



Transatel / Telefónica dispute resolution proceeding

Application with regard to the dispute resolution procedure pursuant to Article 17 (1) Roaming Regulation by Transatel SA vs Telefonica Germany GmbH & Co OHG and E-Plus Service GmbH for breaching the access obligations under the Roaming Regulation (File reference: BK2b-17/005). BNetzA requests BEREC according to Article 3 (6) subpara. 7 of the Roaming Regulation to adopt an opinion with regard to the action to be taken in accordance with the Regulation:

Measures envisaged

BNetzA intends to take measures which will ensure,

1. that the defendant (Telefónica) also grants access to wholesale roaming services in accordance with Article 3 Roaming Regulation, provided that the applicant (Transatel) uses IMSI with the non-geographical code 901 to identify its customers; and
2. that the defendant (Telefónica) does not grant access to the applicant upon the requirement to provide monthly proof that all Transatel's customers are EU-EEA roaming customers in terms of their SIM-card.

BNetzA therefore requests a BEREC Opinion on the above measures until June 1.

Facts (in short)

The applicant is the France-based mobile communications company Transatel SA (hereinafter Transatel). The defendant is Telefónica Deutschland GmbH (hereinafter referred to as Telefónica). Transatel is seeking access to Telefónica's network for its customers based on a wholesale roaming access contract, where the regulated charges apply as set out in the Roaming Regulation.

Telefónica is of the opinion that the applicant is not entitled to be granted wholesale roaming access as provided for in the Roaming Regulation. As a result, Telefónica refuses to submit a draft contract for a regulated wholesale roaming access product. It would only agree to provide such a draft contract, if Transatel fulfilled certain conditions which Telefónica believes should ensure that the services used by Transatel actually correspond to the purpose of the Roaming Regulation, namely to create a viable basis at the wholesale level to enable EU-EEA citizens or persons with stable links to an EU-EEA country to use mobile services for the purpose of periodic travel on the same conditions as in their home network.

From Telefónica's point of view, the publicly available information about Transatel's business model raises justified doubts as to whether the roaming services requested by Transatel as part of the demanded wholesale roaming access are actually used in

compliance with the Roaming Regulation. One reason for this is that Transatel does not want to use the IMSI with a specific EU-EEA country code for its mobile services, but rather the 901 IMSI. Unlike the traditional IMSI, these are not awarded by the national regulatory authorities of the individual EU-EEA countries but by the ITU. The 901 IMSI can be used worldwide. This means that network operators wishing to offer mobile services in several countries do not have to apply for a corresponding IMSI in each individual country. Due to its universal nature, the subscriber ID does not reveal the home network and therefore the roaming partner cannot identify the country in which the network operator operates its home network.

Telefónica understands that the underlying country code of the IMSI used guarantees the end user's stable links to his home network and thus belongs to the group of customers that should be supported by the Roaming Regulation by granting his/her provider regulated wholesale roaming charges. From Telefónica's point of view, the 901 IMSI does not allow the assumption that a customer also has stable links to an EU country. This would open the door to abusive practices.

However, if the use of the 901 IMSI is in principle provided for or at least not excluded by the Roaming Regulation, Telefónica sees the need to implement other means of protecting itself against an abusive use of regulated wholesale roaming charges that do not comply with the Roaming Regulation. An access seeker using the 901 IMSI for its customers and also offering its services outside the EU-EEA would have to prove prior to concluding the contract that the regulated wholesale roaming charges only apply to customers that have stable links to an EU-EEA country. Specifically, Telefónica requires Transatel to provide information about the place of residence of its customers. Such information must be provided prior to the conclusion of the contract and must be continuously updated during the contract term.

Transatel considers this requirement questionable and disproportionate under data protection provisions. Transatel argues that they have a control system in place, which in advance examines whether a customer falls within the scope of the Roaming Regulation. However, this control system has not been further explained. In principle, Transatel only wants to accept the obligation to provide information like the other access seekers.

In the run-up to the public hearing, Transatel explained how it was intending to ensure the use of regulated roaming services in conformity with the Roaming Regulation, namely by examining the nationality of the customers and where the SIM-card was initially activated, as well as subsequently blocking the IMSI of non-EU-EEA customers for the regulated roaming services. In the public hearing Telefónica explained that based on this information it may grant access on regulated terms should Transatel provide evidence of such an adequate control system.

