data roaming limit that is lower than permitted by Article 4(2) of the CIR, and light grey shading indicates a data roaming limit that is equal to or greater than the minimum permitted.

<sup>116</sup> The calculation for establishing if a bundle is an 'open data bundle' is contained in Article 2(2)(c) of the CIR.

<sup>117</sup> This is the minimum data roaming limit that should have been applied in line with Article 4(2) of the CIR.

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Roaming inclusive pre-paid bundle	Price	Domestic data allowance	Open bundle? <sup>116</sup>	Minimum data roaming limit (GB) <sup>117</sup>	Limit at 29 Aug 17	Limit at 5 Sept 17	Limit at 12 Sept 17	Limit at 13 Sept 17	Limit at 17 Nov 17	Limit at 27 Nov 17
UK Plan Megaonline	£20.00	11GB	Y	5.121870	3GB	3GB	4.75GB	4.75GB	5.5GB	5.5GB
UK plan Mega	£20.00	11GB	Y	5.121870	3GB	3GB	4.75GB	4.75GB	5.5GB	5.5GB
UK Plan Mega POSA	£20.00	11GB	Y	5.121870	3GB	3GB	4.75GB	4.75GB	5.5GB	5.5GB
UK PlanUltra	£24.80	15GB	Y	6.351119	3.25GB	3.25GB	5.75GB	5.75GB	6.5GB	6.5GB
UK Plan Ultra	£25.00	15GB	Y	6.402337	3.25GB	3.25GB	5.75GB	5.75GB	6.5GB	6.5GB
UK Plan Ultra SA	£25.00	15GB	Y	6.402337	3.25GB	3.25GB	5.75GB	5.75GB	6.5GB	6.5GB
Uk PlanUltra online	£25.00	15GB	Y	6.402337	3.25GB	3.25GB	5.75GB	5.75GB	6.5GB	6.5GB
UK Plan Ultra POSA	£25.00	15GB	Y	6.402337	3.25GB	3.25GB	5.75GB	5.75GB	6.5GB	6.5GB
Data Lovers	£24.80	15GB	Y	6.351119	n/a	3.25GB	5.75GB	5.75GB	6.5GB	6.5GB
Data Lovers	£25.00	15GB	Y	6.402337	n/a	3.25GB	5.75GB	5.75GB	6.5GB	6.5GB
CHATTERBOX	£19.80	11GB	Y	5.070651	n/a	3GB	4.75GB	4.75GB	5.5GB	5.5GB
CHATTERBOX	£20.00	11GB	Y	5.121870	n/a	3GB	4.75GB	4.75GB	5.5GB	5.5GB
CHATTERBOX	£20.00	11GB	Y	5.121870	n/a	3GB	4.75GB	4.75GB	5.5GB	5.5GB
CHATTERBOX	£19.80	11GB	Y	5.070651	n/a	3GB	4.75GB	4.75GB	5.5GB	5.5GB
DATA SAVER	£15.00	6GB	Y	3.841402	n/a	2GB	3.5GB	3.5GB	4GB	4GB
DATA SAVER	£15.00	6GB	Y	3.841402	n/a	2GB	3.5GB	3.5GB	4GB	4GB
DATA SAVER	£15.00	6GB	Y	3.841402	n/a	2GB	3.5GB	3.5GB	4GB	4GB
DATA SAVER	£15.00	6GB	Y	3.841402	n/a	2GB	3.5GB	3.5GB	4GB	4GB
VALUE SAVER	£12.00	2GB + 1GB	Y	3.073122	n/a	2GB	2GB	2GB	2GB	2GB
VALUE SAVER	£11.80	2GB + 1GB	Y	3.021903	n/a	2GB	2GB	2GB	2GB	2GB
STUDENT PASS	£10.00	2GB	Y	2.560935	n/a	2GB	2GB	2GB	2GB	2GB
SIM Only Plan S	£9.00	1GB	N	n/a	n/a	n/a	n/a	1GB	1GB	1GB
SIM Only Plan M	£13.00	4GB	Y	3.329215	n/a	n/a	n/a	4GB	4GB	4GB
SIM Only Plan L	£18.00	10GB	Y	4.609683	n/a	n/a	n/a	5GB	5GB	5GB

