

# **BEREC FRAUD PROCESS CONSULTATION**

**Cable&Wireless**  
Worldwide

16<sup>TH</sup> NOVEMBER 2012

CWW comments with regard to BEREC BoR (12) 85

## **Article 28(2) Universal Service Directive: A harmonised BEREC cooperation process**

### **SUMMARY**

Cable&Wireless Worldwide (CWW) welcomes the achievements with regard to cross-border co-operation on fraud and abuse activities. The proposals from BEREC demonstrate a very positive step forward.

Operating in a fully international environment, the enablers of cross-border voice services are even more dependent on a consistent and reliable process at the international level than nationally focussed operators. The BEREC draft process is in our view a very positive starting point, with a recognized need for further elaboration of a detailed process with clear and legally binding guidelines, to which operators can refer in their interconnection contracts. Because the process is broadly drafted and because the procedure relies on discretion at the investigation and intervention stages, there is not much certainty around the detailed steps being applied. CWW believes that a future process requires a higher level of standardisation of national and particularly cross-border activities, more (legal) certainty and clearly defined responsibilities, as well as some structures governing the end-to-end process and the achievement of objectives.

### **STANDARDISATION**

CWW understands that the BEREC draft process is a non-binding framework of recommendations for NRA's to deal with instances of cross-border fraud and abuse. This level of discretion greatly risks the process and the effectiveness of combatting fraud through withholding interconnect payments. CWW suggests BEREC taking the lead to set national and cross-border standards in dealing with such instances by:

- Referring to binding thresholds for intervention
- using common definitions

- aiming for actions within a given timeframe
- referring to a common scope of possible interventions.

### **RESPONSIBILITY AND LEGAL CERTAINTY**

In addition to the use of standards CWW suggests to improve the process by clarifying roles and responsibilities, . as with the current BEREC draft it remains open as to who is responsible for maintaining and updating the registers. For example paragraph 126 states that the review of the case register is reliant upon co-operation between NRAs. Given the large differences in dealing with fraud cases across Member States we have concerns that not all NRA's might be (organisationally) prepared to conduct their role as described in the BEREC process. How can it be ensured that each NRA is taking all of the necessary actions?

The assessment of whether particular circumstances qualify as misuse / fraud or not is subject to discretionary powers and national legislation. The question arises as to whether NRA's in transit countries may not accept a certain case as misuse / fraud and may not support the withholding of interconnect payments. This discretion may limit the effectiveness of a cross-border process and the anticipated effect on the parties' legal certainty. Also, CWW is asking BEREC to provide more clarity around when and how certain clauses, considered under heading 3, will be rendered ineffective.

Implementing the BEREC process is likely to require resources within authorities being freed up to ensure that the right scale is in place and requests are processed with the necessary speed. If this is not the case which body will administer the operational aspects of such a detailed process and who has the necessary legal powers to do so?

In addition, contrary to the current process description CWW is proposing to consider that the originating NRA who accepts a case needs to own the communication process and gather the information to validate the fraudulent claims from all impacted parties including those from NRA's outside the EU

### **GOVERNANCE**

In light of the NRA's discretion CWW suggests BEREC considering the use of a governance framework for these actions. Such a framework should consider defining an

appeal process, and a strict evaluation of the procedure and actions as well as developing methodologies to refine the framework.

#### **BEYOND**

Finally, as experience shows that most fraudulent activities involve jurisdictions that are outside of the European Union, we encourage BEREC to invite other NRA's to join the inter-jurisdictional process and principles. CWW is of the view that international pressure and co-operation could become the most effective contribution to the overall objective of minimise fraud and improve consumer experience with the use of electronic communication services.

#### **IN DETAIL:**

*Question 1: Are there other incentives or issues that will impact end users and/or operators that should be considered by BEREC? If this is the case, please propose and explain such incentives or solutions.*

CWW appreciates and acknowledges BEREC and NRA's intentions to protect consumers from the financial burden of misuse and by this to create more trust in the use of electronic communication services. However, CWW has experienced cases where the application of Art 28 (2) USD powers resulted in an unbalanced approach, favouring End-Users' interests over and to the detriment of the interests of an operator, but significantly even then failing to achieve the main objectives. The framework set-out here would not automatically avoid the re-occurrence of these cases. Careful consideration of the incentives set and the realistic impact of the BEREC procedure is therefore important for the wellbeing of consumers and the whole industry.

