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BEREC Opinion on the Draft Delegated Act setting single maximum Union-wide voice fixed and mobile termination rates

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EXECUTIVE SUMMARY

This document is the BEREC response to European Commission's letter, from 28 July 2020, asking BEREC for its opinion on the Draft Delegated Act (DDA) setting single maximum Union-wide voice fixed and mobile termination rates ("Eurorates").

First of all, BEREC notes that in some cases the current termination rates which are referenced in the DDA and the Staff Working Document (SWD) are outdated and it is indispensable that the EC considers the latest known rates for all MS before the Delegated Act (DA) comes into force, in particular those that are closer in time to the entry in force of the provisions.

BEREC supports the **general principle for defining mobile and fixed termination services** along the numbers assigned to the provider of the called party, which is a clear, practical and transparent approach. BEREC also concurs with the approach for **hybrid services** and the possibility for NRAs to resolve disputes through dispute resolution procedures.

Concerning Art. 1 (3) in the DDA, BEREC would appreciate any requests that the DA **clarifies the concept of "calls originating and terminating in the Union"** so that it is clear that the regulation should apply to calls originated by and terminated to numbers assigned nationally to numbering plans of operators active in the Union, irrespective of the country of origin or termination of the calls.

The DDA states that the definition of the termination services includes **associated facilities** to the extent that those are used to provide the termination service. BEREC understands that incremental costs for associated facilities attributed to termination services are likely to be low, especially when migration to IP networks are completed by all operators in all MS. However, BEREC points out that associated facilities are not included in the Axon models for calculating maximum union-wide fixed and mobile termination rates and considers that to include those under the termination service definition it needs to be ensured through appropriate documented data that there is sufficient margin between the TRs and the underlying costs so as to cover the incremental costs of associated facilities, so that it is ensured that all the underlying costs are remunerated. Moreover, it remains necessary for NRAs to being able to impose non-price remedies regarding associated facilities to address competition issues in voice termination markets.

Regarding the **calls to numbers other than fixed geographic or mobile numbers** (e.g. premium numbers, short codes, emergency telephone numbers such as 112), BEREC considers that the DA should not include a generic obligation to impose Eurorates regarding termination to non-geographic numbers other than mobile numbers, but only include an obligation for services with "non-geographic numbers other than mobile numbers" to be bound by the fixed Eurorate, when there exists a risk of excessive prices (i.e. termination monopoly situation) for wholesale termination services, and this happens under the CPP pricing interconnection regime. Moreover, Recital (6) should be revised accordingly, it should be clarified that all origination services/VAS are out of scope of the DA.

BEREC supports the idea of allowing **all incoming calls from third countries** with equivalent of termination rates to fall under the DA. This approach is simple, in so far, the Annex referred to in Art 1 (4b ii) is public and available to all concerned.

BEREC agrees that criteria must be identified in order to determine whether the maximum Union-wide termination rates should apply for calls originated by country outside the Union. In particular, BEREC fully agrees with Art 1 (4a) in the DDA. However, BEREC points out that there are implementation issues that seriously impair the widespread applicability of this article as it is indispensable that in arguing the applicability of this provision in negotiating contracts with European operators, international carriers (and in general, any negotiating entities) provide verifiable information about the concerned third country operators' termination rates.

BEREC suggests that the EC considers the possibility to include countries in the Appendix only, if third countries explicitly submit to the Eurorate regime (this is, the relevant authorities in these countries provide for all incoming calls from the EU to be charged with termination rates that are smaller or equal to the relevant Eurorate levels).

Regarding the **implementation** of the DA BEREC agrees on the principles used to establish the efficient TRs and on the level of those TRs: EUR 0.2 cent per minute for the mobile termination rate and EUR 0.07 cent per minute for the fixed termination rate.

BEREC also agrees that for the maximum FTRs a transitional period is necessary for countries with national regulated FTR which are large relative to the single maximum Union-wide voice termination rates.

For the MTR, BEREC indicates that by taking the highest observed cost in the chosen scenario of the Axon model for the period 2021-2025, the proposal presented in the DDA in the context of the single maximum Union-wide mobile voice termination rate, ensures cost recovery for all elements within the model's scope, for operators within the Union throughout the applicable years of the single maximum Union-wide voice termination rates. With the current information, BEREC concludes that the proposed three-year glide path will allow for an overall gradual reduction of mobile termination rates and takes into account the need for a swift application of the efficient costs established. As regards the starting point for the glide path, BEREC considers that the level close to the simple average of the latest available and applicable current mobile termination rates is the right solution.

Finally, BEREC wants to highlight that **non-price remedies** are still necessary to ensure effective competition in markets downstream of the termination markets and that the DDA by setting maximum Europe wide termination rates is only addressing possible pricing abuses of a SMP position. It is however essential for NRAs also to be able to easily and effectively tackle non-pricing issues, which has been outlined in detail in the BEREC opinion on the European Commission's draft Recommendation on relevant product and service markets susceptible to ex ante regulation.

1 Introduction

In its letter from 28 July 2020, the European Commission (hereafter EC) asks BEREC for input in the preparation of a Delegated Act (hereafter DA) setting single maximum Union-wide voice fixed and mobile termination rates. This input covers the lists of elements that are laid down in the Draft Delegated Act (hereafter DDA) which accompanied the letter.

2 Definition of voice termination services

The DDA provides for a technologically neutral definition of termination services as was suggested by BEREC in its response to the EC public consultation on the scope of the Delegated Act setting single maximum Union-wide mobile and fixed termination rates[1]. BEREC therefore supports the general principle for defining mobile and fixed termination services along the numbers assigned to the provider of the called party – meaning that calls to mobile numbers are priced with mobile termination rates, and calls to fixed geographic numbers, are priced with fixed termination rates. It is a clear, practical and transparent approach[2].

BEREC concurs with the approach for hybrid services and the possibility for NRAs to resolve disputes through dispute resolution procedures (see Staff Working Document, page 21) and suggests that the DA clarifies that this approach will enable NRAs to tackle specific instances of over and under compensation after disputes arise, perhaps by defining specific numbering ranges[3]. Hybrid services cannot be identified to be purely mobile or fixed services, *i.e.* calls to a fixed number can be delivered over a mobile network or *vice versa*. Given the variety of hybrid services already in place and to take account of future offers that are likely to be developed along the technological changes, it makes sense to provide room for the NRAs to assess cases that are brought forward and to resolve those disputes on a case-by-case basis.

Furthermore, BEREC appreciates any clarification of the concept of "calls originating and terminating in the Union" (Art 1 (3) in the DDA). In BEREC's opinion, the regulation should apply to calls originated by and terminated to numbers assigned nationally to numbering plans of operators active in the Union, irrespective of the country of origin or termination of the calls. Indeed, resorting on the number rather than on the country guarantees that the discriminating factor is the number, in line with the definition of termination services, and not the country where the calls has been originated or terminated. Thus, the identification of the caller should

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[1] BoR (19) 223.

[2] BEREC explains its position on the treatment of calls to numbers other than fixed geographic/mobile numbers in subsection 2.2.

