Body of European Regulators
for Electronic Communications
BEREC

BoR (20) 154

BEREC Report on the outcome of the public consultation on the updated BEREC Guidelines on Intra-EU communications

01 October, 2020

Contents

Executive summary

During its 42nd plenary meeting (5-6 March 2020, Belgrade) the Board of Regulators approved the updated BEREC Guidelines on Intra-EU communications (hereinafter – Guidelines) for public consultation.

According to the BEREC Regulation that amends the TSM Regulation, BEREC has to draft BEREC Guidelines on Intra-EU communications on laying down criteria for NRAs assessing derogations for regulated intra-EU communications. In addition to the guidance for the derogation that is required under the Regulation, BEREC provides guidance on the application of the Regulation to ensure a consistent implementation across the EU/EEA. In March 2019, BEREC published its Guidelines on Intra-EU communications (BoR (19) 35).

BEREC decided to review the BEREC Guidelines on Intra-EU communications after one year of its publication because of two reasons: i) to update the Benchmark that is necessary for the assessment of sustainability applications and ii) to clarify issues that may have arisen during the implementation process.

During the public consultation, stakeholders were requested to provide comments on the updated BEREC Guidelines on Intra-EU communications and specifically include reference to relevant paragraphs or section of the Guidelines.

Stakeholders were invited to submit their inputs on the draft Guidelines by 10 April 2020 17:00 CET. Contributions received after the above-mentioned deadline were not taken into account.

All stakeholders were strongly encouraged to submit their contributions on draft Guidelines through the BEREC online public consultation platform on https://www.discuto.io/en/consultation/34035, however, further enquires about the consultation or contributions sent via email to the dedicated address intra_eea_gls@berec.europa.eu were also accepted.

All contributions will be published on the BEREC website, taking into account requests for confidentiality and restricted use of personal data.

1. Introduction

This report summarises the responses sent by stakeholders to the public consultation on the updated BEREC Guidelines on Intra-EU communications. The BEREC public consultation was open from 10 March to 10 April 2020 with the objective to get insights from all types of stakeholders (consumers, companies in the telecommunications sector, digital companies, other companies, institutions, associations, etc.) in the context of updating BEREC Guidelines on Intra-EU communications.

In response to the consultation, BEREC received six contributions from the following stakeholders[1]:

1. BEUC
2. Deutsche Telekom (DT)
3. ETNO
4. GSMA
5. MVNO Europe
6. Operator.

BEREC is grateful for receiving the submissions and has carefully considered them, and sets out its summary of stakeholders' assessments and responses in this report. The non-confidential responses are also published on BEREC's website and can be consulted for the complete version of respondents' submissions.

2. General comments

Overall, the stakeholders welcome the opportunity to comment on the updated Guidelines (**BEUC, DT, ETNO, GSMA, Operator**) and understand the reason for BEREC to review the Guidelines, since new benchmark values have to be taken into account for new applications for derogation procedures (**DT**).

However, **DT** highlighted that any further changes foreseen in the draft Guidelines produce insecurities for operators on how to implement the relevant rules (a more detailed analysis from DT follows in chapter 3).

MVNO Europe considers the Guidelines a low-priority item and assumes that there are far more pressing dossiers such as:

a) Reviewing and reducing wholesale roaming caps;
b) Ensuring continued non-discrimination for wholesale mobile call termination and related interconnection arrangements after the Eurorates for fixed and mobile termination rates (FTRs/MTRs) enter into force;
c) Ensuring competitive mobile (including 5G and IoT) markets through determined attention to the wholesale dimension.

[1] In alphabetical order.

3. Comments on “Price Caps on intra-EU communications”

Both **ETNO** and **DT** disagree with the proposal for guideline 9. **ETNO** assumes that Guidelines should clarify obligations already included in the Regulation. In that case, BEREC’s proposal to delete “”*should*” and introducing “*must*” is enhancing inappropriately regulatory intervention. Operators’ obligation to offer regulated intra-EU communication should not rely on a legal tool such as the Guidelines. **ETNO** suggests keeping the original text from the draft Guidelines “*Operators should offer regulated intra-EU communications in which the regulated price caps should apply by default. Article 5a (4) TSM Regulation gives consumers the option to switch from or back to tariffs with regulated price caps, therefore such tariffs must be an option offered by providers of international communications*”.