CWW agrees with the view that incentives are set to reverse the liability for fraudulent traffic in a way that would allow transit operators to withhold interconnection payments in certain cases. However, incentives may not turn into expected outcome: First of all the amendment of interconnection agreements will take time. The quickest changes are expected to take place with regard to interconnect agreements between carriers that are

similarly affected by the change in legislation and procedures, i.e. interconnection agreements within one country and those that are established within the EU. Even this is expected to take between 2 years (Europe) and 7 years (more difficult markets). CWW would also expect that not all carriers with which the company maintains or is commercially willing to set-up an interconnect agreement would agree to amended liability clauses in case of fraudulent traffic.

In summary, even if one could agree that incentives are set, this is not expected to change the industry as quickly and in scope as originally intended.

Apart from these carrier-side considerations CWW is concerned about the possibility that the factual non-payment for service by the affected End-User(s) will reduce their incentives to maintain appropriate and effective technical safeguards to protect their IT estate from fraud and hacking.

Paragraph 31 of the document states *“BEREC came, among others, to the conclusion that the lack of an explicit definition of the terms “fraud and misuse” within the USD might hinder a harmonised application of Article 28 USD at EU level as such definitions would be subject to the relevant national transpositions. Thus a coordinated approach and practical cooperation mechanisms between “relevant authorities” may be elaborated.”*

CWW agrees with the point that a commonly agreed description of fraud and misuse is expected to harmonise the application of the concept and adoption of measures, thus harmonising national actions, easing the application of contractual provisions and improving the end-to-end effectiveness of interventions. We urge BEREC to adopt definitions and guidelines as binding concepts at national levels as well.

In paragraph 53 and 54 of the document it is described how article 28(2) USD and the implementing rules at national level can contribute to reducing or preventing consumer harm. The envisaged effect on consumer trust and confidence in the use of cross-border services is in our view not applicable in full scale. Certain cases such as PBX hacking may not have any relation to the End-Users (if existing) reservations over the use of non-geographic numbers and international services. Therefore, we believe there is a tendency to overestimate the non-pecuniar positive effect on the consumer side.

The document continues in paragraph 70 stating *“Withholding revenues on the other hand will reduce the financial exposure for end-users and operators in connection with the calls already made.”* CWW does not fully agree to this assumption as far as operators are

concerned. Although there are cases where the chain of orders to withhold payments may protect carriers from financial losses, international (transit) operators and receiving parties are put at much higher risk, as their ability to benefit from the chain of interconnection payment freezes is potentially impacted by rules and regulations that differ to the new EU procedures and rather follow international standards maintaining liability for fraudulent traffic with the originating carrier in a transit agreement.

Question 2: Are there other issues related to the provision that are not discussed in this section that should be considered by BEREC? Please give details about your suggestions.

With regard to cross-border services CWW's xperience is that traffic, which is suspected for being fraudulent, mostly terminates outside of the EU. Therefore the success of the new procedures depends upon the willingness of other markets outside of the EU, and in particular those destinations that are more likely to be involved in fraudulent traffic, to adopt these principles and accommodate the EU procedures. We therefore suggest BEREC considers methods of actively involving other NRA's.

Question 3: Do the responses received and presented by BEREC represent an accurate reflection of the situation as experienced by operators and end users across Europe? Are there further aspects that should be considered by BEREC?

None.

Question 4: Do you consider the proposed process to constitute a practical and effective method for NRAs to cooperate with each other in order to implement the requirements of Article 28(2)? Please explain your view with any suggestions you may have.

CWW agrees to the process as such. To become practical and powerful we believe that it needs further development with regard to standardisation, legal certainty and governance:

Paragraph 109 of the BEREC process description states *"Where an operator has a financial exposure because it is unable to recover its costs, it may be appropriate that the NRA or relevant authority takes action to minimise that exposure."* This is highly relevant

for a mindful application of the process in particular for operators involved in cross-border transit. As most instances of fraud that are cross-border do terminate outside of the EU, and as we expect that a majority of fraud cases will continue to involve geographies where the BEREC process is not adopted, we expect the transit market to be put at risk when it comes to unilateral interconnection payment freezes. CWW therefore suggests that where operators can show a remaining financial exposure, NRA's should be urged to shape the intervention in a way that limits the financial impact on these operators, in particular as they are not involved in the abuse / fraudulent activity per se.

