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BEREC – Guidelines on the application of Article 3 of the Roaming Regulation- WHOLESALE ROAMING ACCESS - BoR (12) 67

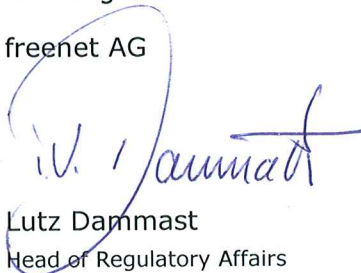
Dear Ladies and Gentlemen,

we welcome the opportunity to provide comments on BEREC's Draft for Guidelines on the application of Art. 3 of the Roaming Regulation.

If you have further questions we would be happy to be able to comment on this written comment during a meeting in Brussels. Please do not hesitate to contact me if you need further information.

Kind regards

freenet AG



Lutz Dammast
Head of Regulatory Affairs

Submission to BEREC's public consultation on

**BEREC – Guidelines on the application of Article 3
of the Roaming Regulation
- WHOLESALE ROAMING ACCESS - BoR (12) 67**

freenet AG

Hamburg, 10.08.2012

freenet AG welcomes the opportunity to provide comments on BEREC's Draft for Guidelines on the application of Art. 3 of the Roaming Regulation.

freenet AG is the biggest network-independent telecommunications provider in Germany. The Group offers its customers a comprehensive portfolio of services and products, primarily in the field of mobile voice and data services.

As a mobile service provider (a so called "Light MVNO"), the freenet Group has no network infrastructure of its own but markets, under its own name and brand and for its own account, mobile communications services. freenet uses all 4 German mobile network operators (Telekom, Vodafone, E-Plus and Telefónica) as Host MNO. In 2011 the total revenue of the freenet Group was 3,2 billion EURO. At the end of 2011 freenet provides mobile telecommunication services to 15,2 million customers (Prepaid and Postpaid) using our main brands "mobilcom-debitel", "klarmobil" and "callmobile".

freenet's primary sales channels are its around 550 branded shops, about 6,000 additional sales points at retailers, electronics dealers and superstores, as well as online and direct-to-customer sales; notable sales channels are the Group's collaboration with Media-Saturn Deutschland GmbH, and the exclusive cooperation with GRAVIS Computervertriebsgesellschaft mbH signed in October 2011. Our marketing focus is essentially on the B2C business with private households in Germany.

Q1. Do you agree with BEREC's interpretation of the Regulation concerning timing of provision of service?

freenet agrees with BEREC's interpretation and the wording of Guideline 1. Mobile Network Operators in Germany have denied their obligation to offer wholesale roaming access services in the past only because BEREC Guidelines were not yet published. It is absolutely clear that the Guidelines are an interpretation document only. The obligation to grant access is solely based on the regulation itself and not linked to the guidelines.

Q2. Do stakeholders agree with BEREC's approach to mandatory and optional resale access services and to its approach to pricing?

We agree with BEREC's approach to mandatory and optional services. It is essential that every access seeker will get all services he needs to provide roaming services for customers.

To avoid lack of clarity we recommend to clarify that in case of light MVNOs / resellers without network infrastructure (HLR, own IMSI range etc.) the domestic host MNO – in

addition to the foreign network operator - is also obliged to grant access and to provide all necessary services to enable the MVNO / reseller to provide regulated roaming services for customers. Otherwise light MVNOs / resellers probably would not be able to use of Wholesale roaming Access at all. In this case we possibly have two obligated network operators. One network operator is the foreign roaming operator which has to provide access to his network for the customers of the light MVNO and the other obligated party is the domestic host MNOs of the respective light MVNO. The host MNO has to enable the foreign roaming operator and has to provide access to the IMSIs and all other necessary services and infrastructures.

Furthermore we would like to stress, that the quality of the roaming service must not only be "satisfactory", but in a quality equal to that of the roaming service of the MNO itself. Without this non-discrimination clause we suspect that some MNOs may be tempted to provide a low quality roaming service only.

We do not agree with BEREC's approach to pricing. We believe that the wording of the regulation is clearly stating which services should be included in the wholesale roaming charges and there is no alternative interpretation of the wording. The wording of Article 3, paragraph 3 says:

Wholesale roaming Access shall cover access to all network elements and associated facilities, relevant services, software and information systems, necessary for the provision of regulated roaming services to customers.

