

## **BEREC Opinion on BNetzA request on providing wholesale roaming access**

1 June, 2018

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## Executive summary

BEREC considers that the Roaming Regulation covers roaming services provided by Transatel via a 901 IMSI for EU/EEA customers<sup>1</sup> with a home network that is located in an EU Member State.

BEREC is of the view that Telefónica's requests to ask Transatel to provide information about the place of residence of all of its customers, that would generate traffic on Telefónica's network, individually goes beyond what is intended in the Roaming Regulation, so that a draft contract has to be provided in any case before entering into further discussions. Other details of the contract before reaching an agreement can be negotiated after the draft contract is provided to the access seeker.

BEREC is of the view that Transatel may implement measures intending to ensure the use of regulated roaming services on Telefonica's network in compliance with the Roaming Regulation. Telefónica should have the right to ask for a review; this can be carried out by an independent third party such as a private audit or NRA based on Article 17 (1) of the Roaming Regulation.

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<sup>1</sup> This opinion is limited to assessing whether an operator providing services via 901 IMSI may request roaming access under the Roaming Regulation. Therefore, this opinion does not analyse which kind of numbering is used by the access seeker to address subscribers for the particular services (i.e voice, SMS or data). For instance regarding SMS services, the numbers used are related to the national E.164 numbering plans (see Roaming Regulation Article 2 (2) (j))"

## 1. Introduction

BNetzA's Ruling chamber 2 has a pending dispute resolution procedure under Article 17 of the Roaming Regulation for which BNetzA requested an Opinion by BEREC in its letter from 7 May 2018.

The opinion should be with regard to actions to be taken according to Article 17(1) of Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union (hereinafter the Roaming Regulation, RR) and Articles 2(b) and 3(3) of Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office (hereinafter the BEREC Regulation).

BEREC therefore initiated a call for interest for legal experts to constitute a task force drafting a BEREC Opinion on the questions raised by BNetzA. Experts from the Roaming EWG were nominated to draft this opinion. This task force is chaired by the Mobile/Roaming EWG Co-chairs with assistance of the BEREC Office.

The measures BNetzA intends to take should ensure that:

1. an access provider also grants wholesale roaming access in accordance with Article 3 of the RR, provided that the access seeker uses IMSI with the non-geographical code 901 to identify its customers; and
2. an access provider does not require, in order to grant wholesale roaming access to an access seeker, that the latter provides monthly proof that all access seeker's customers are EU/EEA roaming customers in terms of their SIM-cards.

BNetzA requests a BEREC Opinion on the above-described measures before 1 June 2018. This Opinion is provided pursuant to Article 2(b) and 3(3) of the BEREC Regulation and Article 17 (1) of the Roaming Regulation.

## 2. Background

### 2.1. Case description

According to the information provided by BNetzA in its letter of 7 May, the applicant for wholesale roaming access is a France-based mobile communications company called 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.

More precisely, BNetzA notes in its letter of 7 May that :

*“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/EEA 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 the implementation of a corresponding control mechanism for identifying the customers' home base would open doors to disproportionately complicate the business of mobile operators to apply the provisions of the Roaming Regulation with regard to finding stable links."*

## **2.2. Legal background**

The Roaming Regulation sets up wholesale roaming access obligations for mobile network operators (MNOs) and rights for access seekers. In addition to the general provisions laid down in the Roaming Regulation according to Article 3 (8) Roaming Regulation, BEREC has to publish guidelines for wholesale roaming access in order to contribute to the consistent application of Article 3 of the Roaming Regulation.

Due to the amendments set out by Regulation (EU) 2017/920 of the European Parliament and of the Council of 17 May 2017, an update of the guidelines was necessary. Therefore, BEREC published the latest revised BEREC Wholesale Guidelines (BoR (17) 114) in particular taking into account the provisions on wholesale level enabling the Roam-Like-At-Home principle. It should be noted that although the BEREC Wholesale Guidelines do not have a legal character, NRAs are required to take the guidance into utmost account when resolving any disputes or taking any enforcement actions concerning Article 3 and mobile network operators are required to take into account the BEREC Guidelines when publishing their reference offer according to Article 3 (5) of the Roaming Regulation.

This Opinion is provided pursuant to Article 2 (b) and 3 (3) of the BEREC Regulation and Article 17 (1) of the Roaming Regulation. Article 2 (b) of the BEREC Regulation outlines that BEREC shall "*on request, provide assistance to NRAs on regulatory issues*" and Article 3 (3) of the BEREC Regulation states that NRAs shall take the utmost account of any opinion adopted by BEREC. Article 17 (1) of the Roaming Regulation provides that the dispute resolution procedures laid down in Articles 20 and 21 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ("Framework Directive") shall apply to a dispute in connection with the obligations laid down in the Roaming Regulation. Article 20 of the Framework Directive does not provide a mechanism for seeking an opinion from BEREC.