CWW understands that the legislative powers derived from Art 28 (2) USD are independent from civil law proceedings. This is also described in paragraph 118 of the BEREC process.<sup>1</sup> However, we would like to raise awareness that from an operators' point of view the duality of rules and proceedings may place further risks on the whole procedure. What is a relevant proceeding? What happens if judicial proceedings come to a different conclusion than NRA proceedings? What evidence is put at NRA's investigations and are these mutually accepted for contractual purposes in framing relevant cases of fraud liability? CWW does understand that these questions may not be answered by BEREC alone but nevertheless we would like to seek NRA's and BEREC's views on this as putting answers against these questions is an important step to achieve the necessary legal certainty.

In paragraph 119 the BEREC process states *"NRAs at each stage of the process have discretion on a case-by-case basis as to whether to take action within their jurisdiction and, if so, the nature of that action."* CWW believes that NRA's should largely follow standardised procedures and that the use of discretion should be minimised.

With regard to the inter NRA process, paragraph 124. ii) is relevant. For CWW it is currently undetermined, how the NRA in the originating country would identify which transit NRA to contact in cases where numbering ranges do not belong to an EU member state?

Paragraph 124. iv) describes the steps taken but comes without any time planning. CWW is concerned that the procedure gives participants and actors no timeframe for actions, and could therefore prove to be ineffective. Where transit operators are involved passing traffic

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<sup>1</sup> *"In addition, actions taken by an NRA or other administrative authority to put a halt to a situation they feel falls within the remit of Art 28(2) may be independent from actions taken by judicial or other authorities under criminal law provisions."*

between different countries, the payments could be released prior to instruction from an NRA to withhold payment being given. CWW therefore would like to understand, the impact of a payment being released on the resolution process? Further, we urge BEREC to consider ways to embed the process within a timeframe, allowing actions to be taken before payments are released.

The procedure as described confirms in paragraph 129 the responsibility of NRA's for confirming the incident, gathering information and forming a judgement. There will need to be a change of positioning taken with some of the NRA's / national frameworks: for example, an incident raised with OFCOM supported with sample call recordings, last year, was met by the response that while the calls did appear suspect, OFCOM recognized this case of not being of priority and hence OFCOM would not pursue the matter on our behalf. Different countries have different approaches to these matters, which may lead to confusion as to how and when national procedures will initiate an EU wide process according to the BEREC rules. This can create operational and legal uncertainty, for which we request clarification before contractual amendments can take place.

Paragraph 131 implies the responsibility for investigating a case moving from the operator to the NRA. CWW asks BEREC to confirm whether this is commonly agreed by each NRA and what appeal process exists if an operator disagrees with the result of such an investigation. Does this mean that national contract positions such as the Annex E of the British Telecommunications plc Standard Interconnect Agreement will be superseded by this process? Apart from this question, CWW recommends to achieve an optimal level of harmonisation not only with regard to the definitions and criteria applied to assessing fraud/misuse but also with regard to adopting remedies and taking actions. This would help establish common acceptance and clarity on which cases would be legitimate under the (to be amended) liability clauses of interconnection contracts.

As the procedure described is non-binding and based on NRAs' discretionary powers, CWW would like to understand cases where NRAs do not proceed as expected. For example in relation to paragraph 134: what should a transit operator do with relation to the flow of money where an NRA has not contacted them to give authority to withholding money from the next carrier in the call chain? Further we would like to point out paragraph 138. This section lacks a description of what happens if the terminating NRA is not intending to take action or deeming the calls to be contrary to national legislation. By default does it mean the case would be dropped?