Telefónica's concerns about including the 901 IMSI in the scope of the Roaming Regulation are shared by the two mobile network operators involved in the proceedings, Vodafone Deutschland GmbH and Telekom Deutschland GmbH. From their point of view, including the 901 IMSI in general or at least without requiring to implementing a corresponding control mechanism for identifying the customers' home base would open doors to disproportionately complicate the business of mobile operators to applying the provisions of the Roaming Regulation with regard to finding stable links.

Reasons for the decision

BNetzA is of the view that the Roaming Regulation does not allow excluding IDs with the 901 code. The access provider is also not entitled to request individual information about each customer before the conclusion of the contract with the access seeker. The access provider can at best request aggregated information.

Valid claim pursuant to Article 3 (1) Roaming Regulation when using 901 IMSI

BNetzA considers mobile roaming services provided via the 901 IMSI as covered by the Roaming Regulation. From BNetzA's point of view, the Roaming Regulation does not refer to telephone numbers in relation to the roaming customer. Wholesale roaming access is subject to the provision of mobile retail roaming services to EU-EEA roaming customers. A geographic number from an EU-EEA country may indicate that a roaming customer is from the EU-EEA.

See also BoR (17) 114 Wholesale Roaming Guidelines, guideline 4:

"Article 2 (2) (g) Roaming Regulation defines 'roaming customer', which is an end user of a roaming provider of regulated roaming services, by means of a public mobile communications network situated in the Union. BEREC considers that a roaming customer could for example be identified by numbering resources from EEA Member States and which are in accordance with the E.164 ITU Recommendation or E.212 ITU Recommendation."

The 901 IMSI are part of the e.212 ITU recommendation.

Neither added duties to provide information or evidence for the control system

While BNetzA is of the view that the provisions of the Roaming Regulation do not generally exclude a particular IMSI from using them for regulated roaming services (see above), the question is whether and to what extent a mobile network operator that is obliged to grant regulated wholesale roaming access would have the possibility to protect itself against an abusive use of such 901 IMSI by a specific customer. In this context, it is on the one hand important to consider the measures to detecting misuse prior to the conclusion of a contract and, on the other hand the safeguards that could be used during the drafting of the terms and conditions of the contract.

To conclude, BNetzA believes that the visited network operator can implement measures to prevent abusive behavior according to the Roaming Regulation both prior to the conclusion of a wholesale roaming access contract or during the drafting of the terms and conditions.

Possibility to request information prior to concluding a contract

BNetzA is already aware that access providers have the right to reject an application for a contract for regulated wholesale roaming access as set out in Article 3 (2) Roaming Regulation. Accordingly, the access provider may refuse an access request on the basis of objective criteria. Although the Roaming Regulation does not provide an explanation of those "objective criteria" however, number 5 of the BEREC Guidelines sets out an

indicative list of reasons for a refusal of requests. BNetzA notes that the BEREC Guidelines are to be taken account of by NRAs

Guideline number 5 provides that mobile network operators may not, during the examination of the application, seek any information on the commercial nature of the services that the access seeker wishes to offer, except to verify that the roaming service in question is not being used for purposes other than providing regulated roaming to the roaming provider's customers while they are periodically travelling.

On the one hand this means that the access provider basically can make an assessment as to whether the roaming services the access seeker intends to offer fall under the provisions of the Roaming Regulation and that such an assessment is valid. This also means that the access provider could refuse access, if it turned out that the provision of wholesale roaming services were misused.

Furthermore, Guideline 5 makes clear that it is the responsibility of the access seeker to provide evidence that a business model of an access seeker, which generally would be entitled to wholesale roaming access, could in the end not comply with the provisions of the Roaming Regulation.

In this regard, Guideline 5 points out that the access provider can request information about the commercial nature of the services the access seeker is planning to offer as the access provider naturally does not possess such information. To this end, the access seeker has in turn to meet such a request provided that the request complies with the provisions of the Roaming Regulation and cannot be considered undue or disproportionate in other terms (e.g. data protection provisions).