[3] See footnote 7 in BoR (19) 223, BEREC response to the EC consultation on this matter; "in some particular national cases it may be the case that some hybrid operator holds mobile numbers where really its terminating costs are more similar to a fixed networks', for example when calls are IP and directed over the broadband network. These exceptions should be detected and dealt with by NRAs, but in any case, the numbering range (fixed or mobile) should generally be the criteria in determining the type of termination rate to apply."

be based on the calling line identification (A-party number), so that calls originating from numbers pertaining to the national numbering plans of countries outside the EU or callers roaming internationally can be distinguished. In this regard, any reference to international numbering plans should be removed from the DA to clarify that global numbers assigned by the ITU are not within its scope.

Conclusion

BEREC supports the general principle for defining mobile and fixed termination services along the numbers assigned to the provider of the called party, which is a clear, practical and transparent approach. BEREC also concurs with the approach for hybrid services and suggests that the DA clarifies that it would be possible for NRAs to tackle specific instances of over and under compensation after disputes arise as suggested in the SWD.

BEREC would appreciate that the DA clarifies the concept of "calls originating and terminating in the Union" (Art. 1 (3) in the DDA), so that it is clear that the regulation should apply to calls originated by and terminated to numbers assigned nationally to numbering plans of operators active in the Union, irrespective of the country of origin or termination of the calls.

2.1 Inclusion of Associated Facilities

The definition of the termination services includes associated facilities to be part of it to the extent that those services are being used to provide the termination service. According to recital 5, associated facilities include interconnection equipment, colocation services and internal transit from the point of interconnection to the end-user. Therefore, no additional payments should be allowed over the termination rates, since the associated facilities used to provide the relevant termination services cannot be sold separately from the termination service.

Associated facilities are needed to physically exchange traffic between the interconnected networks and are necessary services, i.e. the operator buying termination is obliged to buy associated facilities as well. The exact type and amount of associated facilities depend on the characteristics of the involved networks. For example, colocation is necessary in TDM networks, while in IP networks it could be virtualized and/or not required; other services, like interconnection ports, are needed in IP networks as well, although the migration implies technology changes[4] . In particular, the migration to IP networks is going to reduce the amount of needed associated facilities, as a consequence of the reduced number of necessary points of interconnection and the higher efficiency of the IP networks.

[4] In the above-mentioned for example, TDM interconnection is based on IC ports with a 2Mbps capacity or other alternatives, while IP interconnection relies on Gigabit Ethernet ports, or even higher.

BEREC notes that migration to IP networks is impacting the costs for associated facilities, such as due to the reduced number of interconnection points necessary to provide a full service to the end-users. This would indeed lessen the importance of associated facilities in terms of prices and symmetric networks (in terms of level of interconnection and number of interconnection points) could justify the introduction of a Bill & Keep price model on associated facilities used for terminating calls. In case of symmetric interconnection infrastructures, indeed, the amounts of payments between the two operators involved in the interconnection could be equal, since the amount of associated facilities bought from each other could correspond.

BEREC points out that NRAs treat associated facilities differently; some NRAs consider their costs included in the termination tariff or some others impose a Bill & Keep regime, allowing no bilateral payments for associated facilities. Some NRAs consider associated facilities to be separate services, for which there are separate underlying costs and prices. BEREC also acknowledges that some of those associated facilities, such as collocation or IC-ports, are not solely used for terminating calls, but shared with other interconnection services (origination and transit). NRAs either use benchmarks, cost accounting data or their cost model to derive the charges for associated facilities. In these cases, the prices remunerate all the underlying costs, coming from volumes of all the interconnection services.

For those cases, the share of the incremental costs of associated facilities is considered to be relevant for specifying separate charges. Furthermore, associated facilities are imposed separately, which implies separate charges. Moreover, if the associated facilities were rated separately, the effects on other services of including the associated facilities' incremental costs pertaining to termination under the DA are unclear.

It has to be considered that, where the associated facilities are rated separately, the imposition of price control obligations for the provision of associated facilities in the termination markets makes a reference for the bilateral negotiations in the unregulated interconnection markets of origination (fixed and mobile) and transit. Indeed, the associated facilities used in the unregulated markets are the same (i.e., a unique equipment is used for all the interconnection services, including termination) or equivalent (i.e., the equipment is the same). In these cases, and despite these markets are disciplined by competition, the risk linked to the inclusion under the DA of associated facilities may be an increase of prices in the unregulated markets, to the detriment especially of the smaller operators like MVNOs.

BEREC points out that associated facilities are not included in the Axon models for calculating maximum Union-wide fixed and mobile termination rates; in other words, the Eurorates may not remunerate the costs of the associated facilities. However, the incremental costs for associated facilities pertaining to termination are likely to be very low when migration to IP networks are completed by all operators in all MS. In any case, the associated facilities are used for all the interconnection services irrespective from the technology used (TDM or IP) and as a consequence the share of incremental costs of the associated facilities pertaining to termination is likely to be very low. BEREC points out that for associated facilities to be part of the termination service, it needs to be ensured that the margin between the Eurorates and

underlying costs is sufficient so as to cover the incremental costs of associated facilities, so that it is ensured that all the underlying costs are remunerated.

Notwithstanding the aforementioned, even if associated facilities are considered to be part of the termination service in the DA, it remains necessary for NRAs to being able to impose the provision of associated facilities, in particular, obligations addressing the possibility of discriminatory provision of associated facilities.

As set out in the BEREC opinion on the draft relevant markets recommendation and the BEREC response to the EC public consultation on the scope of the DA , it is necessary that NRAs can counter anti-competitive market conduct with imposing non-price remedies. Contrary to the reasoning put forward by the EC, the likelihood for anti-competitive conduct is still very high in many Member States (hereafter MS) even in the presence of the Eurorates. In particular, it is crucial that providers offering voice termination services are obliged to accept reasonable requests for interconnection as otherwise access may be denied.

Conclusion

BEREC understands that incremental costs for associated facilities attributed to termination services are likely to be low, especially when migration to IP networks are completed by all operators in all MS. However, since those services were not considered in the Axon models, BEREC points out that for those to be part of the termination service, it needs to be ensured through appropriate documented data that the margin between the Eurorates and underlying costs is sufficient so as to cover the incremental costs of associated facilities, so that it is ensured that all the underlying costs are remunerated.

Moreover, it remains necessary for NRAs to being able to impose non-price remedies regarding associated facilities to address competition issues in voice termination markets.

2.2 Treatment of calls to numbers other than fixed geographic or mobile numbers (e.g. premium numbers, short codes, 112)

The EC is setting fixed voice termination rates also for "*non-geographic numbers other than mobile numbers*" (draft Art. 2, 1 (b), e.g. premium numbers, short codes, emergency telephone numbers such as 112).

The main reasoning behind this is as follows[5]:

[5] See DDA Recital (6) on p.8 and SWD Eurorates on p.16.

(1) The EC argues that the majority of these services, if not all, are provided over a fixed infrastructure, rather than a mobile one, which would be consistent with their treatment as fixed termination services, since the relevant costs would match those of a fixed network.

(2) Given the relatively low level of the single Union-wide fixed voice termination rate, the application is, according to the EC, unlikely to distort existing market arrangements for the provision of these services.

