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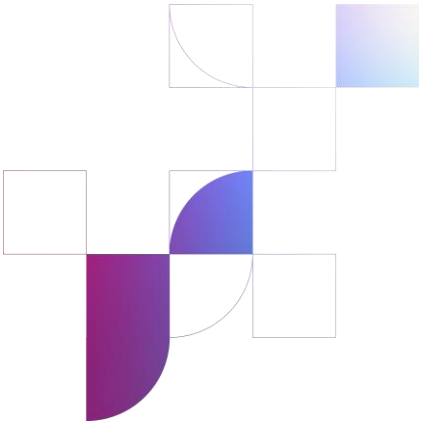
BEREC Opinion on the Implementing Regulation on intra-EU communications



14 April 2025

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1. Introduction and background

On 7 March 2025, BEREC received a letter from the European Commission (EC) requesting BEREC's opinion on the draft Commission Implementing Regulation (CIR) for the application of Regulation (EU) 2015/2120 of the European Parliament and the Council (hereinafter referred to as the "Intra-EU Communications Regulation") concerning fair use, based on typical usage patterns, and anti-fraud measures for intra-EU communications services.

In accordance with Article 5a (8) of the Intra-EU Communications Regulation, providers that voluntarily choose not to impose different retail prices to consumers for domestic communications and intra-EU communications will be exempt from adhering to the maximum retail price caps established for intra-EU communications, subject to a fair use policy. The fair use policy outlined in this draft Implementing Regulation serves exclusively this specific purpose.

BEREC has been asked to provide its opinion no later than the end of April 2025. Following the consultation with BEREC, the Implementing Regulation will be finalised by the EC, with the assistance of the Communications Committee.

The following chapters present BEREC's opinion on the draft Implementing Regulation, taking into account the legal requirements set out in Article 5a (8) of the Intra-EU Communications Regulation. This paragraph states that, as of 1 January 2025, *providers may on a voluntary basis comply with the obligation not to apply different retail prices laid down in paragraph 7. Those providers shall be exempt from the obligations laid down in paragraph 1, subject to a fair use policy, with a view to bringing the benefits of equal retail prices for domestic and intra-EU communications to consumers earlier.*

In general, BEREC notes that the draft CIR establishes only fundamental principles without providing concrete definitions, which may lead to uncertainty, complexity and lack of transparency for all involved parties, including operators, consumers and national regulatory authorities (NRAs). It introduces a complex regulatory framework, which may discourage providers from opting out of the established retail price cap regime.

2. Assessment of Fair Use policy (Article 1)

The draft CIR stipulates that the fair use policy (FUP) shall enable providers of electronic communications services to the public to implement safeguards when a consumer's usage of intra-EU communications is significantly higher than the typical usage volume of minutes or SMS. Article 1 (2) defines the typical usage volume as the number of intra-EU minutes or SMS consumed per month per subscriber in the Member State (MS), as reported in the latest Intra-EU communications BEREC Benchmark report (BMK) available at the time of the assessment. Safeguards shall apply separately for intra-EU calls, distinguishing between fixed and mobile calls, and for intra-EU SMS. However, Article 1 (3) also stipulates that the indicators used by providers to determine whether a customer's usage pattern exceeds the typical use should be based on "*objective criteria*", linked to the typical usage patterns of that specific consumer concerned, and assessed over a period of time sufficiently long to enable a proper assessment of the typical nature of the usage pattern, and in any event not shorter than a month.

Furthermore, Recital 4 mentions that typical usage of intra-EU communications may vary, *inter alia*, depending on the type of consumer.

This requirement appears to establish three distinct and potentially conflicting references to what constitutes "typical" usage. Paragraph 2 defines "typical usage" in relation to the average consumption within the Member State, paragraph 3 refers to the individual consumer's specific usage pattern, while Recital 4 specifies typical usage in relation to the type of consumer amongst other factors. The draft CIR does not provide a clear relationship or hierarchy between these three notions, which could lead to interpretative ambiguities. In particular, this lack of clarity could be construed as allowing fair use thresholds to vary across individual consumers, which would create significant transparency issues for consumers and high complexity for providers in implementing compliance mechanisms. Furthermore, the absence of a clear framework for reconciling these definitions could present considerable challenges for NRAs, particularly in the event of disputes, potentially leading to inconsistent interpretations.