DT also disagrees with the proposal to change guideline 9, which does not reflect the rules set up by the Regulation 2015/2120, but would extend this Regulation beyond its scope. The Regulation requires operators to allow consumers to switch from or back to a regulated tariff for Intra-EU communications. As the words “*from*” and “*back*” already indicate, the assumption of this rule is that the consumer has a tariff which allows Intra-EU-communication in the first place. Otherwise, the consumer could not switch from such a tariff to any other tariff. Therefore, an understanding of article 5a (4) as an obligation to offer tariffs including Intra-EU communication goes too far and is not covered by the Regulation itself. Consequently, **DT** assume that guideline 9 should remain unchanged.

BEREC’s response:

According to article 97 and recital 254 of the EECC, Member States shall ensure that, where economically feasible, end users are able to access all numbers provided in the Union. Taking into account the provisions of both the EECC and the TSM regulation, BEREC considers that changing “should” to “must” in guideline 9 is in accordance to the European legal framework and its objectives.

4. Comments on “Alternative tariffs”

The majority of the comments received were regarding alternative tariffs. **BEUC**, **ETNO** and **Operator** expressed their ideas on the topic.

BEUC welcomed clarification of guideline 15 “…*Operators that offer such alternative tariffs must in any case offer the same domestic tariff plan (under the conditions mentioned in Guideline 20) with a regulated tariff…*” as consumers should get used to the new regulated tariffs as a regular part of the providers portfolio.

However, for **ETNO** is not clear what the intentions of BEREC are with the introduction of this sentence. As per **ETNO** understanding, it appears that the Guidelines are exceeding their remit and introducing new regulatory requirements beyond intra-EU calls; in this case intervening in domestic plans. **ETNO** suggests deleting the following sentence from the draft Guidelines: “…~~*Operators that offer such alternative tariffs must in any case offer the same*~~

~~*domestic tariff plan (under the conditions mentioned in Guideline 20) with a regulated tariff*~~…"

Operator expressed a third opinion by submitting new proposals for guideline15 and 16.

As for guideline 15, "…*An example for such alternative tariffs could include per minute billing with a charge of EUR 0.25 for both intra-EEA calls and calls originating within EEA and terminating outside the EEA. Another possible example for such alternative tariffs could include EUR 0.10 EUR for calls between BENELUX countries and EUR 0.25 for both the remaining intra-EEA calls and calls originating within EEA and terminating outside the EEA*" **Operator** proposed the following changes: "*An example for such alternative tariffs could include per minute billing with a charge of EUR 0.25 for both intra-EEA calls and calls originating within EEA <u>in the domestic country</u> and terminating outside the EEA. Another possible example for such alternative tariffs could include EUR 0.10 EUR for calls between BENELUX countries and EUR 0.25 for both the remaining intra-EEA calls and calls originating within EEA <u>in the domestic country</u> and terminating outside the EEA".* **Operator** assumes that changing the wording "*within EEA*" to "*in the domestic country*" would clarify that the price caps apply only to calls originated from the domestic country of the consumer and not to any call originated "*within EEA*". **Operator** mentioned that this is already clear according to guideline 6, but with the proposed modification, it would be clearer.

As for guideline 16, "*BEREC considers that alternative tariffs for intra-EEA communications which are wholly or partly based on consumption of such services and include calls and/or SMS at the same price to countries outside the EEA can be offered without the restrictions of the price caps set forth in Article 5a (1) TSM Regulation...*" **Operator** proposed the following changes: "*BEREC considers that alternative tariffs for intra-EEA communications which are wholly or partly based on consumption of such services and include calls and/or SMS ~~at the same price~~ to countries outside the EEA**,** can be offered without the restrictions of the price caps set forth in Article 5a (1) TSM Regulation…*". **Operator** therefore suggest to modify guideline 16 to highlight that the proposed stating "*at the same price*" is just an example, and that it should be clearly stated that the condition "*at the same price*" is just an example and not a condition. **Operator** also submitted an idea that an alternative offer could have (some or all) EEA countries priced at values higher than the price cap and (one or some) extra EEA countries priced at discounted rates; maximum freedom should be left to the market competitive forces to address the needs of specific cluster of customers.