(3) The EC argues that leaving termination rates to all these numbering ranges unregulated would have harmful consequences because some of the services provided over such numbering ranges require the imposition of price controls obligations given the existence of the termination monopoly as in "traditional" termination markets.

(4) Given the multiplicity of these services and the variety of numbering ranges across MSs, this measure would reduce regulatory burden and increase legal certainty for market players. NRAs would not need to assess the competitive dynamics of services provided under each national numbering range in order to investigate whether regulation is warranted or not.

Services provided through non-geographic numbers other than mobile numbers affected by the DA

The EECC defines a non-geographic number as a "*number from the national numbering plan that is not a geographic number, such as mobile, freephone and premium-rate numbers*".[6]

Given this open definition, a high diversity of services provided through non-geographic numbers other than mobile numbers would be affected by the application of the single maximum Union-wide fixed voice termination rate. These include[7]:

(i) fixed nomadic services,
(ii) free-phone services, where the charge for the call is paid by the called party and not the caller,
(iii) premium-rate services used for calls where certain services are provided, and for which the prices are higher than normal calls. Unlike a normal call, part of the total call charge is usually paid to the premium rate service provider, generally a distinct entity from the ECS provider, thus enabling businesses to be funded via the calls,
(iv) shared-cost services, which allow the caller to be charged for only part of the cost of the call, with the called party being charged for the remainder,
(v) emergency services (e.g. 112),
(vi) social value services, such as the EEA harmonised number range 116 XXX,

[6] EECC, Art. 2. (34).
[7] Source: SWD Eurorates on p. 16 and BEREC input on EC's request for the preparation of the legislative proposal for the new roaming regulations. BoR (20) 131. P. 24.

(vii) Other special phone services, which do not fall into category i-vi, but are charged more than a regular fixed call, like directory services, (e.g. 11 8 XY in some MS used for directory services),

(viii) M2M services, in MS where non-geographic numbers other than mobile are used for M2M voice communications.

Except for categories (i), (v) and (viii), the rest of services provided through non-geographic numbers other than mobile are generally known as Value Added Services (VAS). As most of the concerns referring to non-geographic numbers other than mobile refer to these categories of services, throughout the document the term VAS is also used for the sake of clarity.

No clear techno-economic rationale for including all non-geographic numbers other than mobile numbers

Although there are MS where voice termination to some non-geographic numbers (e.g. nomadic numbering ranges) has been included in termination market definition and the national regulated fixed termination rate already applies, most of the services with non-geographic numbers are not considered a termination service, because they are provided by network/service providers to offer VAS addressed to originating operator's subscribers. In this sense, calls to non-geographic numbers other than mobile numbers -with exceptions- are not person-to-person calls (calls between individuals), as in regulated termination markets, where the charging system is based on CPP principle.

The EC argues that services accessible through non-geographic numbers other than mobile numbers are provided over a fixed infrastructure. However, BEREC would like to point out that, technically, VAS numbering ranges are not associated to an end-user termination equipment. These numbers are used as a reference in the terminating network operator, in order to apply a specialized treatment and finally route the call to the service provider platform. Hence, the type of network elements that are involved in the whole provision of the termination in VAS (Intelligent Network[8], Service Provider platform) may also differ from the termination of a call towards a conventional end-user.

On the other hand, the business model and economic rationale of voice interconnection to VAS services are, in BEREC's opinion, very different from person-to-person voice interconnection, because of the involvement of service providers in the value chain.

Fixed and mobile voice termination under the CPP principle follow a 'two-way' model, whereby an interconnection agreement needs to be negotiated by the interconnecting operators A and B, to deliver calls from operator A's customers to operator B's customers, and vice versa. However, the competition dynamics are different when negotiating interconnection agreements to access VAS. Voice calls to VAS are one-way only, and the charging principles do not follow the traditional CPP charging regime.

[8] BEREC notes that the use of dedicated Intelligent Network equipment in these cases is only required in traditional voice telephony networks (POTS/ISDN) but not in IP networks.

The provision of VAS is subject to the receiving party pays (RPP) principle (free-cost numbers) or revenue sharing agreements (e.g. premium numbers) where the terminating network/service provider determines the end-user pricing of the call and the originating operator charges a wholesale origination rate.

Therefore, the "terminating" network operator does not necessarily have significant market power to impose a wholesale termination rate to the originating network, as there is always a wholesale origination rate to be paid to the originating network. This countervailing negotiation power exerted by the originating operator has justified the NRAs decisions to exclude termination to VAS from the termination markets and consider these services bound to call origination service. Moreover, in some cases, NRAs have regulated wholesale origination rates to these services[9].

It has to be stressed that the called service provider in fact is not indifferent to the price it pays to the "terminating" network operator. This economic rationale has been already correctly outlined by the EC itself in the Explanatory note to the RRM 2014[10].

Therefore, BEREC is of the opinion that there is no general economic justification (i.e. permanent termination monopoly situation with the associated risk of excessive pricing) for setting a cap on the termination rates for all VAS. In this regard BEREC notes that the EC has previously advocated to exclude VAS for these reasons in the RRM 2014[11].

In BEREC's view the economic rationale has not changed since, the arguments now given by the EC in the SWD (i.e. costs are similar to FTR, no distortions, risk of harmful consequences if not regulated) are not convincing to BEREC to set FTR for all non-geographic numbers other than mobile numbers.

No clear legal provisions to regulate all non-geographic numbers other than mobile numbers

According to the general interpretation of NRAs and the EC so far, interconnection to VAS has not been included in the termination market definition and is generally considered a call origination service, mostly unregulated in MS.

If Eurorates would be applied to all non-geographic numbers other than mobile numbers, operators which provide call origination services may also be affected by regulation in different

[9] Under the remedies imposed in call origination market (2/2007) or under dispute among operators.

[10] Cf. European Commission (2014): Commission Staff Working Document, Explanatory Note, SWD (2014) 298, p. 29. "As a consequence, the terminating operator is generally facing a competitive constraint, being presented with a risk that its service provider end customer can switch to another network operator in case of an increase of termination rates, causing a loss of revenue, unless there are objective and insurmountable obstacles to switching terminating operator."

[11] Cf. European Commission (2014): Commission Staff Working Document, Explanatory Note, SWD (2014) 298, p. 29: "…the mechanics of termination of calls to non-geographic numbers for the provision of value added services would rather argue in favour of excluding this type of termination from the relevant market."

ways, which is explained in detail in the next section. In this regard, BEREC would like to point out that the current and the revised RRM does not consider the market for call origination to be subject to regulation.

In addition, Article 75 EECC only mentions mobile voice termination or fixed voice termination services to be regulated by the DA. Since call origination services/VAS are not mentioned under Article 75, in BEREC's view no Eurorates can be applied to those services. Imposing Eurorates in this event would possibly lack a legal basis and exceed the mandate of Article 75.

