

INTERNATIONAL ROAMING – CONSULTATION ON ARTICLE 3 GUIDELINES

**Summary of responses received during the public consultation and
BEREC view on issues raised by stakeholders**

27 September 2012

The BEREC consultation on the draft approved at Plenary in May 2012 was launched on 9 July 2012 and closed on 10 August 2012. 38 of responses were received which raised a wide range of issues. The consultation served as input for the preparation of the final version of BEREC Guidelines.

Responses from stakeholders

In general, all market players are happy that BEREC intends to deliver its Guidelines on time (i.e. before October 1) as promised. There is also general agreement that the Guidelines should be a living document which will be kept under review in the light of practical experience and market developments and revised accordingly from time to time.

There was a high degree of consistency in the reactions of the MNO community, although with different points of view expressed on some aspects by some smaller MNOs. Equally, there was broad consistency amongst the access seeker community. It was however predictable that these two broad points of view were, in a number of important respects, polar opposites. MNOs generally argued for interpretations which minimised the extent of their access obligations and maximised their discretion over dealing with access requests. Access seekers argued the opposite.

The main issues are summarised below

Extent of obligations

BEREC argued in its consultation that it is mandatory to interpret the Regulation in such a way that the intentions of the legislators could be achieved. This implies in particular that resellers should be able to take advantage of the access obligation to be able compete effectively in the retail market. The MNOs argue for a narrow interpretation which would in practice allow them almost total control over the extent of retail competition via resale. BEREC believes that this would undermine the clear intentions of the legislators and cannot be accepted. The main points of difference are as follows:

BEREC argued that the access price for resellers (which is limited by the wholesale price cap) has to include all wholesale roaming services necessary for a reseller to construct its own retail service. The MNOs contradicted this view, arguing that the price cap related only to resale of the service purchased from the visited network operator and that they could add “fair and reasonable” charges for a wide range of other necessary wholesale services. BEREC considers that implementation of such light approach in the Guidelines could substantially raise risk of offering resale at a much higher “retail minus” prices which would, in effect, add nothing to the intensity of competition in the retail market.

The access seekers considered that the price cap should also cover provision of certain retail functions (such as operation of the “bill shock” mechanism).

BEREC reconsidered the draft guidance in the light of these comments. BEREC consulted the Commission services over interpretation of the text of the Regulation and their view of the intentions of the joint legislators. In the light of this, BEREC does not plan to change its substantive view although there have been some drafting changes to improve clarity.

BEREC argued that there is an implicit obligation for access providers to provide certain retail services which cannot economically or practically be self-provided by resellers or outsourced to a third party enabler. It also argued for an implicit obligation to provide resale

of non-EEA roaming alongside EEA roaming. In both cases, BEREC proposed “fair and reasonable” charges. Access seekers agreed with BEREC’s approach. On the contrary, MNOs argued that there are no such explicit requirements in the Regulation and that the matter must be left to commercial negotiation.

It is true that the Regulation does not explicitly include text covering either of these obligations inferred by BEREC. Nevertheless, if the matters were left to commercial negotiation, there is no guarantee that terms could be negotiated which would allow resellers to compete effectively. In the absence of the ability to perform the key retail functions, a retail service cannot be delivered at all. In the absence of the ability to offer non-EEA roaming, BEREC considers that a retail roaming service is unlikely to be commercially viable. Therefore, BEREC did not change its substantive view. At the same time Guideline 16 indicates that charges for unregulated roaming services are not covered by price caps and should be fair and reasonable.

Non-discrimination

Guideline 21 requires MNOs not to discriminate between their own retail services and resellers in matters such as repair times in the event of malfunctions or supply of information. BEREC considers that avoidance of non-price discrimination is a key requirement for the emergence of a competitive retail market. In markets such as this one where the providers are under a regulatory obligation to provide service and might well have preferred not to do so at all, there is a large risk that the service provided will be of inferior quality, with the intention and/or effect of inhibiting the access seeker from attracting and retaining customers. Discriminatory terms would therefore not be “fair and reasonable”. BEREC did not propose to include pricing within the scope of the non-discrimination rule as this would have the perverse effect of suppressing price competition in the wholesale market. Additionally, access seekers are already very well protected by the wholesale price cap.

MNOs object in principle on the grounds that there is no explicit mention of non-discrimination in the text of the Regulation. BEREC does not share these views. Access seekers must meet all reasonable requests for access and a request for non-discriminatory access would, other things being equal, be a reasonable one.

Slightly stronger is the MNO argument that there was more than one attempt during the negotiations to include a non-discrimination rule and it was not accepted. This is true. However, the rules proposed during the negotiations would also have covered pricing and were rejected for that reason.

Service level agreements and guarantee payments

To underpin the proposed non-discrimination rule, BEREC proposed that MNOs should offer “reasonable” SLAs (and corresponding payments for non-achievement of the agreed service). Such arrangements are commonly seen in contracts in competitive markets between willing buyers and willing sellers. MNOs raised object “on principle” but, did not provide persuasive arguments to support their case.

BEREC clarified in Guideline 23 that the Reference Offer should incorporate SLAs in the case of direct and resale wholesale access. Where absolute benchmarks are not available, in particular where the quality of service in question depends on the performance of other

network operators, it is acceptable to define standards by reference to those experienced by the MNO's own retail customers.

Hubs

Roaming hubs are an important part of the commercial landscape. They provide a ready mechanism for new entrants in particular to connect to a number of MNOs without building individual connections. The arrangement often suits both parties as it minimises the burden of testing new connections.

The text in the Regulation dealing with hubs is rather obscure. But for BEREC it is clear that the legislators intended that the option to connect via a hub should be a practical one, in particular for small MNOs. The Guidelines attempted to make sense of the Regulation. Respondents appeared to understand BEREC's problem but feared in particular that its approach might lead to regulated prices being made available "by the back door" to non-EEA MNOs.

This was not BEREC's intention. To make the Guidelines transparent, Guideline 4 has been amended and explicitly states that operators of hub aggregation have only limited access i.e. in case of serving EEA providers of regulated retail roaming services.

Termination of outgoing roaming SMS

This is a complex area which is again not dealt with explicitly in the Regulation. The service is clearly essential to the provision of a retail roaming service but is not included within the scope of regulated wholesale charges. The question arises therefore as to what charges can be made by MNOs to resellers for this service. Most stakeholders were content for BEREC to clarify the issue and a number (from amongst access seekers and MNOs) were broadly content with BEREC's approach. However, others considered that the approach was inconsistent with some commercial models. BEREC had no intention to interfere with satisfactory commercial models. Guideline 20 was amended to address operators' concern. Amended Guideline 20 does not exclude taking into account the commercial agreements which allows for sharing the income for termination of incoming roaming SMS.