Notwithstanding the possibility of the access provider to assess the commercial nature of the planned offers of the access seeker, the question is to what extent the access provider would be allowed to make such an assessment and which information could actually be requested in advance of the submission of a draft contract pursuant to Article 3 (5) sentence 2 Roaming Regulation, particularly with regard to possible control mechanisms for ensuring that the use of the services is in line with the Roaming Regulation.

It should be noted that the requirements set out here directly impact the possibility to use regulated wholesale roaming access services particularly for companies that focus on cross-border services.

Limited impact of control systems and lack of evidence for a significantly increased potential for abuse of 901 IMSI

To answer the question about whether any mechanism to verifying the information requested can be justified with regard to ensuring that the roaming services are used in accordance with the Roaming Regulation, potential limits of the relevant possibilities to do this must be taken into consideration. BNetzA cannot exclude any cases of abusive usage even if there was a complex control system in place. It is also not clear why such an assessment should be justified for 901 IMSI in particular. The perception of the access provider about the increased potential for abusive usage particularly of the 901 IMSI is not reasonable.

As a result, it is agreed between the parties involved that it would practically be impossible to implement such a control mechanism that would make it possible to clarify in advance

for each case whether the roaming service will actually be used by end users pursuant to the Roaming Regulation.

Thus, the access provider offers its mobile services to all interested customers in Germany. If for instance an Asian customer concludes a mobile contract with the access seeker in Germany, it may not be clear, whether the customer is actually staying in Germany for a longer period or will establish stable links. Usually a customer having stable links to Germany would receive a SIM with a country specific (German) IMSI. As a result, even an IMSI with a German country code can be used for a customer from outside the EU.

From the access provider's point of view, the minimization of the risks in view of abusive or anomalous usage is ensured only in case of IMSI with the identifying country codes. The access provider argues that the likelihood is quite high that end users with a country-specific IMSI have stable links to the home network to which the IMSI (MCC) is assigned.

It is true that in most countries the allocation of IMSI with a corresponding country code is linked to the condition that extraterritorial use of the IMSI is not allowed. This basically also applies to IMSI from Germany, with the exception that IMSI for M2M services can also be used for extraterritorial use without restriction.¹

Although the periodical use of roaming services in other EU-EEA countries is allowed, however permanent extraterritorial use of roaming in other EU-EEA countries than the home country is still prohibited. In addition, selling mobile services in terms of corresponding IMSI to customers from other EU-EEA countries is allowed (unless they use the cards permanently abroad).

Even if it was concluded that using country-specific IMSI provides evidence of those customers having stable links to the respective country, there is still no guarantee that this is actually the case. It is possible that a European operator is providing customers from outside EU-EEA who want to travel in the EU-EEA for a certain period with SIM-cards that have country-specific IMSI from an EU-EEA country. Since at least a temporary use of country-specific IMSI is allowed in the EU-EEA (with the exception of permanent extraterritorial), there are no fundamental objections to such temporary extraterritorial use, at least with regard to national numbering requirements.

The underlying idea to only allow country-specific IMSI is only of limited value with regard to detecting misuse and could at best only indicate such a misuse.

In particular, since the selling of mobile services with country-specific IMSI to non-EU-EEA customers is allowed as long as they do not permanently use the SIM card abroad, we can only assume that permanent roaming based on country-specific SIM cards does not occur very often.

It should be noted, however, that especially in cases where permanent roaming occurs, we can already assume that misusing roaming services was intended from the beginning by the roaming provider or the customer. Accordingly, if a provider or an end user intends to use a SIM card from another EU-EEA country permanently in his home network, this could as well be done with country-specific IMSI as well as with 901 IMSI as even with a 901 IMSI, the access provider can assume that such a customer does not belong to the home

¹ See decree No.33/2016 BNetzA Official Gazette.

network. To this end, the access provider must be able to assess the traffic data collected in his own network. Therefore, one cannot necessarily assume that 901 IMSI provides for a particularly high potential for abusive or anomalous usage compared to IMSI with specific country codes.

