

To: Body of European Regulators for Electronic Communications
PC_Wholesale_GLs@berec.europa.eu

15 June 2022

Re.: Public consultation on the draft BEREC Guidelines on the application of Article 3 of Regulation (EU) 2022/612 of 6 April 2022 on roaming on public communications networks within the Union (Guidelines)

Dear Madams, Sirs,

MTX Connect S.à r.l. (**MTX**) is a Luxembourg based telecommunications start-up in a form of full MVNO. The regulated direct wholesale roaming provisions are crucial for all small operators and MVNOs in particular. Previous frameworkⁱ had considerable reservations with respect to wholesale roaming access that particularly affected MVNOs. The newly introduced Roaming Regulationⁱⁱ together with the Codeⁱⁱⁱ did not resolve the problematic issues. Besides, the proposed Guidelines seem to ignore the existing constrains as well.

In the present opinion on the draft Guidelines, MTX would like to raise the BEREC's attention to certain matters that either remain unresolved by the new legislation or demand explicit clarifications.

For the ease of reference, the section names and numbering used in our contribution follows the same reference system as used in the Guidelines. Those matters that are not covered by the draft Guidelines are marked as "Suggested Guidelines".

2. Wholesale roaming provisions.

Guideline 1. Entry into force.

The last paragraph of Guideline 1 states that the current access agreements shall be amended in case they are incompliant with the Roaming Regulation. We suspect that this guideline may be interpreted in different ways.

As it was exemplified in 2017, after implementation of Regulation (EU) 2017/920^{iv}, many access providers took the newly introduced access regime as an opportunity to terminate the existing access agreements instead of amending them. The contractual termination right was used for those purposes. In the outcome, the access seekers had to undergo the

whole negotiation process all over again as was required by Article 3 of Regulation 531/2012. Thus, a mere amendment into the current legal framework forced access seekers to spend time and administrative resources to get the new wholesale roaming access, while the access providers, inter alia, got the chance to renegotiate other terms of access agreements, not related to the changes required by Regulation (EU) 2017/920.

In other words, there is a great risk that access providers would consider the implementation of Roaming Regulation as an opportunity to amend the existing agreements through termination and renegotiation of new access terms.

Suggested Guideline. Access through unregulated entities.

The draft Guidelines suggests a detailed identification of access seeker (Guideline 4), limiting the circle of potential candidates to MNOs and full MVNOs only; it also proposes the access providers to collect various information on the access seeker before, during and after the signature of a wholesale access agreement (Guidelines 7-9 respectively). However, nothing is said about identity, rights and obligations of a contractual party on the side of the regulated wholesale roaming access provider.

Big operators having presence in several countries through their subsidiaries or partnerships may concentrate their roaming business activities in one hand (and place), be it a department within the same undertaking or a separate special purpose entity (SPE). Such outsourcing is time and cost efficient and likely increases the productivity of the whole group. When dealing with such SPE an access seeker may increase its network coverage to several countries by entering only one agreement. In commercial wholesale roaming access such outsourcing seems to be a win-win solution for all parties to it. But in regulated wholesale roaming access there are several issues that require straightforward explanations on the rights and obligations of all parties subject to such arrangement, as well as possible dispute resolution solutions (on this latter query see Suggested Guideline in section 5 below).

A notable example of outsourcing roaming negotiations is Vodafone Roaming Services Sarl (VRS), a company in Vodafone group that manages all Vodafone roaming business, including regulated wholesale roaming access arrangements. VRS is a Luxembourg company having “*wireless telecommunications activities*”^v as the main object of the company’s business. At the same time, VRS an unregulated entity within the meaning of Article 12(2) of the Code since it has never filed a notification with Luxembourg NRA for the general authorization^{vi}. We are not aware whether VRS is listed as regulated undertaking elsewhere, but for the Luxembourg NRA this entity is an unregulated undertaking within the EU telecoms’ framework. From the regulated roaming perspective dealing with an unregulated SPE creates certain ambiguities for the access seekers.

First, unregulated SPE is not bound by the regulated obligations. Potentially it poses questions about transparency and non-discrimination with respect to access seekers. Nothing prevents an SPE to alter the access provider’s reference offer or to impose additional terms and conditions that may undermine the commercial value of the access sought. It is not clear whether the SPE applies similar conditions to equivalent

transactions or not. There might be a potential abuse of competition law restrictions mentioned in articles 101-102 of TFEU^{vii} as well.

