

**BEREC report of the public consultation
on the
BEREC report on cross-border issues under
Article 28(2) USD**

February 2011

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1. Introduction

On the 9th December 2010, BEREC published for consultation a draft report ⁽¹⁾ on cross-border issues under Article 28(2) USD. The report aimed to explore:

- a) The extent to which cross-border instances of fraud or misuse within the scope of Article 28 of the USD might arise in the future and what number ranges and services might be affected;
- b) Current national conditions and practices in respect of cross-border issues, as well as to anticipate if or how they might change due to the transposition into national legislation of Article 28 of the USD, in particular paragraph 2;
- c) How the enforcement powers of requiring networks and/or providers to block access to numbers/services and withhold interconnection revenues may work in practice in regulatory and technical terms, both on a domestic basis and where the numbers have been allocated by another MS and/or the service originates in another MS;
- d) Areas where it may be appropriate for BEREC members to cooperate and the form that such cooperation might usefully take, with reference to existing cooperation mechanisms and previous CEPT and ITU recommendations;
- e) Areas where further work is needed, presenting proposals accordingly.

The outcome was a proposed approach for further work, within the context of the transposition into national legislation of the new version of Article 28 of the USD, taking into consideration, mostly, information collected previously from NRAs and research carried out by BEREC. The approach proposed included:

- Definition of “misuse” and “fraud” for the purpose of Article 28(2) of the USD;
- A contact list of the “relevant authorities” for the purposes of Article 28(2);
- A minimum set of responsibilities that should be given to “relevant authorities”;
- Provision of information by undertakings to relevant national authorities in the context of compliance actions;
- A minimum and common set of enforcement actions should be defined by MS;
- Practical cooperation mechanisms between “relevant authorities”.

⁽¹⁾ http://www.erg.eu.int/doc/consult/bor_10_62.pdf

The public consultation ended on 13 January 2011. Three contributions were received in response, from the following organisations:

- Voice on the Net Coalition Europe (VON EUROPE) ⁽²⁾;
- The Number ⁽³⁾;
- European Telecommunications Network Operators' Association (ETNO) ⁽⁴⁾.

This document summarises the responses received and presents BEREC's position with regard to relevant suggestions and proposals mentioned in those responses. The full texts of the responses are published separately.

In general, respondents welcomed the document and did not seem to oppose BEREC's proposed approach for further work. There was a low level of stakeholder response to the public consultation, and the major concern arising from all responses received seemed to be the issue of accessibility of numbers and services, related to Article 28(1) of the revised USD, which provides:

“Member States shall ensure that, where technically and economically feasible, and except where a called subscriber has chosen for commercial reasons to limit access by calling parties located in specific geographical areas, relevant national authorities take all necessary steps to ensure that end-users are able to:

- a) access and use services using non-geographic numbers within the Community;*
and
- b) access all numbers provided in the Community, regardless of the technology and devices used by the operator, including those in the national numbering plans of Member States, those from the ETNS and Universal International Freephone Numbers (UIFN)”.*

BEREC is due to address the question of access to numbers in accordance with Article 28(1) under the BEREC 2011 Work Programme, as part of its work on cross-border and end-user issues.

⁽²⁾ An organisation launched in December 2007 by Internet communications and technologies companies – iBasis, Google, Microsoft, Skype and Voxbone – with the purpose of informing policy makers in the EU on government policies to enable innovation based on the Internet.

⁽³⁾ The Number and its group companies are worldwide providers of directory enquiry services. In Europe they perform in the UK, France, Italy, Austria, Switzerland and Ireland.

⁽⁴⁾ ETNO was established in May 1992 as policy group for European electronic communications network operators with the purpose of enabling discussion between its member companies and decision-makers for the development of the European Information Society.

2. Consultation questions

Stakeholders were invited to present their views by responding to 7 questions, which covered different aspects of the draft BEREC report – the future of cross-border service provision and the need for increased enforcement; the importance given to current cross-border issues; the relevant national authorities for the purpose of Article 28(2) of the USD; important measures and procedures, including cooperation, to allow relevant authorities to effectively put in place the revised USD in what concerns fraud and misuse at a cross-border level.

Except for consultation question 2 ⁽⁵⁾, to which no stakeholder responded, a summary analysis of the responses received to the consultation questions is set out below, although most stakeholders responded by providing general comments and comments on issues outside the scope of the questions. A summary analysis of these has also been included below.

The BEREC report has been updated to reflect the comments received, as appropriate.