BEREC's response:

BEREC considers that the clarification inserted in Guideline 15 is in line with the provisions of Article 5a (2) TSM Regulation and therefore the sentence: *"Operators that offer such alternative tariffs must in any case offer the same domestic tariff plan (under the conditions mentioned in Guideline 20) with a regulated tariff."* remains unchanged.

Regarding Operator's proposal on the text included in paragraph 15, BEREC agrees with the alternative drafting proposal and will adapt the text accordingly.

BEREC understand Operator's comment on Guideline 16 and suggests adapting the text in order to underline that having the same price is an example.

5. Comments on "Premium Rate Services"

ETNO express their concerns regarding Premium Rate Services (guideline 23). According to guideline 23, operators should inform customers in advance when providing Premium Rate Services, but the problem is that pricing information is often not available in advance. **ETNO** proposed to amend the BEREC proposal, limiting this obligation to cases in which operators are aware of Premium Rate Services pricing. **ETNO** proposed the following amendment: "*BEREC considers that the caps referred to in Guideline 8 do not apply to the whole tariff that is charged for the provision of PRS, but only to the tariff component corresponding to the connection of such services. If they offer access to PRS numbers of other EEA Member States, operators should ensure that consumers prior to using such services are informed about how any PRS expenditure is tariffed, charged and controlled, <u>in the cases where this is known in advance by operators</u>".*

However, **BEUC** supports BEREC's proposal by highlighting it as an important addition. **BEUC** gives an example of its Danish member (*Forbrugerrådet Tænk*), which found fraud cases, where people were duped into calling numbers abroad, which in fact were Premium Rate Services.

BEREC's response:

BEREC has already expressed its view – also in the context of other work streams (see BEREC input on EC request for roaming[2]) – that more transparency regarding PRS both at the wholesale level and the retail level is needed. However, regardless of transparency issues, BEREC believes that operators should give some information on how PRS are charged and in case the exact retail price is not available prior to using the service, customers should at least be warned of the risk of high charges. Therefore, the text will be maintained.

6. Comments on "Sustainability Exemption Procedure"

Both **GSMA** and **ETNO** express their concerns of consistency between the sustainability exemption procedure described in the BEREC Guidelines on intra-EU communications and the text of the Regulation.

According to the respondents, step 1 of BEREC procedure reflects that, the Regulation allows exemptions for applicants only in case of "specific and exceptional circumstances distinguishing it from most other Union providers". Recital 48 of the Regulation details that this condition ("specific and exceptional circumstances") can come in two ways: Either the "high proportion of regulated intra-EU communications in the global revenues or profits" or

[2] https://berec.europa.eu/eng/document_register/subject_matter/berec/opinions/9373-berec-input-on-ec-request-for-the-preparation-of-the-legislative-proposal-for-the-new-roaming-regulations , see chapter 4

"low domestic margins compared to industry benchmark". Those two ways do not have to be cumulative.

Both **GSMA** and **ETNO** point out that BEREC only considers the first way "high proportion of regulated intra-EU communications in the global revenues or profits", but ignores the second way "low domestic margins compared to industry benchmark", as a justification for "specific and exceptional circumstances".

According to both associations, the explicit explanation given by BEREC on this point in guideline 36 is neither convincing nor satisfactory:

a) They commented that it is not convincing because NRAs can estimate EBITDA on communication service of national operators. In addition, if NRAs can calculate volumes and revenues on regulated intra-EU communications, NRAs can also derive estimations of intra-EU gross margins. In other words, it appears questionable that reasonable proxies of exceptionally low margins for domestic operators, in a screening perspective, would be out of reach of BEREC;

b) According to them, it is also not satisfactory if, following Guideline 32, an NRA rejects the demand of exemption of an operator which has exceptionally low margins, but which has not an exceptionally large part of its activities in intra-EU communications, this would be in contradiction with the Regulation.

Both **GSMA** and **ETNO** suggest that either this section of Guidelines should be amended, or NRAs should ignore those specific provisions of the Guidelines when they examine demands of exemptions of operators.