Paragraph 143 states *"In cases where the sharing of revenue has been blocked in the origination or earlier transit countries, the NRA in the transit country should consider the impact on operators in the country of its jurisdiction and whether it should take any action. The thresholds for intervention (both those set for the process and for that country's national intervention) will be relevant for assessing the likely impact on operators and any decision to intervene."* CWW is seeking clarification from BEREC as to whether it is legally certain that transit countries NRA's are empowered by Art 28 USD to take such actions? Similar questions arise in the context of paragraph 183, where the aim is that contractually bound agreements without the possibility to withhold interconnection payments in cases of fraud should be suspended with reference to Art 28 (2), where possible. CWW wishes to understand whether and how each NRA would apply these powers directly upon contractual clauses.

Important reference is made in paragraph 165. *"Given the importance of timing, which is discussed in section 6.1.4, it may be considered necessary by an NRA to make an interim finding in order to allow time for further investigation into the relevant incident. Following this investigation, the NRA may then make a final finding upholding its original interim decision, or, depending on the evidence received, rescind the original decision. The advantage of this approach is that it can put a hold on interconnection payments and service revenues for a period during which the investigation can continue, operators can be advised of the basis for the intervention and operators and other parties have time to make considered representations to the originating NRA."*

*166. The BEREC process and relevant national processes should facilitate this temporary intervention pending the conclusion of the investigation process by a Relevant Authority."*

CWW agrees with the need to develop a timely approach which may involve the need to make interim decisions. However, we also would like to point out that interim findings further complicate the whole process of interconnection payment, freeze and ex-post settlement. Each action that is taken by NRA's in this regard will need to be mapped into legally binding actions, invoicing and payment control between each of the carriers that are involved for each case of fraud and misuse. Please bear in mind that process efficiency and resource awareness should not only be taken into account at BEREC level and NRA's but also at the carrier side.



Question 5: Are these initial thresholds for retail operators and transit operators set at a realistic and practical level? Should other issues affecting whether NRAs initiate a case under this process be considered on a systematic, rather than ad hoc, basis? Please provide details on any proposals made.

Paragraph 167 states *"Since the introduction of Article 28(2) the experience of NRAs that have intervened in this area suggests that the resources associated with such investigations can be significant. Even given process developments for cross border cooperation it does not seem likely at this stage that intervention in every single case would be practical for NRAs and operators.[...]"*

Further in paragraph 173 it is stated *"[...] The threshold to be applied for transit operators is a matter for national processes and may be set at such a level that the administration cost of withholding revenues does not exceed the amount withheld. However, this threshold may not be relevant in the context of information gathering where the information may be needed to identify the end destination of the calls."*

Having this in mind CWW welcomes the proposal in paragraph 167 to introduce thresholds that ensure that materiality and costs are balanced. Overall CWW is of the view that the process lacks details and decisions are again subject to the local NRA's procedure. CWW believes that all participants would benefit from a common and harmonised procedure that provides guidelines for each NRA to follow justifying the threshold for regulatory intervention or interconnect payment freeze. This should certainly include thresholds and concepts for dealing with transit market interventions.

Paragraph 183 states *"Experience has shown that some operators may have committed to contracts that do not permit the withholding of interconnection revenues, even if such revenues originate through the perpetration of fraud or misuse. In such cases the action should be taken to render such clauses ineffective through the use of Article 28(2) where possible."*

In this regard CWW would like to seek clarity as to whether and how each NRA would apply these powers directly onto contractual clauses. It is important to note that rendering such clauses ineffective through the use of Art 28.2 would be a major change to the standards currently applied in transit contracts. It's expected to depend on the governing law of the contract and how Art 28.2 has been implemented in each affected jurisdiction. Given these considerations we urge BEREC to define and agree a more detailed and

binding process with a clear view of whether clauses will be automatically rendered ineffective or fraud liability should be adjusted in inter-carrier agreements at a bilateral level.

Question 6: Are there other types of clauses found in typical commercial interconnection or other agreements that might influence the ability of operators to withhold interconnection revenues when required to do so by an NRA? Please provide details and examples of such agreements.

One of the key aspects here will be the timing of actions where a number of transit operators are concerned. Where payments have been released in relation to the actual suspect calls, will the NRA have the authority to stop subsequent payments from future months for the equivalent value associated with a case they are dealing with?

Question 7: Are there other circumstances at which NRAs should consider intervention under Article 28(2)? Please give reasons for your response.

No.

End.