With reference to the country-specific notion of "typical usage" as defined in Article 1 (2), BEREC understands that, in practice, according to the above described FUP provisions, providers are supposed to consult the BEREC intra-EU communications reports to determine the number of intra-EU minutes (separately for fixed and mobile communication) and SMS consumed per month per subscriber in their Member State (MS) (e.g. 20 minutes in country A). Based on this data, providers should then establish the FUP threshold at a level which is significantly higher than these reported figures. BEREC notes that, although the term "*significantly higher*" conveys an expectation regarding the FUP, its lack of precise definition introduces ambiguity for all parties involved, i.e. consumers, providers and regulatory authorities, which will be responsible for monitoring compliance with the legal requirements. In light of this, BEREC strongly suggests that the EC clarifies or rather defines the meaning of "significantly higher". For instance, the EC could specify that "significantly higher" corresponds to a defined multiple (e.g. x times the average consumption per month per subscriber per country, as reported by BEREC in its BMK report).

In addition, BEREC notes that, with regard to the concept of typical usage, the draft CIR establishes as a reference point the term "intra-EU minutes or SMS consumed per month per subscriber in the MS as reported in the latest Intra-EU communications BEREC BMK report". BEREC would like to note some shortcomings associated with this approach:

- BEREC currently collects data on regulated intra-EU minutes (separately for fixed and mobile communications) and SMS consumed per month per subscriber who has actively used regulated intra-EU communication in each MS. However, the term "regulated intra-EU communication service" refers only to a subset of intra-EU communications. Specifically, regulated intra-EU communication services encompass those that are charged wholly or partially based on actual consumption. Intra-EU minutes or SMS included in bundles – such as unlimited tariff plans or tariffs with a fixed volume allowance for intra-EU communications – do not qualify as regulated intra-EU communications and are therefore not considered in the aforementioned calculation. Nevertheless, it is important to emphasise that in some Member States, in-bundle consumption constitutes a significant majority of intra-EU traffic. Furthermore, it should be noted that regulated intra-EU communication pertains

exclusively to consumption by consumers, excluding business users. For these reasons, relying solely on the simple average of *regulated* intra-EU units consumed per month per subscriber who has actively used regulated intra-EU communication could result in a significant underrepresentation of the actual "typical" usage pattern in a given Member State. In this regard, it is worth noting that the average number of regulated mobile intra-EU minutes per month per subscriber using regulated intra-EU communication services across all Member States was 4.3 minutes during the period from 1 October to 31 March 2024, while the corresponding average for SMS was 0.47. These notably low figures represent only a minor portion of overall intra-EU communications. Therefore, BEREC emphasises that the CIR should provide specific clarification regarding which BEREC data set should be used for the purpose of the definition of the FUP. At least during the first year of the CIR's application, the data needed for the calculation will not be available. Therefore, BEREC suggests that the CIR should also include instructions for this transitional period. Additionally, BEREC questions the reference in the CIR to all subscribers and not only to consumers (i.e. the wording refers to the number of intra-EU minutes or SMS consumed per month *per subscriber* instead of number of intra-EU minutes or SMS consumed per month *per consumer*). Given that the rules apply only to consumers, BEREC considers that the correct indicator should be based on consumer usage alone.

- Some operators fail to provide complete or reliable data, which results in some MS not being included in some graphs of the BEREC Intra-EU communications Benchmark report. In addition, some NRAs classify their national data as confidential. The CIR should include a provision on how operators should proceed in cases when no public data is available. Finally, for some countries, not all operators are requested to submit data to BEREC (e.g. operators with a market share of less than 0.5 %).

Furthermore, BEREC wishes to highlight that Article 1 (3) includes some terminology that is not consistent with the terminology used throughout the rest of the text of Article 1 and is rather vague at some points. For example:

- Article 1(3) refers to objective criteria: This term is an undefined legal term and its application will bring legal uncertainty to all relevant parties.

- Article 1(3) refers to an assessment over a period of time sufficiently long and in any event not shorter than a month. BEREC considers that this again introduces further legal uncertainty, intransparency and complexity, as the term "sufficiently long" is not defined. In addition, the draft CIR should provide further details about the implementation of surcharges in such cases (i.e. surcharges to apply only for the remaining period of the billing cycle in which there is significantly higher consumption).

Finally, BEREC emphasises that the CIR should explicitly state that, if an operator on voluntary basis decides to opt for the application of Article 5a (8), this decision should apply uniformly across all its regulated intra-EU tariffs. Such a provision should ensure that an operator does not take advantage by opting to apply uniform pricing for domestic and intra-EU communications only for those consumers who may be subscribed to tariff plans with retail prices for domestic communications which are higher than the maximum retail price caps set for intra-EU communications.

