

ETNO Reflection Document on “Article 28(2) Universal Service Directive: a harmonised BEREC cooperation process - Consultation paper”



November 2012

Executive Summary

- ETNO would like to thank BEREC for the opportunity to participate in the Consultation on “Article 28(2) Universal Service Directive: A harmonised BEREC cooperation process”.
- We welcome the initiative by BEREC to investigate further possibilities for a stronger international collaboration against fraud.
- However, our greatest concern with a collaboration procedures lies in the practical implications and effectiveness given amongst others the implication of many stakeholders and taking into account that fraud is innovatively looking to any possible weak point in the system e.g. fraud implying non- European countries.
- We understand that the proposed procedure still allows operators/NRA’s at local level to take appropriate and fast (provisional) measures to combat fraud rapidly where possible and this independent but complementary to the proposed inter NRA procedure.
- It should be taken into account that the type of fraud is very fluctuating and unpredictable. It is therefore very difficult to define the best solution beforehand. But it could be investigated by BEREC to include in the procedure some kind of monitoring and warning system for fraud related issues in Europe.
- The option to reimburse an end-user who was subject to fraud should be carefully considered before application. It should not be considered as a general principle nor should it be communicated as such. Such principle could have negative impact in our fight against fraud and is not justified as a general measure.
- It would be better to leave it up to national situations, to determine with the involved operators the need to withhold interconnection payments and any alternative actions.
- Finally, it should be taking into account that blocking access can only be done if technically feasible. On the other side the accessibility of numbers throughout Europe should also remain in balance with the risk of fraud and with the real demand for this accessibility.

Introduction

The Association of European Telecommunications Network Operators (ETNO)¹ would like to thank BEREC for the opportunity to participate in the Consultation on “Article 28(2) Universal Service Directive: A harmonised BEREC cooperation process”.

The proposed BEREC cooperation mainly with the NRAs process has been thoroughly analyzed, and, since it mainly relates to regulatory and legal issues inside NRA legal roles and powers, additional suggestions are possibly outside the operators’ scope.

However, we understand that the proposed procedure still allows operators at local level to take appropriate and fast measures to combat fraud and this independent but complementary to the proposed inter NRA procedure.

However, our greatest concerns with the proposed procedure lie in the practical implications, it’s effectiveness and workings of the proposed regime. But it could be considered by BEREC to use some specific fraud cases to test practical issues in such procedure.

As a general comment it is important that BEREC consider that operators have a very small and marginal possibility to deal contractually with the misuses and/or frauds caused by foreign commercial entities and/or providers: in fact, the contractual measures cannot have a great legal value or power in the case of such situations and/or cause lengthy legal conflicts between different undertakings with difficult practical solutions.

Also numbering blockings have technical limitations on network platforms and systems as well as other legal implications when the numbering is assigned to a different national operator and that matter should be solved in advance by the correspondent national regulation.

BEREC and NRA harmonized process, according to art. 28(2) of the European regulatory framework, should mainly aim to remove the original cause of misuse/fraud with appropriate action on service centres, etc., than just to limit action to blocking numbering as is usually the case in existing practise. Moreover, in some cases blocking may only be able to be applied to blocks numbers ranges, as such blocking could have unintended detrimental consequences by affecting innocent parties.

Therefore it is a complementary element to keep the accessibility of numbers throughout Europe in balance with the risk of fraud and misuse that is linked to these numbers and with the real demand for this accessibility (especially for premium rated numbers).

¹ The European Telecommunications Network Operators' Association (ETNO) represents 38 Full Members and includes 12 Observer companies which provide electronic communications networks over fixed, mobile or personal communications systems. ETNO is Europe's leading trade association. More information about ETNO can be found at: www.etno.eu

The idea of reimbursing an end-user who was subject to fraud should be carefully considered before application. It should not be considered as a general principle nor should it be communicated as such. Such principle could have negative impact in our fight against fraud and is not justified as a general measure.

Finally, BEREC should also consider harmonizing EU action against numbering misuses and/or frauds with the analogous initiative from the ITU organization, for instance supporting in EU the application of the ITU-T global numbering misuses/frauds regulation.

They have been illustrated below directly in the answers.

Answers to Questions

Question 1: Are there other incentives or issues that will impact end users and/or operators that should be considered by BEREC? If this is the case, please propose and explain such incentives or solutions.

Answer: ETNO believes that the proposed new EU harmonized process involving Berec and NRAs should be mainly focused on removing the original misuse and/or fraud caused toward service centres.

If there were a common, central reporting process it would be possible to report fraud/misuse and simultaneously alert both NRAs and operators to current activity. Operators may then be in a position to better protect consumers by restricting or denying access to exploited services or numbers, in the limit of the technical feasibility and sustainability, so that NRAs would receive much faster notice of apparent abuse within jurisdiction.