## A6. Evidence schedule

### Correspondence between Ofcom and Lyca

No.	Source
1	Lyca email to Ofcom dated 4 May 2017: setting out intended approach come 15 June 2017
2	Ofcom email to Lyca dated 11 May 2017: setting out concerns and referring to Regulations
3	Lyca email to Ofcom dated 12 May 2017: advising Lyca would not be applying for sustainability exemption
4	Ofcom email to Lyca dated 22 May 2017: highlighting upcoming changes to the Regulations
5	Lyca email to Ofcom dated 14 June 2017: notification of Lyca's FUP
6	Ofcom letter to Lyca dated 4 August 2017: opening of Initial Assessment
7	Lyca letter to Ofcom dated 18 August 2017: setting out that neither PAYG or pre-paid bundles are alternative tariffs
8	Lyca email to Ofcom dated 8 September 2017: calculation of data roaming limits
9	Ofcom email to Lyca dated 11 September 2017: encouraging Lyca to review its data roaming limit calculations
10	Lyca email to Ofcom dated 12 September 2017: advising it would be recalculating its data roaming limits
11	Ofcom letter to Lyca dated 19 October 2017: opening of investigation
12	First Notice dated 6 November 2017
13	<p>First Response including:</p> <ul style="list-style-type: none"> <li>• Lyca's response to First Notice dated 27 November 2017</li> <li>• Lyca's response to First Notice dated 4 December 2017</li> <li>• Lyca's response to First Notice and clarification questions dated 7 December 2017</li> <li>• Lyca's email providing clarification dated 16 March 2017</li> <li>• Lyca's email providing clarification dated 3 October 2018</li> <li>• Lyca's email providing clarification dated 5 October 2018</li> <li>• Lyca's email providing clarification dated 10 October 2018</li> </ul>
14	Second Notice dated 22 March 2017
15	<p>Second Response including:</p> <ul style="list-style-type: none"> <li>• Lyca's response to the Second Notice dated 13 April 2017</li> <li>• Lyca's email providing clarification dated 19 April 2017</li> </ul>

	<ul style="list-style-type: none"> <li>• Lyca’s email providing clarification dated 24 April 2017</li> <li>• Lyca’s email providing clarification dated 3 October 2018</li> <li>• Lyca’s email providing clarification dated 5 October 2018</li> <li>• Lyca’s email providing clarification dated 10 October 2018</li> </ul>
16	Third Notice dated 30 April 2017
17	Third Response including: <ul style="list-style-type: none"> <li>• Lyca’s response to the Third Notice dated 4 May 2017</li> <li>• Lyca’s email providing clarification dated 16 May 2017</li> <li>• Lyca’s email providing clarification dated 7 June 2017</li> <li>• Lyca’s email providing clarification dated 8 June 2017</li> <li>• Lyca’s email providing clarification dated 15 June 2017</li> </ul>
18	Notification under Regulation 3 of the Mobile Roaming (European Communities) Regulations 2007 dated 26 June 2018
19	Written representations including: <ul style="list-style-type: none"> <li>• Lyca’s written representations dated 14 September 2018</li> <li>• Lyca’ email providing clarification on 27 September 2018</li> <li>• Lyca’ email providing clarification on 3 October 2018</li> </ul>
20	Oral representations on 28 September 2018
21	State of play meeting on 13 December 2018
22	Ofcom letter to Lyca dated 14 December 2018: Inviting Lyca to set out the steps it had taken or intended to take to come into compliance.
23	Lyca letter to Ofcom dated 23 January 2019: setting out the steps it had taken or intended to take to come into compliance.
24	Lyca email to Ofcom dated 27 February 2019: further setting out the steps it had taken or intended to take to come into compliance.
25	Lyca email to Ofcom dated 4 March 2019: setting out its intention to provide refunds

## Screenshots of information online

A6.1 Copies of the screenshots referred to in the table below have been provided in a separate document.

No.	Source	Page
1	Screenshot of Lyca’s terms and conditions dated 4 September 2017	1
2	Screenshot of Lyca’s terms and conditions dated 11 June 2018	2
3	Screenshot of example non-roaming inclusive pre-paid bundles dated 18 June 2018	3-5

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4	Screenshot of Lyca's '2GB+1GB' roaming inclusive pre-paid bundles dated 18 June 2018	6-11
5	Screenshot of Lyca's 'International' packages as advertised on its website on 20 February 2019	12-16
6	Screenshot of Lyca's UK Plan Giga as advertised on its website on 1 February	17
7	Screenshot of Lyca's standard PAYG rate for data as advertised on its website on 20 February 2019	18