Potential negative side effects with regards to VAS

In BEREC's view there is also the risk of possible negative effects on billing of VAS since several fees meet together (i.e. end-user fee, origination fee, payment to service provider and the regulated Eurorate FTR etc.).[12] The effect of the regulated Eurorate FTR on these fees remains unclear, obliges all operators in the market to revise how the DA affect their commercial agreements, giving rise to regulatory uncertainty favouring disputes that could end up in NRA intervention. BEREC notes that in case of VAS, all fees are usually billed together for the end-user (calling subscriber) as one VAS-fee. It is unclear how the Eurorate FTR would affect this billing/the possibility to bill all services together.

- In many MS, wholesale prices charged to VAS are based on a charging mechanism different from the termination rate. In fact, what is charged is a wholesale origination rate, which is generally not regulated. In most wholesale agreements charges are negotiated on a time-based billing (e.g. per second or per minute) while the retail charges can be billed on a per call basis or a combination of both[13]. There may be disputes if the retail charge is billed on a per call basis and the Eurorate FTR applies on a per minute basis. This results in operators having to pay wholesale termination charges for the whole duration of a customer's call, bearing a risk of losses.

- Operators could bilaterally agree that Eurorate FTR is included in their current interconnection payments, in order to avoid any disruption. However, as NRAs have the mandate to monitor the application of Eurorate, this could impact existing billing arrangements. For example, in case of interconnection to premium rate services, it would be required to distinguish the termination rate for conveyance of the call to the terminating operator from the value-added service component for the VAS provider.

- Application of Eurorate FTR to free-phone services will likely create confusion, as currently no termination charge is invoiced, and could result in disputes regarding

[12] Cf. Draft SWD Eurorates on p. 16.

[13] BEREC input on EC's request for the preparation of the legislative proposal for the new roaming regulations. BoR (20) 131. P. 28.

wholesale origination rate, which is currently unregulated in most MS. In case of dispute, NRAs could intervene, but their decisions could risk to be heterogeneous among MS.

The Eurorate FTR application to VAS will further impact interconnection agreements and billings systems with both intra-EU and with non-EU countries. In addition, the markets for call origination may be still subject to dedicated regulation in certain MS. In BEREC's view there is a risk that regulation of call origination services at national level and the DA can contradict each other.

VAS in the context of roaming regulation

As stated in June 2020 BEREC input for new roaming regulations[14], VAS are neither legally defined in the current European legislation framework nor consistent and differ in almost all MS in terms of definition, numbering, services offered and prices. In the report BEREC pointed out that there is a lack of transparency both at the wholesale and retail level related to calls to VAS in roaming situations, leading to an unpredictable situation for end-users and mobile operators and in some cases to bill shocks.

BEREC would like to take advantage of this opportunity to highlight that there is a need for more clarity in the roaming regulation with regard to VAS, under a broader regulatory approach, that takes into account the overall legal framework.

Based on a joint EC/BEREC survey among MNOs, MVNOs and NRAs that was carried out in April 2020, BEREC assessed a number of transparency measures that could be considered, such as a European database for VAS numbering ranges, the publication of wholesale charges for VAS, implementation of bill shock warning, and even a justified blocking of roaming calls to some VAS.

One of the proposed measures that was firstly mentioned in June 2019 BEREC Opinion on the functioning of the roaming market[15], was the extension of wholesale termination rates regulation to also cover VAS[16].

The application of the regulated termination rates to VAS numbering ranges could theoretically limit the risk of unpredictable wholesale high rates to some numbering ranges where the high termination rate would not be justified by the additional service provided. However, this measure would not be effective for all VAS, such as premium rate or directory services, where a higher rate is applied by the visited network because of the remuneration charged by the service or content provider. This has been raised in the last BEREC input on the EC request for the preparation of the legislative proposal for the new roaming regulations, which further

[14] BoR (20) 131, page 24.

[15] BoR (19) 101.

[16] BoR (19) 101, page 6 "making it compulsory to apply the wholesale termination rates to all numbering resources for the conveyance part of the calls".

includes the possibility to extend the roaming wholesale cap to cover "*origination, transit and the respective termination rate applied at the domestic level for calls to these VAS numbers*"[17] for those VAS services that entail higher termination rates.

Moreover, as already mentioned regarding the application of fixed Eurorate to VAS numbering ranges, the charging mechanism for calls to VAS at national level is different from the termination rate. In fact, what is charged by operators is a wholesale origination rate, which is generally not regulated. This has also been pointed out in last VAS conclusions in BEREC input to roaming (BOR (20) 31): "*However, wholesale prices applied to VAS at national levels are not always regulated and as such any intervention at the roaming level will impact the national markets. This would be especially important for essential VAS like services of social value. This should be carefully considered in light of any other measures.*"

As a conclusion, BEREC would like to emphasize that, at this stage, there is not a wholesale solution which fits all the possible issues regarding unexpected high rates applied to VAS in roaming scenarios. On the one hand regulating termination rates for VAS would not resolve all the problems of lack of transparency and bill shock when accessing VAS in roaming and on the other hand BEREC warns, because of all the reasons already exposed, about the drawbacks of the DDA general application of fixed Eurorates to all non-geographic numbers other than mobile numbers, including also VAS numbering ranges. The issue of lack of transparency and high prices for roaming subscribers should be further assessed considering all alternative measures in a broader scale.

Inclusion of numbers used for M2M services

BEREC would like to highlight to the EC that some Machine-to-Machine (M2M) business models in some MS also make use of non-geographic numbers other than mobile numbers.[18] There are MS (e.g. Spain and the Netherlands) where specific M2M numbering ranges are assigned to both fixed and mobile operators for voice connectivity of M2M equipment. In these cases, voice termination interconnection agreements are in place, applying FTR or MTR depending on the terminating network operator.

However, BEREC wants to point out that the conditions differ between MS. In some MS, (e.g. Germany) dedicated M2M numbering ranges do not exist. M2M business models often use normal numbering ranges if they use telephone numbers at all. If they use normal telephone numbers, it is difficult if at all possible for originating operators to identify that a call is an M2M connection in these cases. There are also hybrid M2M-Cases, for example eCall (M2M communications with the possibility of voice communication in case of an accident).

[17] BoR (20) 131, page 34.

[18] Most mobile M2M Business models use IMSI numbers and data plans (not E.164 telephone numbers which are used for voice and are in the scope of the DA), see in detail: BEREC Report Enabling the Internet of Things, BoR (16) 39, page 14.

Due to the different conditions in each MS, BEREC is of the opinion that the DA should not differentiate interpersonal voice calls and M2M-Services which use telephone numbers (E.164 numbers) for M2M voice communications. In BEREC's view termination rates applied should in principle also be based on the number called (mobile numbers or fixed numbers and non-geographic numbers other than mobile numbers) in these cases.

However, BEREC wants to point out that M2M services with dedicated non-geographic numbering ranges other than mobile would be charged with Eurorate FTR, as far as termination monopoly under CPP pricing regime is assessed. As most of underlying networks providing M2M services are mobile networks, there could be a problem of cost recovery in certain cases. Given this and the potential variety of M2M services with non-geographic numbers other than mobile numbers, BEREC suggests that NRAs should be able to decide which regulatory treatment (fixed or mobile termination) should be applied in those cases[19].