As a result, the access provider's assessment that using 901 IMSI would have a much higher potential for abusive or anomalous usage than the use of country-specific IMSIs is not convincing.

No right to request customer-specific information about the residence of the customers

It is generally true that information about the customer's place of residence may provide relevant indications of the potential risk for abusive or anomalous usage. However, this does not mean that the access provider is entitled to receive customer-specific information even at the time before an agreement is reached.

Although it cannot be ruled out that customers from the country in which the home network operator is situated may in individual cases still not establish stable links with the home network for instance because they work abroad for a longer period, it is usually reasonable to assume that information about the customer's place of residence should offer a high probability of the customer having a stable link to the country in which he/she resides. To this end, it is at least in principle reasonable that the access provider considers the receipt of such information to be helpful in assessing the likelihood of the occurrence of abusive usage. However, it should be noted here that in principle non-EU-EEA users staying in a EU-EEA country for a longer period but do not have a place of residence in the EU-EEA can also establish stable links to an EU-EEA country and are therefore likely to be entitled to roaming services within the meaning of the Roaming Regulation.

BNetzA has to clarify whether and to what extent the information requested by the access provider, which may be requested prior to concluding the agreement in order to decide whether it can reject a corresponding application for access on reasonable grounds, is covered by the Roaming Regulation.

For having such a right to request customer-specific information, it could be argued that Guideline 5 of the BEREC Guidelines (see above) allows the access provider to request information about the commercial nature of the services the access seeker intends to provide to the extent, that enables the access provider to verify whether these roaming services are not used for services other than the provision of regulated roaming services. Information about the place of residence of the end users can at least bear the assumption that the services to be offered meet the requirements of the Roaming Regulation.

However, the question arises as to what extent the requirement for the disclosure of such customer-specific information, as requested by the access provider before providing a draft contract, can still be considered as covered by the Roaming Regulation.

The Roaming Regulation does not provide any further information on the character of the information that may be required from the access seeker, in particular before concluding a contract, in order to decide whether to accept or refuse wholesale roaming access.

According to Article 3 (6) Roaming Regulation the specific measures that the access provider may apply to prevent permanent roaming or abusive or anomalous use of

wholesale roaming access, as well as the objective criteria on the basis of which such measures may be taken, may be set out in the reference offer. Such criteria may refer to aggregate roaming traffic information. However, Article 3 (6) Roaming Regulation clearly states that specific information relating to individual traffic of customers must not be referred to.

“The reference offer may, inter alia, provide that where the visited network operator has reasonable grounds for considering that permanent roaming by a significant share of the roaming provider’s customers or anomalous or abusive use of wholesale roaming access is taking place, the visited network operator may require the roaming provider to provide, without prejudice to Union and national data protection requirements, information allowing the determination of whether a significant share of the roaming provider’s customers is in a situation of permanent roaming or whether there is anomalous or abusive use of wholesale roaming access on the network of the visited operator, such as information on the share of customers for which a risk of anomalous or abusive use of regulated retail roaming services provided at the applicable domestic retail price has been established on the basis of objective indicators in accordance with the detailed rules on the application of the fair use policy adopted pursuant to Article 6d [Roaming Regulation].”

To sum up, the access provider can request information on roaming traffic in an aggregated form but not in terms of specific information relating to individual roaming traffic.

Recital 12 of Regulation 2017/920 specifies which type of information is also allowed to be requested prior to the conclusion of a contract. For example, the access provider may request information on the proportion of customers with insignificant domestic consumption compared to roaming consumption. This information seems to be appropriate, because it enables the access provider to assess whether roaming services are used in accordance with the Roaming Regulation, which means for periodic use in the EU-EEA. In the context of aggregated information, taking the share of non EU-EEA customers also seems plausible. In any case, specific information relating to individual traffic of the access seeker’s customers cannot be requested by the access provider.

Also from Telefónica’s point of view, it seems to be indisputable, that conditions in the reference offers cannot be based on customer-specific information. Nevertheless Telefónica is of the opinion that during the contract initiation with regard to granting a wholesale roaming access for an access seeker who uses 901 IMSI it is essential to have such information. The submission of a reference offer must be based on such evidences, although the customer-specific information will not be part of the reference offer.