Second, the scope of rights and obligations of all parties involved in a roaming agreement with unregulated entity is unclear. The access agreement binds directly only the SPE and the access seeker, but not the actual roaming access provider (or several providers in different countries, as the case may be). Enforcement of SPA's contractual obligations falling under commercial law rules are clear. But there is no certainty on how to enforce the regulated obligations of the unregulated entity or how to make the respective access provider to perform the regulated obligations stated in a contract with SPA.

Third, the dispute resolution provisions mentioned in Article 18 of the Roaming Regulation seem to be inapplicable to claims involving SPAs. On this matter, please see the Suggested Guideline in section 5 below.

4. Reference Offer.

Guideline 22. Obligations to publish a Reference Offer.

According to Article 3(5) of the Roaming Regulation, MNOs must publish their Reference Offers and shall make them available to access seekers. For the purposes of control over performance of this obligation, BEREC suggests that MNOs shall inform the NRA about their published Reference Offers. We strongly believe that this measure is insufficient.

Random check for Reference Offers of various MNOs in different member states shows that obligation of transparency is not observed by everyone. Some operators do have clear links to their Reference Offers on their main websites. Others publish the Reference Offers on their secondary websites and it usually takes time to find a proper link to a proper webpage. There are also operators whose Reference Offer can be found only through a Google search and in PDF format with no indication whatsoever on the validity of such offer. Finally, there are MNOs who do not publish their Reference Offers at all.

In the last case scenario, it is not clear whether MNO does have a published offer but intentionally hides it, or did not comply with the regulated obligation at all. NRA does not publish the information on whether a certain operator duly complied with the transparency obligation or not and if yes than to what extent (fully, partially or not at all: by analogy with access to interconnection where there may be "security reasons" that allow the operator not to publish its offer or certain provisions thereof). Besides, an access seeker is put in a situation where it needs first to request for Reference Offer, which request is not mentioned in the Roaming Regulation and actually falls beyond the regulated roaming access negotiation procedure. MNOs simply ignore such requests for offers.

We suggest that the following minimum guidelines shall be adopted by BEREC:

- NRAs shall verify the compliance of the published reference offer to the requirements of the Roaming Regulation and national laws;

- In case of provision of regulated wholesale roaming access through third-party subcontractors or SPEs (whether or not those are un/regulated undertakings), MNOs shall provide NRA with sufficient information on such subcontracting and confirmation of performance of, and liability for not observance of regulated obligations by such subcontractors;
- NRAs shall verify whether the reference offer is publicly available and can be easily accessible;
- NRAs shall publish on their websites the information about all reference offers that must be published by local operators, indicating the allowed limitations of such publishing (whether there are confidential provisions that are not published);
- NRAs shall periodically control the availability of all reference offers subject to mandatory publishing.

Guideline 26. Information regarding access to emergency services through emergency communications.

The implementation of caller location identification (CLI) is subject to national laws and the Commission delegated acts^{viii}. The first deadline for such acts is set out for 21 December 2022. BEREC is supposed to provide its opinion on the subject matter. Regarding this obligation we would like to stress the BEREC's attention to the following.

Each member state will have its own rules on compatibility, interoperability, integration, protocols and other matters of the CLI. The general concept is that national operator will provide a respective CLI to a local PSAP in a format and in a way as prescribed by national law. The emergency communications are executed through a local breakout. The question is who shall provide the CLI (if at all) in case of emergency call originated from a SIM registered in a visited network while roaming? The obligation to comply with CLI requirement falls on the visited operator or remains on the home operator? If it is the home operator then to which PSAP shall it send the CLI? If it shall be sent to the PSAP of a visited country then in what format and through what channels shall the home operator fulfil its obligation: in accordance with its national law or under the rules of the visited member state? In the latter case, how a home operator can be aware of the emergency communications requirements of the visited member state and will such awareness not overcomplicate the CLI obligations for the home operator?

This is a crucial point for all operators and we would very much appreciate the BEREC's expeditious opinion on the matter.

Guideline 35. Measures to prevent permanent roaming or anomalous or abusive use.

