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## **PUBLIC CONSULTATION ON DRAFT BEREC WHOLESALE ROAMING GUIDELINES, BoR (22) 55**

**24.06.2022**

Dear Madam, Dear Sir,

1&1 appreciates the opportunity to comment on BEREC's Draft Wholesale Roaming Guidelines and would like to point out the following aspects.

According to Article 3 (8) of the incoming Roaming Regulation (EU) 2022/612 BEREC is required to update its Wholesale Roaming Guidelines. They serve to facilitate the consistent application of Article 3 of the Roaming Regulation, which in turn governs the wholesale roaming relationships between access providers and access seekers. Hence the Guidelines have significant ramifications on access providers and access seekers with regards to their commercial negotiations, and the National Regulatory Authorities who are required to take the Guidelines into utmost account when resolving any access-related disputes.

Generally, we consider the BEREC Wholesale Roaming Guidelines as a useful tool in determining the wholesale roaming access obligations of MNOs and the rights of access seekers, particularly the access rights of resellers and MVNOs. Nonetheless, the Draft Guidelines raise unresolved questions which we seek to address in this response. We have aligned our comments to the numerical order of the Draft Guidelines, which should facilitate the processing of our responses.

### **Chapter 2 – Wholesale Roaming Provisions**

#### ***Guideline 5 – Refusal of requests***

While Guideline 5 circumscribes the conditions under which refusals of access requests would not be objectively justified, it does not address the issue of appropriate legal redress available to access seekers. Hence Guideline 5 ought to refer to the dispute resolution procedure specifically prescribed in Guideline 50 (in turn, referring to Article 18 (1) of the Roaming Regulation in conjunction with Article 26 of the EECC).

## Chapter 3 – Wholesale Roaming Access Services

### **Guideline 11 – Resale Access**

Guideline 11 lays out the correct principle that resellers / light MVNOs should generally pay the same wholesale roaming prices that MNOs charge one another in accordance with the wholesale price caps in Articles 9-11 of the Roaming Regulation. In theory, this should result in the mere passing on of wholesale roaming charges and thus prevent price discrimination between MNOs and resellers / light MVNOs as respective access seekers. However, the wholesale price caps are generally higher than the bilaterally negotiated wholesale roaming charges between MNOs in a direct access relationship (within the meaning of Guideline 10). By contrast, the regulated wholesale price caps are the direct reference point for the MNOs' prices charged to resellers / light MVNOs. Hence there is a residual cost discrepancy to the detriment of resellers / light MVNOs, leading to indirect price discrimination. Therefore, BEREC should emphasise the need for MNOs to charge resale access prices that are at par with their own bilaterally negotiated wholesale roaming charges to give effect to the spirit of non-discrimination as envisaged in Guideline 11.

A separate, but closely related problem with the Roaming Regulation is its premise of balanced inbound and outbound roaming. However, resellers / light MVNOs and MNO entrants dependent on national roaming access are each unable to provide incoming EU roaming services on a nationwide basis. Hence, they are missing out on the wholesale revenue stream for incoming EU roaming calls, placing them at a competitive disadvantage against established MNOs. This is particularly true in Member States with high EU tourism. In effect, the Roaming Regulation therefore discriminates against the business models mentioned.

### **Guidelines 13 and 15 – Unregulated Roaming Services / Fair and Reasonable Prices**

While Guideline 13 states that unregulated roaming services should be subject to fair and reasonable prices, and while Guideline 15 further substantiates the notion of fairness and reasonableness, disputes over that notion arise frequently between access providers and access seekers. Despite of the intended clarification in these Guidelines, the interpretation of fair and reasonable given by access providers and, respectively, access seekers remain diametrically opposed.

Hence both Guidelines should address the appropriate legal redress available to the parties involved. They ought to refer to the dispute resolution procedure specifically prescribed in Guideline 50.

### **Guideline 14 – Retail functions which can practically or economically be provided only by the access provider**

We welcome the clarification that as part of resale access, MNOs must *inter alia* provide data bill shock services within the meaning of Article 14 of the Roaming Regulation. This was already made clear in the expiring BEREC Wholesale Roaming Guidelines. Nonetheless, whether the provision of data bill shock services is part of resale access services has been a contentious issue in negotiations between MNOs and resellers / light MVNOs.

Thus, we would urge BEREC to add a reference to the available dispute resolution procedure as outlined in Guideline 50.

### ***Guideline 20 – Value-added services***

The problem of differing pricing conditions for value-added services across Member States – as described in Guideline 20 – essentially stems from information opacity. This is because numbering ranges for value-added services are not harmonised at Union-level, making it harder for operators to recognise them in advance in all Member States. This has indeed led to unexpectedly high resale access charges. Hence 1&1 welcomes the incoming Union-wide database of numbering ranges for value-added services in each Member State in accordance with Article 16 of the Roaming Regulation. It is our estimation that this will minimise resale-related disputes between MNOs and resellers / light MVNOs.

## **Chapter 5 – Disputes and NRA intervention**

### ***Guideline 50 – Dispute Resolution***

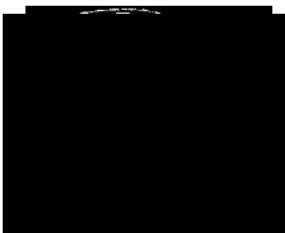
We generally welcome that Guideline 50 refers to Article 18 (1) of the Roaming Regulation in conjunction with Article 26 EECC, which *inter alia* covers the procedure available to resellers / (light) MVNOs for disputes arising with MNOs concerning resale access in their home Member State. We would invite BEREC to expressly mention that the dispute resolution procedure is intended to provide legal redress to resellers / light MVNOs for disputes with MNOs related to resale access in connection with the Roaming Regulation.

In addition, we would like to bring to BEREC's attention that Germany has attempted to transpose Article 26 EECC in § 212 (1) of the German Telecommunications Act ("TKG"). This provision arguably contains an editorial error, since it suggests that only disputes arising from rights and obligations stipulated in, or based on, the TKG may trigger the dispute resolution procedure. However, the wording of § 212 (1) TKG does not cover disputes related to the Roaming Regulation, which is directly applicable in all Member States.

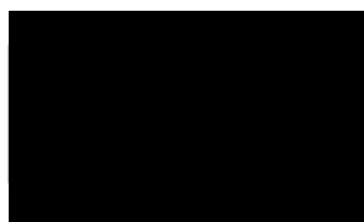
Hence it would be helpful if BEREC clarified that any disputes involving rights and obligations from the Roaming Regulation should trigger the national dispute resolution procedure equivalent to Article 27 of the EECC. This would particularly pre-empt any legal doubts on the application of the German dispute resolution procedure, despite the wording of § 212 (1) TKG.

We would be pleased to answer any further questions that you may have.

Sincerely,



Head of Regulatory Affairs



Senior Public Affairs Manager