Relating to the pricing of those Wholesale roaming access services Article 3, paragraph 4 states:

Rules on regulated wholesale roaming charges laid down in Articles 7, 9 and 12 shall apply to the provision of access to all components of wholesale roaming access referred to in paragraph 3.

Based on this paragraph it is clear that all services the access seekers need to provide regulated roaming services to their customers are part of the wholesale roaming services. This does not include any differentiation between services which are wholesale in nature (whatever that means) and other services, which are not wholesale in nature.

Rather, all relevant services needed by an access seeker must be provided and can only be charged with the Wholesale cap laid down in Article 7, 9 and 12. Therefore recital 26 rules, that the wholesale roaming access regulation should cover access to all components necessary for the specific access seekers.

Such access should be in line with the needs of those seeking access.

That means, if the provision of HLR services is part of the necessity of a light MVNO / reseller, it has to be part of the Wholesale Roaming Access. All parts of the Wholesale

Roaming access should be provided under application of the Wholesale caps laid down in Articles 7, 9 and 12.

On the other hand it is clear that there are services, which are not part of the Wholesale Roaming Access. Recital 29 describes which kind of roaming services could be charged with a fair and reasonable mark-up. Recital 29 enumerates value added services and additional software, information systems and end customer billing systems. Those additional services as well as sales, distribution and marketing, customer support and customer debt collection are clearly within the responsibility of the access seeker ("retail" services). The MNOs are obliged to provide those "retail" services at fair and reasonable prices if requested by the access seeker.

To avoid unwanted market entry barriers MNOs must not charge the cost of being compliant with regulation to the access seeker. Small MVNOs and resellers are not able to pay excessive setup fees. Result of the latter would be strong distortion of competition.

Only this clear and simple interpretation of the regulation prevents inappropriate behaviour of the MNOs obliged to grant access. Following BEREC's approach access seekers will have to argue with MNOs about the question, which service is "wholesale in nature" and which service is not "wholesale in nature".

To illustrate those fruitless discussions we want to give some insight in our current negotiations with German host MNOs. Some MNOs are asking for significant mark-ups for the following services:

- Costs for the authentication of a MVNO customer visiting a foreign network
- Costs for the handling of billing data / CDR delivery
- Clearance of Wholesale Roaming Services with foreign network operators
- "Network Operation Center" costs
- Management of roaming contracts

Without clear guidelines we do not expect to achieve mutual consent on this issue. One of the MNOs added up wholesale roaming charges and "fair and reasonable" mark-ups leading to a total amount that is more or less identical to the retail minus charges charged before the new roaming regulation was in effect. Obstruction caused by MNOs can only be avoided by clarifying that every access seeker, despite the depth of value creation, shall get access to all services needed to provide roaming services to customers – not including "retail" services – without having to pay more than the defined wholesale roaming charges.

This does not represent a disproportionate burden for MNOs as the wholesale roaming charges are clearly not cost based.

So we propose the following wording for Guideline 2:

MNOs must be prepared to offer both direct and resale access, irrespective of whether they currently offer such services and irrespective if they are foreign roaming providers or domestic host operators only responsible for parts of the services.

In case of resale access, they will offer:

- a) All wholesale resale services required to allow the specific access seeking provider (MVNO / reseller) to provide a retail roaming service to customers with the same quality as a MNO.
- b) Other Wholesale services without a retail roaming service would not be practicable.
- c) Retail functions which are commonly required by resellers.

In addition they may offer:

- d) Any other services at their own discretion.

The price for the bundle of services under (a) and (b) must not exceed the limits set out in Articles 7, 9 and 12 of the Regulation, subject (where appropriate) to the currency exchange rules in Article 1.

The price for services offered under (c) and (d) shall be fair and reasonable.

In both cases it is not justifiable to charge setup fees to access seekers.

An illustrative ... the price cap.

All services listed under (c) and (d) may be charged by the MNO to access seekers at fair and reasonable prices. We strongly believe that this regulation needs additional coverage to avoid abusive behaviour of the MNOs. Therefore we suggest a completion of Guideline 19 (details see below Q7).