Whereas, Article 21 of the Framework Directive provides, in relation to cross-border disputes, at sub-paragraph 3 that:

*“Any national regulatory authority which has competence in such a dispute may request BEREC to adopt an opinion as to the action to be taken in accordance with the provisions of the Framework Directive and/or the Specific Directives to resolve the dispute.”*

### 3. Assessment

#### 3.1. Application of the Roaming Regulation with regard to wholesale roaming access and 901 IMSIs

The first question to answer is whether the Roaming Regulation covers wholesale roaming access for 901 IMSIs which are in accordance with the ITU Recommendations,<sup>2</sup> but which are not linked to a Member State’s numbering (see explanation in the Annex).

BEREC is of the opinion that a mobile roaming service provided via a 901 IMSI for EU/EEA customers<sup>3</sup> when its home network is located in an EU Member State is covered by the Roaming Regulation. The Roaming Regulation does not contain any provision concerning numbering with regard to SIM cards or end users. The Roaming Regulation rather focuses on the “roaming customer” defined in Article 2 (2) (g) of the Roaming Regulation as

*“... a customer of a roaming provider of regulated roaming services, by means of a terrestrial public mobile communications network situated in the Union, whose contract or arrangement with that roaming provider permits Union-wide roaming”.*

To give guidance to NRAs, Guideline 4 of the BEREC Wholesale Roaming Guidelines (BoR (17) 114) states that

*“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.”*

Although numbering can identify a roaming customer, BEREC does not consider this the only element to take into account. In fact, it is relevant that the definition of “home network” which is defined in Article 2 (2) (d) of the Roaming Regulation as

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<sup>2</sup> See Annex A of the E.164 ITU Recommendation for the procedure for the assignment of shared ITU-T E.212 Mobile Country Codes.

<sup>3</sup> This opinion is limited to assessing whether an operator providing services via 901 IMSI may request roaming access under the Roaming Regulation. Therefore, this opinion does not analyse which kind of numbering is used by the access seeker to address subscribers for the particular services (i.e voice, SMS or data). For instance regarding SMS services, the numbers used are related to the national E.164 numbering plans (see Roaming Regulation Article 2 (2) (j))”

*“a public communications network located within a Member State and used by the roaming provider for the provision of regulated retail roaming services to a roaming customer”*

Therefore, BEREC considers that the Roaming Regulation covers roaming services provided via a 901 IMSI for EU/EEA customers<sup>4</sup> with a home network that is located in an EU Member State.

Article 3 (2) of the Roaming Regulation states that a refusal of a request for wholesale roaming access should be based on objective criteria. The BEREC Wholesale Roaming Guidelines (BoR (17) 114) clarify in Guideline 5 that there should be *“objectively justified reasons”* for a refusal. BEREC does not consider the sole fact that an undertaking requesting access provides mobile roaming via a 901 IMSI as an objectively justified reason to refuse such a request.

### **3.2. Draft contract**

The second question to deal with is the draft contract and the reference offer. Telefónica refuses to submit a draft contract for a regulated wholesale roaming access product to Transatel. It would only agree to provide such a draft contract if Transatel fulfilled certain conditions, which Telefónica believes should ensure that the wholesale roaming services used by Transatel on Telefónica’s network actually correspond to the purpose of the Roaming Regulation, namely to exchange information at the wholesale level to enable Transatel’s end users that are EU/EEA citizens or persons with stable links to an EU/EEA country to use mobile services on Telefónica’s network for the purpose of periodic travel on the same conditions as in their home network. Specifically, Telefónica requires Transatel to provide information about the place of residence of its customers generating traffic on Telefónica’s network.

The question is if Telefónica complies with Art 3 (5) Roaming Regulation when Telefónica only agrees to send a draft contract for a regulated wholesale roaming access product to Transatel under the condition that Transatel can provide this information in advance.