3. Assessment of Fraudulent Use (Article 2)

The draft CIR states that *"providers of electronic communications to the public may apply anti-fraud measures to detect fraudulent usage related to the voluntary decision to apply equal retail prices for domestic and intra-EU communications. Where the provider detects fraudulent activity, it shall notify the NRA of the conduct in question, as well as of the measures proposed to tackle the suspected fraud as soon as possible and, in any event, before any measure is enforced."*

BEREC understands that NRAs should be notified by operators in case of fraudulent activity, however the role foreseen for the NRAs in this process remains unclear. Specifically, it is uncertain whether this notification is intended merely for information purposes, or whether a formal approval by the relevant NRA is required. BEREC would appreciate the inclusion of a provision in Article 2, stating that this notification is for information only, in accordance with the content of the Recitals of the CIR. In this regard, BEREC would like to note, that there might be similar situtations in wich such notifications are not only shared with the NRA for information, but the NRAs also have to approve them. Therefore, clarifying in Article 2 that the process foreseen is for NRA's information only will provide legal certainty to all relevant players.

Furthermore, BEREC notes that providers may need to take prompt action to combat fraudulent activity. Such action would be delayed if providers have to notify the NRA before any measure is enforced, to the detriment of both the providers and their end-users, and to the benefit of fraudsters. One also has to consider that measures typically adopted to combat fraudulent activity, such as call blocking, often impact providers' revenues and so such measures are typically introduced only when necessary. In this respect, BEREC recommends that Article 2 is updated to reflect that NRAs are to be notified of an enforcement measure within a short timeframe (e.g. three (3) working days) after its implementation, rather than necessarily before any measure is enforced.

Moreover, BEREC considers that if all fraudulent activities have to be notified, this might lead to high administrative burdens – both on the operator as well as on the NRAs. BEREC therefore recommends to clarify in Article 2, that such an obligation should only be imposed for cases where the providers also applied or intend to apply anti-fraud measures as a consequence of such activity.

In addition, BEREC requests the EC to include, at least in the recitals, some examples of measures that operators might apply, as well as clarification of measures not allowed to be taken.

4. Assessment of Transparency Provisions (Article 3)

The draft CIR includes provisions with regard to consumer protection in Article 3. Specifically, the CIR foresees that when a provider of electronic communications to the public applies a FUP, it shall include in the contracts with consumers the terms and conditions associated with that policy. In addition, where a provider has evidence that a consumer's consumption of intra-EU communications is likely to exceed the typical usage, it should immediately alert the

consumer of the risk of triggering surcharges. Furthermore, the CIR states that consumers shall have the right to appeal the decisions taken by the provider of electronic communications to the public, including thorough conciliation and competent out-of-court dispute resolution bodies as referred to in Article 25 of Directive (EU) 2018/1972.

BEREC would appreciate, if the EC was more specific in the CIR with regard to the alert in Article 3 (1) by mentioning – similar as it is the case in the Roaming Regulation – when exactly consumers should be notified, e.g. when reaching 80 % and 100 % of the included volumes. Notifications/ alerts must always be provided in advance, with a sufficient time span so that the consumer can avoid being charged with additional costs and can consume up to the limit of the application of the domestic price.

5. Surcharge

The draft CIR states in Article 1 (4) that when the usage goes beyond the typical usage pattern, providers may charge additional prices for the intra-EU communications units concerned.

BEREC understands that when the FUP is exceeded, the operators are allowed to charge something in addition to the domestic price for the intra-EU communication service and that this surcharge could be more than the regulated price cap (otherwise an exemption would not make sense), but BEREC would appreciate to avoid bill shocks for consumers. Therefore, BEREC proposes that the CIR includes a clear indication about the level of appropriate surcharges for such cases (e.g. maximum is 1.5 or 2 times the cap defined in Article 5a (1) of Regulation (EU) 2015/2120).

BEREC also notes that the draft CIR is making use of the term ‘surcharges’ in two different contexts. In order to avoid misinterpretations, BEREC considers that this term should be used solely in the CIR when referring to the additional prices applicable for intra-EU communications when usage goes beyond typical usage. Thus, its use in Recital 6 and Article 3(1) of the draft CIR is considered appropriate and should be retained. However, it is recommended to replace the phrase ‘voluntary decision not to apply surcharges to intra-EU communications’ in Recitals 3 and 9 by ‘voluntary decision not to apply different retail prices to consumers for domestic communications and intra-EU communications’. This approach is in accordance with Article 5a (8) of Regulation (EU) 2015/2120, and also considers that providers may offer some tariff plans where the retail prices for domestic communications would be higher than the maximum retail price caps set for intra-EU communications. Similarly, it is proposed to replace the phrase ‘intra-EU communications without surcharges’ in Recital 5 by ‘intra-EU communications charged at the same retail prices as domestic communications’.

6. Monitoring and enforcement

BEREC suggests to the EC to include provisions for NRAs with regard to monitoring and enforcing these rules in the CIR.