In any case, if the latter proposal is not considered by the EC, it should be at least possible for NRAs to intervene when there are disputes regarding M2M services with dedicated non geographic numbering ranges other than mobile to deal with instances of under and over compensation, just as with hybrid services[20].

Conclusion

BEREC is of the opinion that the DA should not include a generic obligation to impose Eurorates regarding termination to non-geographic numbers other than mobile numbers, but only include an obligation for services with "*non-geographic numbers other than mobile numbers*" to be bound by the fixed Eurorate, when there exists a risk of excessive prices (i.e. termination monopoly situation) for wholesale termination services, and this happens under the CPP pricing interconnection regime.

In BEREC's view Recital (6) of the DA should be revised accordingly, it should be clarified that origination services/VAS are out of scope of the DA.

BEREC notes that there may be a few services with non-geographic numbers other than mobile numbers, that are genuine termination services and for which a price cap would be justified (e.g. nomadic numbering ranges, numbers for emergency services[21]). BEREC is of the opinion that NRAs have already identified cases in their current termination market regulation and can therefore determine the number ranges which should be subject to the rates in the DA.

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[19] This should be without prejudice to any conditions imposed by NRAs prohibiting or limiting the use of interpersonal voice communications services in specifically dedicated M2M number ranges.

[20] Cf. Draft SWD Eurorates on p. 21.

[21] BEREC notes that the wholesale regime for these emergency telephone numbers varies between MS. BEREC is of the opinion that if a wholesale termination charge is applied under the CPP-regime at national level, the DA and the Eurorates FTR should be applied in these circumstances.

3 Implementation

The DDA sets out a single maximum Union-wide mobile voice termination rate at the level of EUR 0.20 cent per minute and a single maximum Union-wide fixed voice termination rate at the level of EUR 0.07 cent per minute. These final cost-efficient rates:

- are based on country-specific input from EU operators,
- are based on the results of the cost models following the principles, criteria and parameters defined in Article 75 and Annex III of the Code,
- are taking as a reference the highest estimated cost of providing wholesale termination services,
- include small security margin to account for possible inaccuracies in the cost models and future uncertainties that could not be fully reflected in the model.

BEREC agrees with the EC's approach of setting a single maximum Union-wide voice termination rates in accordance with the above principles.

Pursuant to art. 75 (b) of the Code, when setting the Union-wide voice termination rates for the first time, the EC must take into account the weighted average of efficient costs in fixed and mobile networks established in accordance with the principles provided in Annex III, applied across the Union.

The DDA also provides for the implementation of the maximum fixed termination rates and the maximum mobile termination rates. In the case of fixed termination services, for 2021 only, in MS with current national TR above EUR 0.0875 cent per minute, the DDA proposes that the maximum fixed termination rates are the current national ones reduced by 20%. Finland and Poland[22] are subject to a different implementation and the TR to be applied in these MSs during the transitory period would be the highest FTR which relies on a pure BULRIC model. In the remaining countries the rate is the efficient rate of EUR 0.07 cent per minute.

In the case of mobile termination services, the EC argues that it is appropriate to introduce a three year glide path whereby the (cost efficient) single maximum Union-wide mobile voice termination rate (EUR 0.2 cent per minute) is reached in 2024. The glide path steps are the following ones:

- EUR 0.7 cent per minute for the first year (up to 31 December 2021);

[22] Poland and Finland have current FTRs which are way above the rates in other MS and they are not based on a pure BU-LRIC model or benchmarking. In BoR (19) 120 and BoR (2013) 171 BEREC issued opinions regarding the review of the wholesale markets for call termination on individual public telephone networks provided at a fixed location, respectively in Poland and Finland.

- EUR 0.55 cent per minute for the second year (2022);
- EUR 0.4 cent per minute for the third year (2023) and
- EUR 0.2 cent per minute as the final single maximum Union-wide mobile voice termination rate in the fourth and fifth year (2024 and 2025).

The glide path rate for any given year is mandatory for MS with current termination rates above the particular glide path rate. As such, the DDA is so that MS with current MTRs at a level below the glide path rate of any year, shall maintain such national rates until the glide path rate is below their currently applied rate.

3.1 Current national rates and exchange rate treatment

BEREC notes that in some cases the current termination rates which are referenced in the DDA and SWD are outdated. This matters for the implementation of the fixed and mobile maximum termination rates, since this implementation is status quo dependent. Therefore, it is indispensable that the EC considers the latest known rates for all MS before the DA comes into force, those that are closer in time to the entry in force of the provisions[23]. Articles 4 and 5 in the DA should then be updated taking into consideration the updated national MTRs and FTRs.

The maximum FTR and maximum MTRs in the DDA are expressed in Euro implying that, for MS with other currencies, maximum termination rates in national currencies will fluctuate with exchange rates. BEREC agrees with the yearly update of the maximum termination rates in local currencies as explained in Article 3 of the DDA. This update will ensure that all countries have the same maximum termination rates in Euro and is in line with the TSM regulation[24], the BEREC intra-EU Guidelines[25] and with the roaming regulation[26].

A second point refers to the Euro values of current national TRs for countries with currencies other than the Euro. The DDA includes these values but it is not clear which exchange rates were used to obtain those. This is important since, for example, the current MTR in Euro determines the glide path for each country. BEREC suggests that the EC should use the same method for all countries (periods of reference and averaging), and that the conversion should be with the latest exchange rates possible and that it should be with the same exchange rates which will be used in March 2021 to calculate the new termination rates in national currencies (see Art 3 2 in the DDA). This is in order to avoid that, as a consequence of

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[23] For example, if it is known that for a given country rates will change in January or February of 2021, these rates should be considered in the DA.

[24] Regulation (EU) 2015/2120 amended by Regulation (EU) 2018/1971, (see Article 5a, 5).

[25] BoR (19) 35 (see paragraph 23).

[26] Regulation (EU) 531/2012 (see Article 1, paragraphs 6 and 12).

fluctuations in exchange rates, in countries with currencies other than Euro and with low national MTRs relative to the threshold of EUR 0.7 cent per minute, the MTRs in national currencies vary once the Eurorates are implemented, relative to the MTRs in the beginning of 2021. These updated rates in Euro should be used to determine the glide path.

Conclusion

BEREC finds that it is indispensable that the EC considers the latest known rates for all MS before the DA comes into force, those that are closer in time to the entry in force of the provisions and that those rates are then used to update Articles 4 and 5 in the DA.

3.2 Implementation of maximum fixed termination rates

At present, FTRs across the Union vary considerably, despite the fact most NRAs use pure BU-LRIC models to set FTRs or benchmarks (consisting of pure BU-LRIC rates in other MSs). Two countries (Finland and Poland) use fully distributed/allocated cost models.

Looking at the current FTRs applied across the EU-27 MS, these are in the range of EUR 0.0272 – 2.8827 cent per minute[27]. For 25 MS applying pure BU-LRIC models or using benchmarks, the simple average rate is EUR 0.0817 cent per minute. BEREC agrees with the position of the EC that the current FTRs and calculated average are the reference points for establishing the implementation mechanism of the single maximum Union-wide fixed voice termination rate.