According to Art 3 (5) Roaming Regulation access providers are obliged to publish a Reference Offer. Guideline 19 specifies the requirements for a Reference Offer:

*“That Reference Offer should cover all the aspects described below in sufficient detail for access seekers to understand the nature of the service offered. The Reference Offer shall also include any additional services which the access provider wishes to provide to any requesting party, over and above those which are regarded as necessary...The access provider may also be prepared to negotiate bespoke*

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<sup>4</sup> This opinion is limited to assessing whether an operator providing services via 901 IMSI may request roaming access under the Roaming Regulation. Therefore, this opinion does not analyse which kind of numbering is used by the access seeker to address subscribers for the particular services (i.e voice, SMS or data). For instance regarding SMS services, the numbers used are related to the national E.164 numbering plans (see Roaming Regulation Article 2 (2) (j))”

*agreements with individual access seekers. These are not to be covered by the Reference offer...*

Art 3 (5) Roaming Regulation, moreover, states that the undertakings requesting access shall be provided with a draft contract for such access at the latest one month after the initial receipt of the request by the mobile network operator. The wholesale roaming access shall be granted within a reasonable period of time not exceeding three months from the conclusion of the contract.

Therefore, there is a distinction between the full Reference Offer as a general contract offer that has to be published and the draft contract in terms of a customized contract offer for the respective access seeker.

Guidelines 7 and 8 set out what information can be required in advance:

*“...Information required by access providers shall be limited to the minimum necessary to allow them to provide an efficient access service, together with any evidence which may be necessary under the national law to establish that the access seeker is entitled to seek access under Article 3 Roaming Regulation. Information may be required at the outset of discussions about access. Further information may be required throughout the duration of the access agreement. (Guideline 7).”*

*“BEREC expects that non-technical information will be limited to such information which commercial parties would normally seek from one another at the outset of any agreement. Access seekers should in particular not be expected to provide any details of the service they expect to provide where these might reasonably be regarded as commercially sensitive. Required technical information for resale of roaming and direct access services must be limited to technical information on e.g. interfaces and protocols used by the access seeker which are needed to assess compatibility with the services offered by the access provider. ....(Guideline 8)”*

That implies that the MNO's request for information before sending a draft contract has to be appropriate and is limited to technical information and to what commercial parties normally seek at the outset of an agreement.

BEREC is of the view that Telefónica's request to ask Transatel to provide information about the place of residence of all of its customers that would generate traffic on Telefónica's network goes beyond these criteria so that a draft contract has to be provided in any case before entering into further discussions. Other details of the contract before reaching an agreement can be negotiated after the draft contract is provided to the access seeker.

### **3.3. Information an access provider is allowed to require from an access seeker to prove that all its customers making use of the Roaming Regulation are EU/EEA customers**

#### **3.3.1. Access seeker may apply measures to ensure that 901 IMSI roamers are EU/EEA customers**

Article 3 paragraph 1 of Commission Implementing Regulation 2016/2286 of 15 December 2016 (hereinafter the CIR) provides that the Roaming Regulation should apply to roaming customers who are normally resident in or have stable links entailing a frequent and substantial presence in the Member State of that roaming provider while they are periodically travelling in the Union.

Transatel is a full MVNO in different Member States including France and the United Kingdom, and provides mobile communications services worldwide in the M2M and IoT areas using 901 IMSI. Accordingly, its customers, who are resident or have stable links with the Member State where Transatel operates, should benefit from regulated roaming conditions. However, BEREC acknowledges that when the access seeker uses IMSI with non-geographical code 901 to provide services, it could raise doubts from the access provider operator on whether the roaming customers are normal residents or have stable links with EU/EEA Member States, especially in the case of Transatel that also offers services outside of EU/EEA. As the 901 IMSI is intended for worldwide usage, access providers are allowed to request access seekers to take measures to ensure that the framework of regulated roaming services only benefits EU/EEA customers (resident or having stable links).

#### **3.3.2. Detailed individual customer information cannot be requested from access seeker**

In order to deal with potential non-EU/EEA customers, Telefónica requires Transatel to provide detailed and regular individual information about the place of residence of its customers roaming on the Telefónica network.

With regard to this request from Telefónica, BEREC recalls that the Roaming Regulation provides that the visited network operator can take specific measures based on objective criteria which “*may refer to aggregate roaming traffic information ... [and] shall not refer to specific information relating to individual traffic of the roaming provider’s customers.*” (Article 3 (6)).

Moreover, as previously mentioned, BEREC Wholesale Guideline 7 states that

*“...information required by access providers shall be limited to the minimum necessary to allow them to provide an efficient access service, together with any evidence which may be necessary under the national law to establish that the access seeker is entitled to seek access under Article 3 Roaming Regulation”.*

Thus, BEREC is of the view that Telefónica cannot request individual customer information from Transatel.