3. Stakeholders responses – general comments and comments on issues outside the scope of the questions

General comments were presented, a few of them regarding areas of future potential work for BEREC, as follows:

- a) VON EUROPE supports BEREC's focus in the 2011 Work Programme on Article 28 of the USD regarding the access to numbers and services. However, VON EUROPE considers that BEREC should focus on removing the link between numbers and locations. BEREC already took note of this suggestion and commented on it on the report of the consultation on the draft Work Programme 2011 ⁽⁶⁾. The 2011 Work Programme ⁽⁷⁾ states that "In 2010 BEREC has looked at fraud and misuse. In 2011 BEREC will shift its focus towards

⁽⁵⁾ "Consultation Question 2: Which cross-border issue, from those identified in Section 2, do you consider most important, bearing in mind the scope of Article 28 of the USD? Please justify the importance given."

⁽⁶⁾ BEREC report of the consultation on the draft Work Programme 2011 BEREC Board of Regulators, December 2010, available at http://www.erg.eu.int/doc/berec/bor_10_43_1b.pdf.

⁽⁷⁾ Work Programme 2011 BEREC Board of Regulators, December 2010, available at http://www.erg.eu.int/doc/berec/bor_10_43_1.pdf

accessibility of numbers”. This discussion is therefore out of the scope of the draft report on cross-border issues under Article 28(2) USD;

- b) VON EUROPE encourages BEREC to present its views on Article 10(4) (8) of the revised Framework Directive (2009/140/CE), by contributing to the EC’s consultation on the “The future harmonisation of numbering resources for the provision of business services”, due to close on 28th February 2011. The 2011 Work Programme states that “In 2009 and 2010 BEREC has inventoried the ways in which NRAs regulate these wholesale building blocks for the provision of communication services to business users. BEREC understands that especially operators who provide transnational services may experience inefficiencies, even if remedies justifiably differ among Member States. In 2011 BEREC will shift it’s focus on the inefficiencies market players claim to experience due administrative barriers. BEREC will analyse the substance of these inefficiencies and if substantial, search for ways on how to resolve these”;
- c) The transposition of Article 28 USD and the need to coordinate NRAs’ actions at a cross-border level should be seen by BEREC and its members as giving them an opportunity to collaborate not only for cross-border fraud purposes, but also to enable cross-border services and numbers. VON EUROPE notes that, in the report, NRAs point out that they may need additional powers to be able to mandate operators to block numbers. VON EUROPE considers that such powers should also cover the possibility to mandate operators to open numbers on their networks.

In a similar way, The Number supported that NRAs should be given the power to not only mandate operators to block numbers but also to open them on their networks, by making reference to Article 25(4) of the revised USD ⁽⁹⁾. This addresses, in particular, directory enquiry services.

The Number argued that this would enable users travelling abroad in Europe with their mobile telephone (business users, elderly users, and persons who

⁽⁸⁾ “Member States shall support the harmonisation of specific numbers or numbering ranges within the Community where it promotes both the functioning of the internal market and the development of pan-European services. The Commission may take appropriate technical implementing measures on this matter.”

⁽⁹⁾ “Member States shall not maintain any regulatory restrictions which prevent end-users in one Member State from accessing directly the directory enquiry service in another Member State by voice call or SMS, and shall take measures to ensure such access in accordance with Article 28.”

have difficulty using foreign languages or who are unaware of what local directory enquiry services are available, how to access them and at what price) to obtain local directory (and other enhanced) information from a live operator back home in their own language and at a price they know and understand.

As noted above, the question of access to numbers and services is outside the scope of this Report, but is due to be considered under the 2011 BEREC Work Programme.

In general, BEREC has noted, in Section 1.2 of the current report, that the implementation of the revised USD, by giving end-users the ability to access and use, where technically and economically feasible, services using non-geographic numbers within the Community, as well as accessing all numbers provided in the Community, may contribute to the EU internal market being more integrated and to enhance end-users' awareness of cross-border opportunities. It may also contribute to end-users in general not being treated differently on grounds of their nationality or place of residence.

However, BEREC has also noted that, where such cross-border provision is technically and commercially feasible, increasing the efficiency of cross-border enforcement will also be important. The EU legislator understands this and, by introducing paragraph 2 to Article 28 of the USD, therefore is giving MS a signal that particular number ranges and services cannot operate, in the event that they are linked to fraud and misuse, which requires enforcement actions by the relevant authorities, by requiring networks and/or providers to block access to numbers/services or withhold interconnection or other service revenues.