The DDA sets out a single maximum Union-wide fixed voice termination rate at the level of EUR 0.07 cent per minute. This estimated efficient cost rate is close to the current simple average of FTRs (EUR 0.08 cent per minute, excluding Poland and Finland) therefore it is not necessary to apply a glide path.

On the other hand, based on the current levels of fixed termination rates in certain MS and the level of the single maximum Union-wide fixed voice termination rate set in the DDA, BEREC finds it justified to grant a transitional period to some MS. The EECC foresees the possibility of allowing for a transitional period of no longer than 12 months in order to allow adjustments in MS where this is necessary on the basis of rates previously imposed (Art 75(e)). This solution ensures a smooth transition from pre-existing termination rates to the Eurorates.

The DDA approach is in line with BEREC opinion presented in the public consultation. BEREC agreed that a transitional period may be necessary, depending on the final level of the single maximum Union-wide voice termination rates compared to current rate levels applicable in some MS. Since several MS have FTRs above the Eurorate, the transitional period proposed

[27] BEREC, Termination rates at European level, January 2020.

in the DDA should be allowed. The purpose of a transitional period is to avoid unwanted disruption in certain MS, as a result of previously existing rates.

However, BEREC wants to note that for two MS, with the highest fixed termination rates (Poland and Finland), the DDA proposal results in significant rate reductions in 2021 and may have a large negative impact on operators. The rapid and drastic drop in fixed termination rates for Poland and Finland may not meet the objective of providing an appropriate period for operators to adjust to changes in their cash-flows and revenue streams. For this reason, the EC should assess the impact of rate reduction on fixed network operators in these MS.

Conclusion

BEREC finds it justified to grant a transitional period to some MS and considers that the DDA approach is in line with BEREC opinion presented in the public consultation.

3.3 Implementation of maximum mobile termination rates

Looking at the present MTRs applied across the EU-27 MS, these are in the range of EUR 0.1700-1.1400 cent per minute. The simple average of MTR at the EU level (only EU MS) stands at EUR 0.7251 cent per minute, whereas the weighted average at EU level is estimated at EUR 0.7725 cent per minute[28]. Most NRAs within the Union rely on a pure BU-LRIC cost model[29].

It should be indicated that the final cost-efficient mobile termination rate, estimated by the cost model at the level of EUR 0.20 cent per minute, is much below the current average level of MTRs and rates currently applied in some MS. For this reason, a good solution is applying a glide path as it provides an effective tool to smoothen the transition to reach the estimated efficient cost level.

Taking into account the current MTRs and calculated averages as the reference points for establishing the implementation mechanism of the single maximum Union-wide mobile voice termination rate, BEREC agrees with EC's position that the glide path is a relevant tool for implementing the single maximum Union-wide mobile voice termination rate.

This approach is also consistent with BEREC opinion presented in the public consultation on the scope of the DA. BEREC agreed that the need for a glide-path would depend on the

[28] BEREC, Termination rates at the European level, January 2020.

[29] The Estonian, Latvian, Lithuanian and Romanian NRAs have not developed specific pure BU-LRIC cost model, but use benchmarks (consisting of pure BU-LRIC rates in other MSs).

estimated level of efficient cost and the difference between the weighted average of maximum termination rates across the EU and the estimated level of efficient cost.

BEREC also highlighted that the glide-path should ensure that MS with MTRs below the designated thresholds would not face a "yo-yo effect"[30]. This objective is achieved by the idea underlying the DDA provisions. Given the fact that a number of MS apply lower regulated MTR than the maximum rates proposed for 2021, 2022 and 2023, and in order to avoid unwanted increases of MTRs in such countries, the DDA establishes that MS with current MTRs at a level below the glide path rate of any year, shall maintain such national rates until the glide path rate is below their currently applied rate.

BEREC supports the views set out in the public consultation that the duration of the glide path should be at most three years. This period should give proper time so that operators can adjust their prices to the estimated level of efficient cost. BEREC considers that a very short glide path causes larger annual reductions in rates, which would significantly affect the situation of operators in the context of the necessary adjustments, particularly financial ones (i.e. revenue adjustment, investment plan, etc.). On the other hand, the longer the glide path, the more significant the risk of prolonging a rate higher than the level of efficient costs for an excessive or unnecessary period of time, to the detriment of consumers and of operators with negative termination balance.

To this end, with the current information, BEREC recommends an implementation of the MTR glide path as provided in the DDA and concludes that the 3-year glide path approach, presented in the DDA is appropriate, for the following reasons:

- this approach ensures an overall smooth transition to the target maximum rate, which is significantly lower than current average MTRs,
- the length of the glide path provides an appropriate period for operators to adjust to changes in their cash-flows and revenue streams, which avoids large disruptions
- it is a balanced solution with regard to the duration of the glide path considers, on one hand, implementing the rate based on the estimated efficient costs as soon as possible to achieve the objectives of Article 75 EECC and, on the other hand, ensuring a smooth decrease for those MS with high regulated current MTRs.

As regards the starting point for the glide path, BEREC considers that the level close to the simple average of current mobile termination rates is the right solution. However, BEREC notes some of the MTRs considered in the DDA are outdated and will need to be updated (see section 3.1). Given this, it is likely that the simple average of the updated MTRs decreases. The EC should thus consider the implementation of the maximum MTRs in Europe on the light of the updated average. For example, if this updated average for MTRs is close to

[30] This is a situation where by as a consequence of the imposition of the glide path, for countries with low national MTRs, maximum MTRs increase in the initial periods and decrease afterwards.

EUR 0.6 cent per minute, this would question the reasons to have a first year glide path step at the EUR 0.7 cent per minute cap (2021) and a second step at the EUR 0.55 cent per minute cap in 2022.

In any case, as explained in Section 3.1, the DA should use the final updated MTRs, which may be the rates for January and February 2021 if those are already defined in an NRA decision. Otherwise, some MS may face a “yo-yo” effect. Suppose that in one MS MTR in 2020 is EUR 0,75 cent per minute and that this national rate will decrease to EUR 0,6 cent per minute in 2021 and that the value considered in the DA for the starting point of the glide-path is the one in force in 2020 (EUR 0,75 cent per minute). In this case, following the national regulation, the MTR of EUR 0,6 cent per minute will entry in force in January 2021, while during 2021 (March or at the latest May) the MTR will raise to EUR 0,7 cent per minute determining a “yo-yo” effect. In this case, it is unclear if the MTR already defined by the national final decision will not enter into force or it will and in second case if it will be substituted by the maximum Union-wide termination rate or not.

Conclusion

BEREC indicates that by taking the highest observed cost in the chosen scenario of the Axon model for the period 2021-2025, the proposal presented in the DDA in the context of the single maximum Union-wide mobile voice termination rate, ensures cost recovery for all operators within the Union throughout the applicable years of the single maximum Union-wide voice termination rates.

BEREC considers that, given the current data, a three-year glide path rightly balances the need to, on the one hand, implement the rate based on the estimated efficient costs as soon as possible to achieve the objectives of Article 75 EECC and, on the other hand, to ensure a smooth transition for those MS with high regulated current MTRs.