Q3. How would your business be affected if the right for direct wholesale roaming access applies to hub aggregators for the purpose of supply of regulated roaming services to EEA customers? How could a distinction between access for such purposes and access for purposes unconnected with the Roaming Regulation be applied in practice?

We are sure that for small MVNOs and resellers hub aggregators are essential. Therefore we support BERECs approach to the access right of hub aggregators. In our opinion a

hub aggregator has an access right derived from a MVNO or retailer seeking roaming access. This interpretation is consistent with Recital 27. Recital 27 is only stating that there must be a possibility for all access seekers to use a hub aggregator. This could also be based on an outsourcing model.

We do not see any need for a distinction between roaming purposes and purposes unconnected with roaming regulation because we think that roaming aggregators are already able to buy roaming services at prices below the regulated wholesale roaming charges today.

Because of our experiences with MNO's behavior negotiating Wholesale Roaming Access during the last months, we propose a further amendment of Guideline 4. Some MNO's denying Wholesale Roaming Access to freenet as a Light MVNO because there is no clear statement in the regulation, that Light MVNOs have a right to Wholesale Roaming Access. This leads to unreasonable delay in granting Wholesale Roaming Access. Up to the present there are still some pan-European MNOs of those we are using as a host in Germany that did not grant lawful Wholesale Roaming Access to freenet AG.

So we propose the following wording for Guideline 4:

The right to Wholesale Resale Access according to Article 3 is applicable for all MNO, MVNO, Light MVNO and Resellers.

Any undertaking which is entitled, under the law of the Member State in question, to provide roaming services to roaming customers in that Member State enjoys the right to wholesale roaming access under the terms of Article 3. BEREC takes the view that a 'roaming customer' is identified by EU numbering resources assigned to the mobile service.

BEREC considers that the right to request direct access on regulated terms extends to operators of hub aggregation services when providing regulated roaming access, to the extent necessary for the hubs to serve EEA providers of regulated retail roaming services, notwithstanding that the hubs may have no retail customers of their own.

Q4. Do you agree with BEREC's general approach to refusal of requests? Do you have any specific suggestions on how the guidance in this area could be strengthened so as to deter refusals on spurious grounds while not constraining the right of MNOs to refuse to provide on the basis of careful objective justification?

We agree with this approach.

Q5. Do stakeholders consider that further Guidelines should be developed to deal with the issue of requests for wholesale resale roaming access from market players whose retail services are otherwise hosted on other networks? If so, please provide examples of commercially credible retail services which could be operated in this manner.

The domestic services which freenet group uses to provide services to its customers are provided by 4 different host MNOs. The possibility to select one host MNO as the roaming provider for all our customers will clearly enforce competition. To enable this possibility we consider it necessary that every host MNO is obligated to support the migration of MVNO customers to any other MNO for roaming services only. If we e.g. would have signed a roaming contract with Telekom Deutschland for our customers using the Vodafone network for the domestic services, we would need Vodafone's support to enable Telekom Deutschland to provide roaming services to these customers.

We propose the following wording for Guideline 6:

Requests for resale access may not be refused on the basis that the access seeker is not currently hosted on the MNO network (either for resale of domestic or roaming services).

Domestic Host MNO are obliged to enable MVNO / resellers to use a different MNO for roaming services on the MVNO / resellers discretion.

Q6. Do you agree with BEREC's views on resale access to unregulated services?

We agree with BEREC approach on resale access to unregulated services. Customers would be strongly obfuscated in case of any disruption between EEA and extra-EEA roaming services. Additionally it would be inappropriate to allow MNOs to refuse access to extra-EEA roaming services and / or to worsen the pricing of those unregulated services in case the MVNO / reseller is asking for access to regulated roaming services (one host MNO already told us that in case freenet Group is requesting wholesale roaming access current pricing for world roaming services and existing roaming packages will not be available any more).

To avoid discriminatory behavior of MNOs it is essential that Guideline 16 clarifies that existing national access rights must not be affected by demanding regulated roaming services in any case. Access seekers must be able to decide freely if they want to purchase roaming services using existing access rights for one part of their customers and to purchase regulated roaming services for another part of their customers.

Furthermore we have to clarify in the Guidelines, that an MNO must not discriminate an access seeker in any other way.