- d) Regarding the amended Article 28(1) of the USD and the reference to ETNS, ETNO stated that the ETNS "+3883" country code has been 'spare' as of January 2011, due to a lack of market demand. As a consequence, national transposition should more appropriately focus on dedicated ITU-T country codes for universal services provisions. ETNO considered that this would avoid introducing further confusion on international services access and numbering. This suggestion is beyond of the scope of the draft report on cross-border issues under Article 28(2) USD as it relates mostly to accessibility to numbers and services, as in paragraph 1 of that same Article, which is due to be addressed in the BEREC 2011 Work Programme.

4. Stakeholders responses – comments related to the questions

In general, no stakeholder other than ETNO provided a response to each of the public consultation questions. Only in response to consultation question 3 was it possible to summarise the specific views of another stakeholder, The Number. As such, general considerations related to the scope of any particular consultation question are also addressed below.

Consultation Question 1: Do you consider that the current technical and commercial limitations on cross-border access – in practice, leading to a fairly low provision of cross-border services and therefore instances of cross-border fraud/misuse – might change in the future, leading to greater provision of cross-border services, and a greater need for cross-border enforcement against fraud or misuse? If so, how?

ETNO considered that an “open access approach” to all geographic numbers and services using non-geographic numbers arising from Recital 46 of the Citizen’s Rights Directive (2009/136/EC), amending the USD, as well as from Article 28(1) of the revised USD, would comprise considerable “weaknesses”. It would lead, according to ETNO, to a greater need for cross-border enforcement against fraud or misuse, as follows:

- Open access to non-geographic numbers would only increase the likelihood of fraud and misuse of numbers and would significantly decrease customer protection – it would be unrealistic to think that every MS NRA knows in detail for which services certain number ranges are opened in all other MS given the number of EU MS and the evolution of national numbering plans;
- There are a number of technical and operational limitations of accessing non-geographic numbers across MS, such as i) pricing aspects (pricing principles vary considerably across MS); ii) taxation aspects (across MS, there are different tax rules applicable, that may result in incompatibilities of the business models between countries); iii) numbering plan aspects (each MS applies different rules as regards non-geographic numbers and short codes); iv) complaint handling (it requires to be extended and harmonised at EU level);

Therefore, ETNO considered that “open access” should be based on the use of internationally defined and managed numbering, such as managed by ITU-T, for PRS provisioning (or to provision of other services accessible by any country, associated with geographic or non-geographic numbers) ⁽¹⁰⁾. ETNO felt that, with these international numbers, users can recognise what they actually are accessing, decreasing the chances of misuse. It is not feasible to open all non-geographic numbers.

ETNO proposed that an alternative to open access would be to open individual types of non-geographic numbers one-by-one on the basis of actual demand, while ensuring that the services comply with national regulations and taking into account the constraints indicated above.

BEREC notes the considerations from ETNO in respect to access to numbers and services and the need for cross-border enforcement against fraud or misuse. BEREC has added these considerations to Section 1.2 of the final report, as a possible challenge arising from the implementation of the revised Article 28 of the USD. Reference to proposals to address issues raised by access were also included in section 4.3 of the final report. The question of access to numbers and services is due to be considered under the BEREC 2011 Work Programme.

Consultation Question 3: Are there additional cross-border issues, other than those identified in Section 2, to be considered within the scope of Article 28 of the USD? If yes, please describe them.

ETNO considers that cross-border misuse of numbers is a dynamic process, since as soon as a method is found to stop a given abuse, content providers will invent a new way of making money in a fraudulent manner. It did not identify any additional cross-border issues to be considered.

⁽¹⁰⁾ Currently, formally established international services use international numbers defined by ITU-T, such as International Freephone Numbers, +800, International Shared Cost Numbers, +808, International Premium Rate Numbers, +979, International Personal Numbers for Universal Personal Telecommunications, +878.

The Number said that it regrets that BEREC draft report only looks at PRS generally. The Number argued that NRAs should consider differentiating directory services, 'the latter being electronic communications services providers and hence already complying with authorization requirements'. It also argued, 'that NRAs should be given the power to not only mandate operators to block numbers but also to open them on their networks, especially when it comes to mobile operators'.

BEREC draws the attention for the fact that the overview of cross-border issues in Section 2 of the draft report was based in the situations of fraud or misuse that NRAs responding to the questionnaire in which the report was based considered to fall within the scope of Article 28(2) USD and that had arisen in the past or the present, or that seemed likely to arise in the future. The services and number ranges cited most frequently by regulators were PRS (fixed and mobile, including voice, SMS and MMS) and a considerable number of them expected fraud or misuse of such numbers or services to continue or increase in the future, including on a cross-border basis.

BEREC has added The Number's point about differentiating between PRS generally, and directory services to Section 2.1.1 of the final report. As above, BEREC is due to consider the question of access to numbers under the 2011 Work Programme.