BEREC also considers that the DA should use the final updated MTRs, which may be the rates for January and February 2021 if those are already defined in an NRA decision.

3.4 Allowed period for operators to prepare for the implementation of the DA

The DA enters into force two months after adoption, a period in which the European Parliament and the Council can object to the DA. After this objection period, the DDA proposed an additional two month period before the maximum termination rates become binding. It is envisaged that this two-month period will be used by operators to adjust and prepare for the new Union-wide maximum fixed and mobile voice termination rates.

The implementation of the MTR (3y glide path) and the FTR (transitional period in 2021 for some countries) requires that the maximum termination rates in MS change at the beginning of certain periods (calendar years after 2021 and given dates in 2021).

With reference to the two month period that the DDA allows for operators to prepare for its implementation, it must be considered that operators have already been consulted by the EC on the DDA, and that the DA will be published by December 2020, so that any preparations for its entry into force can start quite early, before its approval by the European Parliament. Because of this, BEREC agrees with the 2-month period and suggests that the DA should go into force the 1st day of the 3rd month after adoption of the DA.

Note that by suggesting this, BEREC is also advising that the entry into force must happen on the first day of a given month, which is required since the billing systems of operators take place on a natural month basis, as this would prevent the need to develop specific billing exceptions for a single month.

Conclusion

BEREC suggests that the DA should enter into force the 1st day of the 3rd month after adoption of the DA.

4 Incoming calls from outside the EU

The DDA explicitly states that the regulated rates for voice termination should apply only to calls originating and terminating in the Union. The inclusion of calls originated in countries outside the Union where the termination services are not regulated according to cost-efficient principles or where the termination rates charged for incoming calls originating in the Union are higher than the single maximum Union-wide termination rates would risk undermining the objectives of the introduction of single Eurorates. Indeed, the combination of very low (regulated) rates for terminating a call in the Union and high rates for terminating a call outside the Union would have a negative impact on the cost structure of operators in the Union, and, as a consequence on retail tariffs applied in the Union. Moreover, asymmetric rates could distort the competition, due to the different competitive conditions faced by different operators in the Union. Therefore, the EC concludes that these effects would hinder the objectives of the introduction of single maximum Union-wide termination rates, which aim to promote the integration of the single market removing competitive distortions among operators.

However, the EC acknowledges the relevance of a transparent, non-discriminatory and open application of the single maximum Union-wide termination rates and of ensuring the proportionality of the exclusion of calls originated outside the Union from the scope of the DA. Therefore, the EC identifies two criteria in order to establish whether EU operators have to abide by the Eurorates when charging for terminating calls that originate outside the Union. These criteria are:

- Operators from third countries charge termination rates not exceeding the Eurorates for calls originating in the Union and terminating in their network.
- The termination rates in third countries are regulated based on costing principles equivalent to those set out in Article 75 EECC. The list of these third countries which meet such requirements should be included in the DA as an Annex.

Other than this, the DA provisions do bind EU operators when setting termination rates to calls incoming from third countries to numbers pertaining to the national numbering plans of EU MS.

BEREC respects and appreciates the approach of the EC to find a WTO-compliant regulation of termination rates in the DA and appreciates that the EC has taken consideration of this important principle. BEREC agrees that criteria must be identified in order to determine whether the maximum Union-wide termination rates should apply for calls originated from countries outside the Union[31]. It is critical that criteria to be used do not unreasonably restrict the ability of European operators to respond to high termination rates in countries outside the Union, generating at the same time the conditions for lowering prices of calls originated within the Union and terminated outside and ensuring, at the end, benefits for the end-users. Moreover, the criteria to be used should limit the ability of the European operators to unreasonably raise termination rates versus operators already applying termination rates for calls originated in the Union which are lower or equal to the maximum Union-wide termination rates.

4.1 Missing or erroneous CLI (calling line identification)

As the call origin may define whether the Eurorates apply or not (e.g. originating from numbers pertaining to the national numbering plans of countries outside the EU and terminating to numbers pertaining to the national numbering plan of a MS in the EU would generally be treated differently from calls originating from and terminating to numbers pertaining to the national numbering plans of MS in the EU), it is important for EU operators to be able to identify the country of origin of the caller.

For operators to be able to correctly identify the originating country in order to send correct invoices and to avoid disputes between operators, it is extremely important for operators to receive a valid Calling Line Identification (CLI) assigned to every incoming call. CLI is the common method used in order to identify the origin (through the country code) of an inbound call via the signaling information associated to that call. In particular, the country of origin of the caller is identifiable via the country code linked to the CLI.

It is therefore of utmost importance that a valid CLI and associated country code is correctly handed over to terminating operators in order to allow them to correctly bill incoming calls.

Based on the experience from MS currently regulating the application of national termination rates to calls originated in non-EU countries under specific circumstances, operators use the CLI to identify the non-EU country/provider. However, there are cases where the CLI is missing or is not correctly provided (intentionally or not). There have been cases of fraud

[31] BEREC fully agrees with Art 1 (4a) in the DDA but explains why it would consider an alternative to Art 1 (4b) in sub-section 4.3.

where the CLI has been modified, in order to be charged with the regulated rate and, generally, cases where the terminating operator was not in a position to identify the origin of a call at all.

BEREC stresses therefore that the CLI should be identifiable for every incoming call. It must therefore be clear that originating and transit operators will have to be transparent to the terminating operators on the CLI.

BEREC observes there is no provision in the DDA about the consequences for this obligation in case the CLI is missing, erroneous or has been modified. BEREC insists that in any case the EC adds a reference in the DA that in case no/no valid or a fraudulent CLI was received for a call, the European operator is free not to apply the respectively single maximum fixed or mobile termination rates set by the DA.

With this proposal, BEREC aims to avoid fraudulent calls or routing abuses which would negatively impact EU operators.

Conclusion

In order to avoid fraudulent calls or routing abuses BEREC stresses that DA should incorporate a reference that clarifies that in those cases where a no/no valid or a fraudulent CLI is received for a call, the European operator is free not to apply the respectively single maximum fixed or mobile termination rates set by the DA.

4.2 Applicability of Art. 1 (4a)

BEREC agrees with Art 1 (4a) in the DDA. However, BEREC points out that usually international calls are routed through international carriers, and that currently in these occasions, the originating EU operators are mostly unaware of the termination rates applied by the relevant terminating operators. For example, existing contracts establish that EU operators pay a unique fee per minute to the carriers, which includes transit and termination services, or may even bundle under a unique fee calls to different countries outside the EU (for example, on the basis of rankings of termination fees in third countries). Moreover, it is also common that several transit operators, one after another are involved in the delivery of these services. Sometimes international carriers do not know in which third country network a certain geographic or mobile number is connected (e.g. caused by number portability, etc.).

All of this seriously impairs the widespread applicability of Art. 1 (4a) as it is indispensable that in arguing the applicability of this provision in negotiating contracts with European operators, international carriers (and in general, any negotiating entities) provide verifiable information about the concerned third country operators’ termination rates.