In the last sentence of the third paragraph in this Guideline 35, BEREC suggests to revise the wholesale roaming agreement. As has been mentioned above with respect to Guideline 1, any option for a revision may be interpreted by the access providers as an opportunity to existing contract (through contractual termination right) and to force the access seeker to undergo the same, quite lengthy, access negotiation procedure. In this

regard, it would be much appreciated if BEREC clarifies the limits of such a right for a revision.

The last paragraph of this Guideline 35 states that there can be the right to terminate the agreement in case where the restrictive roaming use continues despite the available measures undertaken. Could you please clarify whether this suggested right is the same one that requires an authorization of NRA as stated in para 5 of Article 3(6) of the Roaming Regulation; or it is a separate invention of BEREC? This query is raised due to discrepancies between the said paragraph of Guideline 35, the next Guideline 36, which specifically addresses the termination right subject to prior authorization, and Guideline 39 which refers to cessation of already given access in case of objective justification.

Guideline 39. Wholesale roaming agreement duration including any break clauses.

The German NRA once ruled^{ix} that the contractual right to terminate the regulated wholesale roaming agreement does not require any prior authorization of NRA and the parties are free to employ this right as provided in their respective contract. Now BEREC states that an already granted access cannot be ceased without objective justification.

The Roaming Regulation sets out certain time limits for the access provider to observe: one month to provide a draft contract and to grant the roaming access within maximum three months after the contract is signed. Bearing in mind that there is no regulated time period for negotiation of the contract itself, the whole negotiations process takes considerable time. The contractual right to terminate the regulated access gives the access provider an opportunity to delay the provision of roaming services and in some cases to require a re-negotiation of previously agreed terms. Access seeker has no protection against such tactics. We request BEREC to qualify whether the contractual right to terminate the regulated wholesale roaming access represent an objective justification within the scope of the Roaming Regulation.

It would be also useful to either differentiate the termination rights referred to Guidelines 35, 36 and 39 with sufficient explanation on their differences; or, if it is the same right to terminate that requires prior authorization of NRA, to directly indicate so in all these Guidelines.

Guideline 41. Supply conditions which deter entry.

BEREC asserts exclusivity clauses unacceptable unless in case of specific justification. In fact, it is quite common when big operators with multinational coverage through their affiliates or partnerships with other operators tend to insist on exclusivity clauses. Thus, one exclusivity indeed impairs competition if it overlaps with another exclusivity. In this regard, it would be helpful if BEREC elaborates more on what potentially may be qualified as an exceptional justification.

Guideline 42. Management and implementation of new roaming agreements.

As has been stressed out above, the replacement of the existing roaming agreement is an administrative and time demanding burden for the access seeker. To minimize the exposure of access seekers to such unnecessary complications, and especially for the avoidance of any interruption in roaming services, we suggest to simplify the re-negotiation process and to oblige MNOs not to terminate the existing roaming agreement until the replacing one is not yet in place. Alternatively, the negotiation of the replacing contract shall be subject to more stricter timing rules, which shall cover each stage of negotiation, namely: provision of draft contract after the request for access; limits for negotiation period; granting the access after the contract is signed. In other words, the continuity of roaming services shall be of utmost importance.

Guideline 47. Negotiation time.

The Roaming Regulation is silent on the time limits for negotiation of the roaming agreement. It only mentions that the parties shall negotiate in good faith. Guideline 47 does not answer the timing query either.

The idea of good faith negotiations does not cover the period of negotiation. At least the access providers refuse to consider reasonable negotiation period as a part of good faith negotiation requirement. Appealing to NRAs in case where access provider postpones negotiations for no obvious reason does not resolve the situation, but generates significant legal expenses for the access seeker, especially when addressing to NRA in a different country (or several countries, as it might be the case). NRAs often refuse to force access providers to expediate the negotiation process. This gap in legislation considerably imbalances the market players. We demand BEREC to think over how this gap can be fulfilled.

5. Disputes and NRA intervention.

Guideline 50. Dispute resolution. OR

Suggested Guideline. Resolution of disputes involving unregulated undertakings.

There are too many issues that may force an access seeker to initiate a dispute over regulated obligations where the unregulated entities are involved. Starting from the very first steps of regulated access negotiation when an SPE does not observe the provisions stated in Article 3 of the Roaming Regulation. In the case scenario given above in Suggested Guideline (Access through unregulated entities) we have a multiparty arrangement where an SPA, acting on behalf of one or several regulated roaming access providers, negotiates wholesale roaming access with an access seeker.