Consultation Question 4: In your country, which national authority(ies) is(are) expected to be the relevant one(s) for the purposes of Article 28(2) of the USD? Please identify the "relevant authorities" according to the type of network or service.

ETNO responded to this question by suggesting that a coordinated action among different national authorities would be, generally, necessary. Upscaling these complex processes to the EU-level would be very complex or even not actually viable.

BEREC notes this general consideration, and refers to the more specific commentary presented in section 3.1 of the draft report.

Consultation Question 5: Bearing in mind the high-level description in Section 3, what measures or procedures do you consider important to allow "relevant authorities" to effectively put in place Article 28(2) of the USD?

ETNO was of the view that, regarding international services access, ITU-T's well defined dedicated numbers should be supported by NRAs for Article 28(2) USD transposition, allowing the possible cross-border use of non-geographic numbers for very specific and well-defined market cases and based on bilateral agreements between different operators.

BEREC notes this response from ETNO, but considers that it falls outside the scope of the question, given that it refers to accessibility of numbers and services under Article 28(1) of the revised USD, which may be looked at under the 2011 Work Programme.

(With this question, BEREC intended to collect stakeholders' views on how the relevant authorities will, in practice, be able to take the enforcement actions contemplated in Article 28(2) USD, as in Section 3.2 of the draft report).

In other parts of its response to the public consultation, ETNO provides clarification on the actions to be taken in case of fraud and misuse, in the event that open access to all non-geographic numbers was mandated. In this case, ETNO underlines that it is unlikely to be feasible for national network operators or service providers to block international calls towards non-geographic numbers of another country on a "case-by-case basis" and to withhold payments. It would be impossible to know for which services certain numbers or number ranges are opened in all other countries given the number of EU MS (including Accession Countries) and the constant evolution of national numbering plans. In addition, fraudulent content providers change very frequently the numbers associated to their services to circumvent their services being blocked.

Thus, ETNO considers that there would be the risk for network operators and service providers to be obliged to block huge ranges of numbers, including numbers not misused and geographic numbers. The most extreme measure would be to block entire country codes (as it already happens towards some small or developing countries where numbers, both geographic and non-geographic, are misused).

As in Section 4.5 of the draft report, although agreeing about the risks of blocking number ranges, BEREC underlines that blocking access to a particular number within a block of numbers is possible, although it can be more demanding, making it more difficult to manage such blocks. Notwithstanding, BEREC notes that relevant authorities willing to evaluate this alternative should discuss it with national

undertakings, in order to collect their views on its implementation or on the implementation of an equivalent solution, such as blocking access to numbers that are part of black lists.

Also concerning number blocking, or call barring, is ETNO's reference to the existence of national regulations to block adult content related numbers. Again, in the event that open access to all non-geographic numbers was required, ETNO notes that there would need to be a guarantee and a clear common understanding of the difference between adult content and other content. As there is no such guarantee in each country, operators would depend on the application abroad. In addition, it would be technically very difficult to implement adult call barring options which take account of all international numbering plans.

ETNO suggests that an alternative possibility is to investigate opening up services to non-geographic numbers one-by-one on the basis of real demand, making sure that the services comply with the national regulation and taking into account the identified constraints. In this way, there would be a guarantee that national regulation is respected by the services that becomes accessible.

Although this report does not relate to questions around access, BEREC notes ETNO's considerations on actions to be taken in case of fraud and misuse, some of them reinforcing aspects already addressed in the draft report. BEREC has, therefore, added them, where appropriate, in Section 4.5 of the final report, as part of the proposed approach for further work in what relates to a minimum and common set of enforcement actions that should be defined by MS.

Consultation Question 6: Do you agree with the proposals for further work presented in Section 4? Are there other proposals, which should be considered? Are some proposals more important than others?

ETNO considered useful further analysis by BEREC on how to avoid the increasing misuse by / of services in certain numbering ranges and related fraud in the EU along with studying the increased use of ITU-T international numbering in the EU.

BEREC welcomes ETNO's recommendation and has therefore added it to Section 4.1 of the final report, as part of the proposed approach for further work concerning the definition of "misuse" and "fraud" for the purpose of Article 28(2) of the revised USD.

Consultation Question 7: What are your views on the scope of the cooperation mechanisms foreseen in Section 4, as regards NRAs or other "relevant authorities"?

ETNO was of the view that cooperation mechanisms among NRAs, based upon sharing experiences and best practices, are always very useful and will be useful even more in a converging European market.

ETNO does not provide its view on the scope of the cooperation mechanisms proposed in Section 4.6 of the BEREC report, which, basically, are of a practical or even informal nature.