So we propose the following wording for Guideline 16:

Section 7 shall also apply to unregulated roaming services (e.g. roaming calls to and/or from a state outside the EEA), with the sole exception that charges are not covered by price caps and should be fair and reasonable.

Access seekers must not be discriminated by Host MNOs and/or Visited network operators in any way. Already existing access rights remain unaffected and could be combined with the access rights following this regulation in the sole discretion of the access seeker.

Q7. Do you agree with BEREC's general approach to fair and reasonable prices? Do you consider that other general principles should be articulated?

For all services listed under (c) and (d) the MNO can demand fair and reasonable prices. But we strongly believe that this regulation needs to be clarified to avoid abusive behaviour. We suggest including a transparency obligation for MNO in Guideline 19. For all services the Host MNO or the Roaming MNO is allowed to charge fair and reasonable prices, he must provide objective justification of the basis of the charge to the access seeker. Only with such justification the access seeker is in the position to decide if it is necessary to use dispute resolution of the respective NRA. This is essential for light MVNOs and resellers which do not necessarily have strong network infrastructure know how. It could be no argument that NRAs prefer not to have to resolve pricing disputes.

One possibility to avoid disputes on the question of „fair and reasonable prices“ is to stipulate that access seekers must not pay any charges for retail services, if the MNO does not give the access seeker the possibility to produce the respective service on its own. That means if an access seeker asks the Host MNO to provide his end customer billing the Host MNO is only entitled to charge “fair and reasonable” prices for this service if he is up to give the access seeker access to the call data records of its customers free of charge.

So we propose the following wording for Guideline 19:

Where these Guidelines specify “fair and reasonable” prices, compliance with this requirement will often necessitate consideration of the individual circumstances of the case. In dealing with any complaint about no-compliance or dispute, NRAs will in particular take into account the following considerations:

- whether there is a “market rate” for such services (or broadly comparable services). Any charge significantly in excess of the market rate is unlikely to be reasonable

- the cost of provision and the magnitude of the resulting return to the MNO. Such returns should not be excessive
- the need to minimise the overall cost of resale access, in order to facilitate the objectives of the Regulation to promote retail competition, including via resale.

Objective justification of the basis of the charge must be made available to the access seeker on request concerning the necessity of such charge to avoid providing services at a loss and the reasonableness of the level.

The right to charge for the services specified in Guideline 2 (c) and (d) requires the willingness of the Host MNO to enable the access seeker to provide the respective service on his own.

Q8. Do you agree with BEREC's proposed basis of charging for resale of incoming roaming voice calls?

We do not agree with BEREC interpretation that the resale of incoming voice calls is a service included Guideline 2 (c) and may be charged with a mark-up.

In our interpretation of the regulation the access seeker has the right to demand every service which is necessary for providing roaming services to customers. All these services are already compensated by paying the wholesale caps for outgoing calls. Only because there is no specific Wholesale charge for incoming call, we could not say that this means it could be charged with an extra mark-up. The regulation clearly states that all services necessary to provide a roaming service to customers must be included in the wholesale roaming charges. The offering of incoming calls is without a doubt essential for a roaming offer. Because there is no specific wholesale price in Article 7, 9 and 12, the MNO is not allowed to charge the access seeker for incoming calls! This is not unreasonable, because the domestic MNO already gets MTRs for incoming calls. Additionally we expect that there will be a comparable level of incoming and outgoing calls between MNO networks over time (which results in a cost / income balance).

Furthermore we have to realize in case of light MVNOs / resellers usually MTR charges are collected by the domestic host MNO on their own account and are not forwarded to the light MVNO / reseller. As long as the domestic Host MNO collects the national MTRs for incoming roaming calls, he must be obligated to pay for termination and transit in case of an incoming roaming call without the right to charge this to the access seeking light MVNO / reseller.

Example: Using his domestic Host MNO Vodafone as aggregator for an incoming roaming call on the KPN network in Netherlands, KPN has to pay for termination and transit. This

cost will be charged from KPN to Vodafone. Vodafone on the other hand has MTR income (3,36 Cent per minute in Germany) without having the necessity to terminate the call using the Vodafone mobile network.

Q9. Do you agree with BEREC's proposed basis for resale charges for termination of outgoing SMS?