BEREC's response:

According to the data BEREC has collected on intra-EEA communication services and the level of the price caps, BEREC considers that an operator that does not generate a particularly high share of its revenues or operational profits from intra-EU communications would not be significantly impacted in its capacity to sustain its existing prices for domestic communications. In addition, the collection of mobile margin data for a significant proportion of operators across Europe is a difficult exercise due to the common practice of offering bundles of services by many operators. Therefore, the definition of such a benchmark would not be a robust exercise to be used as a basis for sustainability assessments and would also cause an additional burden for operators to provide the necessary data. Therefore, BEREC will maintain the initial text in the Guidelines.

7. Comments on "Other issues"

BEREC received several comments from **BEUC** on issues, which did not fall in the previous subsections. The summary of these comments is divided in paragraphs below:

a) Deletion of former guideline 5: **BEUC** suggests that the deletion of this guideline is reasonable if it refers to a specific time component. Since there are no price caps for international communications, users should be able to buy fixed volume packages in the future as well.

b) Deletion of former guideline 6: **BEUC** expresses its concern that by deleting this guideline (particularly its last two sentences) makes it unclear how BEREC and NRAs would interpret the Regulation of number-independent interpersonal communication services in this context. **BEUC** points out that deleting this provision could only mean that the Guidelines are only applicable to number-based interpersonal communication services, however, considering evolving technologies and markets, this may lead to uncertainty in the interpretation and implementation by NRAs. **BEUC** recommends reinstating this guideline, particularly the last two sentences.

c) Comments on former guideline 9 (guideline 8 in the current draft version): While BEREC Regulation excludes VAT from the caps, **BEUC** recommends applying VAT per second, not per minute, as this is more favourable to consumers.

d) Comments on former guideline 21 (guideline 19 in the current draft version): For the sake of legal certainty, in line with recital 47 of the BEREC Regulation, **BEUC** recommends adding "*free of charge and*" before "*in accordance with the national legislation*".

e) Comments on former guideline 52 (guideline 50 in the current draft version): **BEUC** believes that NRAs should be granted more than a month period to evaluate an application as this process could be time-consuming. The wording in "*minimum*" deadline could imply that providers could demand a short evaluation period of one month. **BEUC** recommends changing this wording to ensure NRAs have appropriate time to evaluate the application, demanding more time if the evidence provided is not objective or the providers' application is incomplete.

BEREC's response:

BEREC understands BEUC's concern regarding former guideline 6 and agrees to keep former guideline 6 in the Guidelines.

Regarding BEUC's comment on VAT, BEREC notes that VAT calculation is out of the scope of the electronic communications legal framework. Therefore, BEREC's Guidelines cannot make reference to the way VAT is applied. Furthermore, the Regulation does not foresee any obligation on charging intervals.

BEREC will maintain the wording of guideline 19 as national legislation defines the rules that need to apply in cases of changes in terms and conditions.

As regards the time limit for evaluating sustainability applications, BEREC considers that one month is normally sufficient time if the application is complete. Furthermore, guideline 52 foresees an additional time period for NRAs if an application is manifestly unfounded or provides insufficient information.

One of the contributors, **MVNO Europe,** expressed their worries regarding the Intra-EU communications regulation. They provided the following concerns and pointed out what they consider as flaws:

a) Retail prices were capped without clear justification or impact assessment.

b) Insufficient attention was paid to related wholesale dimensions, where charges practices are very high compared to underlying costs (e.g. high unregulated wholesale call, SMS origination charges, high unregulated wholesale voice transit charges, high unregulated wholesale SMS termination charges). This leads some mobile virtual network operators (MVNOs) to incur losses or face margin-squeeze on some intra-EU destinations.

MVNO Europe urges BEREC to monitor and benchmark all related wholesale dimensions, in the same manner as it has already done for FTRs/MTRs and SMS-TRs. Furthermore, **MVNO Europe** recommends (in the future) to regulate (only) the wholesale dimension for end-to-end intra-EU communications (taking into account the Eurorates set for FTRs/MTRs) and deregulate the retail prices.

BEREC's response:

BEREC considers that the comments provided are more related to the content of the Regulation and not to the content of the Guidelines and therefore it cannot respond to them.

Annex - List of received contributions

Name of the contributor	Country	No. of pages
ETNO	Belgium	2
GSMA	Belgium	3
BEUC	Belgium	3
OPERATOR	Italy	3
MVNO EUROPE	Belgium	1
DEUTSCHE TELECOM	Germany	2