The wording of Article 18(1) of the Roaming Regulation states that disputes “between undertakings providing electronic communications networks and services” over obligations stated in the said Regulation shall be resolved in accordance with the Code.

On the face of this provision, the dispute resolution mechanism does not cover disputes with unregulated undertakings.

On the national level, Article 26(1) of the Code widens the list of persons that are subject to regulatory dispute resolution mechanism by including “other undertakings [...] benefiting from obligations of access”. Potentially, an SPE may be considered as other undertaking benefiting from obligations of access. As for cross-border disputes, Article 27(2) of the Code states that “any party” may initiate the claim, which makes the SPE subject to regulatory dispute resolution mechanism. The problem is that it is unclear whether the direct limitation on disputing parties stated in Article 18(1) of the Roaming Regulation prevails over more broader rules of the Code. Needless to say, that this ambiguity gives an inestimable advantage to access providers; therefore, the said limitation requires direct clarification from BEREC.

If the provisions of the Code take precedent and disputes with SPAs are subject to regulatory resolution, then two more questions arise. The first one is which NRA shall be involved in such dispute? In classic direct bilateral arrangement, there are two options: NRA of the country of the access provider or NRA of the country of the access seeker. In multiparty arrangement the dispute can be addressed to any NRA domestic to any of the participating undertakings. However, an SPE is not an operator and no NRA has authority to undertake any actions with or about such entity. Even if the access seeker will address the query to its home NRA such NRA would be unable to answer that query for the same reason.

Alternatively, if an access seeker addresses its claim to the NRA of the actual access provider on whose behalf the SPE acts, there is a risk that such claim will be dismissed due to the absence of direct contractual relationship between such access provider and the said access seeker. The situation worsens considerably if the claim concerns several access providers from different countries represented by the same SPE under the same roaming arrangement.

Provided that the dispute is accepted by one of the above-mentioned NRA, the second problem occurs: how an NRA may force an unregulated SPE to perform the regulatory obligations? According to Articles 26(3) and 27(5) of the Code, only the duly authorized operators may be obliged to perform the obligations laid down on them as a result of a dispute resolution process within the telecoms framework. SPE is not authorized to grant the roaming access and no NRA can force the SPE to do so. On the other hand, the operators who delegated their roaming obligations to SPE may claim that they do not have any direct contractual relationship with the access seeker and thus they may refuse to be a party to the dispute.

We urge BEREC to consider these matters with utmost diligence because so far these issues have never been raised neither in the legislation nor in BEREC documents, but the SPEs and associated difficulties are already there and NRAs refuse to deal with them.

We remain open for cooperation with BEREC with respect to additional information or clarification of our concerns raised in this response. Please address your questions and queries to consultations@mtxc.eu.

Sincerely,

MTX Connect S.à r.l.

ⁱ Regulation (EU) No531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union (as amended, **Regulation 531/2012**).

ⁱⁱ Regulation (EU) 2022/612 of the European Parliament and of the Council of 6 April 2022 on roaming on public mobile communications networks within the Union (recast, **Roaming Regulation**).

ⁱⁱⁱ Directive (EU) 2018/1972 of the European Parliament and the Council of 11 December 2018, establishing the European Electronic Communications Code (recast, the **Code**).

^{iv} Regulation (EU) 2017/920 of the European Parliament and of the Council of 17 May 2017 amending Regulation (EU) 531/2012 as regards rules for wholesale roaming markets.

^v

https://www.lbr.lu/mjrscs/jsp/DisplayConsultDetailCompanyActionNotSecured.action?time=1635950883450&CURRENT_TIMESTAMP_ID=1635950878706#null

^{vi} The Luxembourg register of persons that filed their notification for general authorisation does not list VRS as such: <https://web.ilr.lu/FR/Professionnels/Communications-electroniques/Acces-au-marche/Autorisation/Registre-public/Pages/default.aspx>

^{vii} Treaty on the Functioning of the European Union (**TFEU**)

^{viii} The Code, art. 109.8

^{ix} BNetzA ruling BK2-17-006 of 16 July 2018