We agree with BERECs approach for resale charges for termination of outgoing SMS but for different reason. Because terminating SMS is essential part of a roaming offer it must be part of the wholesale roaming services; this is not depending on the amount of incoming and outgoing SMS. All wholesale Roaming Services are fully paid with the wholesale caps.

So we propose the following wording for Guideline 20:

A fair and reasonable charge for termination of incoming calls may be levied to recover the costs to the MNO arising from termination of calls received by customers of the reseller if the reseller is entitled to demand MTRs for this call. If this is not the case no charge may be levied.

A fair and reasonable charge for termination of outgoing roaming SMS shall take account of income received by the MNO for termination of incoming roaming SMS received by customers of the reseller.

Objective justification of the basis of the charge must be made available to the access seeker on request concerning the necessity of such a charge to avoid providing services at a loss and the reasonableness of the level.

BEREC expects that a fair and reasonable charge will not exceed €0.5c per outgoing SMS, except where the MNO can demonstrate that, for roaming SMS sent and received by customers of the access seeker, the average termination charge paid per outgoing SMS significantly exceeds the average termination charge levied for incoming SMS.

Where the average termination charge paid per outgoing SMS is significantly less than the average termination charge levied on incoming SMS, a charge to resellers is unlikely to be justifiable.

There should be no charge for termination of incoming SMS to resellers having resale access.

Q10. Do you have any comments on BEREC's approach to service level agreements and guarantees or on the regular monitoring of service levels?

No.

Q11. Please set out your views on what the "accepted standards and methods are. Is there any action which BEREC could usefully take to promote further useful standardisation?

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Q12. Do you consider that the Guidelines should include specific provisions on fraud prevention in addition to the generic statements in the draft?

MNO should be obliged to implement state-of-the-art anti-fraud measures for MVNO / reseller customers as well. Fraud prevention is an essential of any mobile telecommunications and therefore has to be provided without additional charges as a part of Wholesale Roaming Access.

Q13. Do you consider that BEREC should provide more detailed guidance on restrictions of conduct of business? In particular, would it be useful to include an indicative list of generally unacceptable restrictions in the Guidelines.

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Q14. Do you consider that any current practical "permanent roaming" applications should be considered as an "unfair use" of roaming wholesale access agreements? If so, please explain why and also how you would propose to distinguish between "fair" and "unfair" uses of permanent roaming. Would a distinction based on the phone number of the roaming MSISDN be relevant and applicable?

We are of the opinion, that "permanent roaming" is no product for the mass-market. Therefore we don't think additional regulation is necessary.

Beyond that we come up a little faster to the goal of an integrative European market for mobile services if we level out the price differences in the member states. Therefore "permanent roaming" could be a suitable tool.

Q15. Do you consider that the Guidelines need further detail concerning anticompetitive provisions which must not be included in the Reference Offer or supply contract?

The situation of a MVNO / Reseller as an access seeker is comparable to the situation of market actor facing a market dominant undertaking as counterpart. So we believe, that the essential rules a market dominant undertaking has to observe, must also be applicable to a MNO granting Wholesale Roaming Resale Access. We need a non-discrimination-rule.

The non-discrimination has to require the equal treatment of an access seeker vis-à-vis other partners of the MNO and other access seekers.

So we propose the following wording for a new Guideline:

MNOs are obligated to provide Wholesale Roaming Access to everyone. MNOs must not discriminate or treat unequally any access seeker direct or indirect in any way without a factual justification. The admission of an access seeker must be accomplished following factual criteria and the principles of non-discrimination and commensurability. MNOs must not restrict any access seeker concerning there own terms and conditions and other fields of activity.

Q16. Do you consider that the Guidelines should cover additional issues or that the draft guidance on issues already covered should be further developed?

Because a light MVNO / reseller has no own network infrastructure he needs support from his domestic Host MNO. To avoid obstructive behavior of the domestic Host MNOs it is necessary to obligate the domestic Host MNO to give all necessary assistance to the MVNO / reseller to allow the MVNO / reseller to manage the roaming services for his customers on his own or using another MNO or hub aggregator.

Those services should be included in the reference offers to be published by the MNOs. We recommend adding this obligation in Guideline 23.

Q17. Do you have any other comments on the draft Guidelines?

No.