Conclusion

BEREC fully agrees with Art 1 (4a) in the DDA, but points out that there are implementation issues that seriously impair its widespread applicability as it requires that in arguing the

applicability of this provision, international carriers (or any negotiating entities) provide verifiable information about the concerned third country operators' termination rates.

4.3 Discussion of the Art. 1 (4b)

BEREC supports the idea of allowing all incoming calls from third countries with equivalent termination rates to fall under the DA. This approach is transparent, in so far the Annex (referred to in Art 1 (4b ii)) is public and available to all concerned.

a.) Criteria to take into consideration to include a country in the Annex

BEREC's and NRAs' experience with implementing a common "pure-LRIC" cost accounting approach across all MS shows that the path to a common solution is lengthy and laborious. The experience of the EC also shows that two attempts were necessary (TERA, AXON) until cost accounting models were sufficiently specified to be available for the fixed network as well as the mobile network. Moreover, this European experience shows that even if the same cost model approach (even the same software implementation) has been used in different countries, very different results can be achieved. Just looking at the current MTR a difference of approximately 600% can be found from highest to lowest[32].

Therefore, BEREC concludes that it will not be easy and uncontentious to establish the equivalence of third country termination services costing methodologies with those described in Article 75 and Annex III of the EECC. On top of this, having observed the substantive differences in national MTRs in the EU (when they are all derived from common cost principles), BEREC considers that the third country termination rates applying to calls incoming for the EU should be the most valued criterion for the inclusion of a third country in the DA annex.

In fact, BEREC suggests that the EC considers (as a replacement for Art 1 (4 b i)) the possibility to include countries in the Appendix only if these third countries explicitly submit to the Eurorate regime (this is, if these countries provide for all terminating operators to charge termination rates at the Eurorate level or below for all incoming voice calls from the Union).

This would be a simple opt-in list, based on a criterion which is simple and transparent to establish, in comparison to the complex assessment of third country costing methodologies. The BEREC proposal should also meet the requirements of the WTO/GATS and is less burdensome than the DDA proposal: there would be no need to require and assess extensive information about costing methodologies from third countries or to update the Annex every time such methodologies would change. By signing to the (opt-in) Annex, the relevant authority in the third country should be committing to enforcing termination rate levels at the Eurorate levels or below for calls incoming from the Union.

[32] BEREC, Termination rates at the European level, January 2020.

b.) Need for consultation on the EC analysis of the third country cost models for termination services

BEREC points out that if the EC prefers not to consider the aforementioned BEREC proposal, and would rather conclude on the Annex membership by investigating whether the TRs for calls originating in the Union and terminating in a third country are regulated in accordance with LRIC principles (see Art 1 (4 b i)), then it would be indispensable that the EC provides for some form of consultation on the analysis of the third country cost models before those are included in the Annex, at least by resorting to a BEREC opinion.

c.) Need to clarify procedural issues to deal with current uncertainties regarding the constitution of the Annex

Finally, regardless of the types of considerations made to include a country in the Annex, BEREC has some concerns on the lack of transparency at this stage on the procedural issues regarding the Annex and recommends that the EC clarifies those in the DA or its recitals. From BEREC's point of view, the implementation of the Annex raises many questions, for instance: How does a third country get on the list? How often is the Annex updated and where is it published? How much time will the EC require to analyse requests?

In the case the Annex is conformed as established in the DDA (Art 1 (4 b i)) there are additional questions: Who verifies the necessary information on the cost accounting approach in the third country? What requirements must be met and what evidence must be provided by that country? How would the EC deal with differences in network elements that are taken into account in the cost accounting model? Would the EC update the Annex if there are changes in the cost models? How would the EC know/learn about those changes?

BEREC recommends that the EC provides some clarity on these procedural aspects in the DA or its recitals, so that stakeholders and NRAs know what to expect and there is less uncertainties with respect to the inclusion of countries in the Annex. In particular, BEREC is of the opinion that the DA should include a clause that states that the EC is responsible for updating the Annex, as soon as the conditions required to be in the Annex are no longer satisfied. These conditions are:

(i) If the opt-in annex is used: the country informs that it no longer subscribes to the opt-in annex or it is established that the operators in the country set termination rates above the required level for incoming calls from the EU,

(ii) If the DDA criteria is used: the costing methods used in the third country change and no longer satisfy the requirements in Art 75 and Annex III in the EECC or it is established that the operators in the country do not set TRs in line with the levels established in the national regulation.

In addition, whenever the EC updates the Annex by adding or delisting countries, the EC should establish a transitional period for the implementation of those changes so that operators would have time to implement those in their billing systems and contracts.

d.) BEREC request to complete Annex with a section indicating country codes for the EU

Some European countries have overseas territories which are part of the EU. However, these territories use a specific country code rather than the Country one. BEREC suggests that for the sake of transparency the Annex includes as well a separate section with a list of all the country codes that are part of the EU, so that those are known to every operator.

Conclusion

BEREC suggests that the EC considers the possibility to include countries in the Appendix only if third countries explicitly submit to the Eurorate regime (this is, these countries provide for all terminating operators to charge termination rates at the Eurorate level or below for all incoming from the Union). In BEREC's view this annex should also include a list of all the country codes that are part of the EU.

BEREC finds it necessary that the EC provides clarity on the procedural aspects regarding the Annex in the DA or its recitals. In particular, BEREC is of the opinion that the DA should include a clause that states that the EC is responsible for updating the Annex, as soon as the conditions required to be in the Annex are no longer satisfied.

Finally, if Art. 1 (4b) in the DA considers the inclusion of countries in the Annex according to their TR costing methodologies, in BEREC's view it becomes indispensable that the EC provides for some form of consultation on the analysis of the third country cost models before those are included in the Annex, at least by resorting to a BEREC opinion.

5 Non-price obligations

Regarding current non-price obligations, the DDA has stated that non-price obligations currently imposed by NRAs fall outside the scope of the DA. BEREC understands that the DA reflects only price obligations, but it is necessary that as part of the Act; articles or recitals; the EC clarifies that the non-price obligations that are currently imposed by NRAs remain applicable since the DA focuses on the price obligations only.

More generally, BEREC wants to highlight that current NRAs' practices in markets 1 and 2 of the 2014 Recommendation on relevant markets lead to a full set of both price and non-price remedies. The DA focuses on a single maximum Union-wide mobile and fixed voice termination rate, and it is therefore only aimed at addressing possible pricing abuse of an SMP operator.

BEREC considers that non-price remedies (especially access, transparency and non-discrimination) could still be, in many cases, necessary to ensure effective competition in markets downstream of the termination markets, whether they are imposed through symmetrical or asymmetrical decisions. It is therefore essential for NRAs to be able to easily and effectively tackle in an efficient way non-pricing issues that may affect competition and investment. This is outlined and developed in detail in the BEREC opinion on the European Commission's draft Recommendation on relevant product and service markets susceptible to ex ante regulation.

Conclusion

BEREC finds it necessary that as part of the DA; articles or recitals; the EC clarifies that the non-price obligations that are currently imposed by NRAs remain applicable since the DA focuses on the price obligations only.

BEREC develops its views on non-price remedies in its opinion on the European Commission's draft Recommendation on relevant product and service markets susceptible to ex ante regulation.