### **3.3.3. Specific measures could be implemented, however, to ensure that the Roaming Regulation benefits only EU/EEA customers**

Nevertheless, different measures could be envisaged by the access provider. For example, during the public hearing organized by BNetzA, Transatel proposed a solution intending to ensure the use of regulated roaming services on Telefónica's network in compliance with the Roaming Regulation, namely by examining itself the nationality of the customers, as well as subsequently blocking the IMSI of non-EU/EEA customers for regulated roaming services on Telefónica's network.

BEREC is of the view that a similar approach (based on the residence instead of nationality), if implemented (Telefónica should have the right to ask for a review by a third party) by Transatel and Telefónica, would guarantee that wholesale roaming access on Telefónica's network benefits only Transatel's EU/EEA customers. Such proof could be for example in a form that is auditable on behalf of Telefónica (see BEREC Wholesale Guideline 29).

### **3.4. Measures to prevent permanent roaming or abusive and anomalous usage for wholesale roaming access**

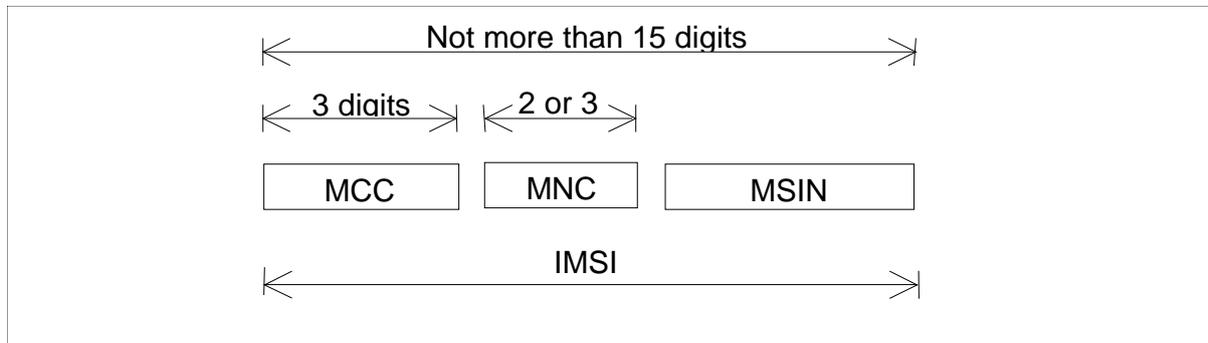
The access provider according to Article 3 (6) Roaming Regulation may include in the reference offer conditions to prevent permanent roaming or anomalous or abusive use of wholesale roaming access. If the access provider has reasonable grounds for considering that permanent roaming by a significant share of the access seeker's customers or anomalous or abusive use of wholesale roaming access is taking place, both shall exchange the evidence on these cases. These measures should be included in the access provider's reference offer or included during the negotiation of the wholesale roaming agreement to ensure legal certainty for the access seeker when requested to provide evidence of the use of the roaming agreement (Article 3 (6) Roaming Regulation). It is advisable that this information is provided in an aggregated manner and in full compliance with Union and national data protection requirements (Recital 12 Roaming Regulation (EU) 2017/920 and BEREC Wholesale Guideline 29). Despite the previous information exchange, if the access provider considers that there is not enough proof, it can claim a dispute with an NRA based on Article 17 (1) of the Roaming Regulation. In this procedure, the NRA can assess whether the evidence confirms the access provider's suspicions.

In BEREC's opinion, wholesale roaming agreements should be signed in good faith, and they may include measures to prevent permanent roaming or abusive and anomalous usage of regulated wholesale roaming services.

## Annex

### IMSI Composition

The International Mobile Subscription Identity (IMSI) composition<sup>5</sup> is shown in the following table:



Source: 3GPP TS 23.003

The Mobile Country Code (MCC) identifies uniquely the country of the mobile subscription and the Mobile Network Code (MNC) identifies the home network of the mobile subscription.

The Mobile Subscriber Identification Number (MSIN) identifies the mobile subscription within a mobile network and it is managed by the mobile provider.

MNCs under MCC ranges 90x are administered by the ITU. As a matter of fact, ITU has assigned<sup>6</sup> to Transatel the codes 901 37 (MCC+MNC) to provide its global services. As it was pointed out in the BEREC Report on Enabling the Internet of Things<sup>7</sup>, these shared codes could be used for the addressing in IoT services.

<sup>5</sup> [3GPP TS 23.003 V15.3.0 \(2018-03\)](#)

<sup>6</sup> [http://www.itu.int/net/itu-t/inrdb/e212\\_901.aspx](http://www.itu.int/net/itu-t/inrdb/e212_901.aspx)

<sup>7</sup> [BoR \(16\) 39 - BEREC Report on Enabling the Internet of Things](#)