By a way of example, we can mention that there are certain types of services that have been subjected to fraudulent activities to consumers, which, in turn, has caused generic consumer rejection to this set and full numbering range with very negative consequences to those who have nothing to do with the abuse or misuse. Moreover, when they migrate to less contaminated numbering systems they find that these new numbers are again to be used to commit fraudulent activities by organizations engaged in fraud and again cause rejection by consumers to these new numbering ranges. This is the case of what happened in Spain, with the 903 and 906 numbering and the subsequent 80x numbering ranges on which new fraud activities occurred, thus causing huge losses to operators. Those situations should be prevented to avoid the gradual elimination of the numbering ranges which are scarce resources in last stay.

Rationale: we do not believe that ETNO should express a position on "opt-in" or "opt-out" alternatives for premium service provision, since the scope of art. 28(2) is about access to national numbering from a different EU Member State and all choices shall be allowed in the different MSs (it is national matter).

Question 2: Are there other issues related to the provision that are not discussed in this section that should be considered by BEREC? Please give details about your suggestions.

Answer: See question 1. It is important to stress that numbering blocking should be considered as a last resort measure, since it has technical limitations and can generate further issues when blocked numbering is assigned to a different operator or when the reachability of such as number is from end users belonging to other operators, since the EU and/or national legal basis for numbering blocking is not always clear and effective.

But it should remain a possible measure as it allows in some cases to react fast and to protect customer for further harm. If there is sufficient prove of fraudulent traffic on some numbers, there is limited risk that customer afterwards request again access to these numbers.

Question 3: Do the responses received and presented by BEREC represent an accurate reflection of the situation as experienced by operators and end users across Europe? Are there further aspects that should be considered by BEREC?

Answer: Even if the responses presented by BEREC represent an accurate reflection of the situation as experienced today, there is still ambiguity about the responsibilities of operators. Moreover, additional guidance is needed around the definition of fraud and misuse in the specific case of the national premium services numbering, and how requests to intervene would be dealt with practically.

Question 4: Do you consider the proposed process to constitute a practical and effective method for NRAs to cooperate with each other in order to implement the requirements of Article 28(2)? Please explain your view with any suggestions you may have.

Answer: In general terms, ETNO considers that a system of cooperation within NRAs involved in each case could be an effective method for implementing the requirements of art.28.2 of USD. A kind of cooperation process between NRA's should be designed in order to identify those service providers who are causing deception and fraud to avoid fraudulent business continuity. In those cases the NRA's, autonomously, should act their control and inspection role in order to evaluate the particular misuse and fraud for deciding the appropriate measure to apply,

On the other hand, it is important to consider that operators' action on the contractual basis is not so possible or effective, since it often causes long legal conflicts without a real possibility to solve misuse and/or fraud situation.

Additional attention should be made to international contracts which could not contain effective clauses to enable, if it is coherent with national law, the withholding of revenues and hence, this must be taken into consideration whenever making any decision to do so.

Question 5: *Are these initial thresholds for retail operators and transit operators set at a realistic and practical level? Should other issues affecting whether NRAs initiate a case under this process be considered on a systematic, rather than ad hoc, basis? Please provide details on any proposals made.*

Answer: In general it is better not to specify precise thresholds basing upon which to take actions, since in different countries, and at different times, fraud and misuse may involve different amounts of money. It would be better to leave it up to each NRA, based upon national situations, to decide whether there is a case of fraud or misuse, and whether it may be solved at the national level or whether complementary different Countries should be involved together with BEREC. In other words the pertinent NRAs, belonging to the countries involved, should collaborate and also decide together if the action is sufficient and/or BEREC's role can help to solve the particular misuse (fraud case).

We believe that the openness of a Process must be based on the ad hoc demonstration of the fraudulent activity and on the intention to defraud irrespective of the amount of money involved under the fraudulent action. In any case the specific involved NRAs should in principle evaluate the opportunity to ask for BEREC involvement.

Besides a decision in short time it is essential in such situations and a maximum period of time for the decision should be defined by Berec and harmonized in EU inside the proposed process.

Rationale: for us the certainty of decision time is essential, since it is the case of a service provided in the market on which a fast decision is required.

Question 6: *Are there other types of clauses found in typical commercial interconnection or other agreements that might influence the ability of operators to withhold interconnection revenues when required to do so by an NRA? Please provide details and examples of such agreements.*

Answer: In general, it is very difficult to have all types of clauses in all types of commercial agreements around Europe, and to determine which of them can influence the ability to withhold interconnection revenues. It would be better to leave it up to each NRA in his own Country, to determine with the operators involved the need to withhold interconnection payments and any possible alternative actions.

Rationale: In the case of abroad access it is likely to be not applicable between different Member States.

The main point is that only the NRA can order the numbering blocking and/or the withhold interconnection revenue and that should be clearly defined in the new harmonized process, avoiding to put operators in charge of such actions that require a strong legal evidence.

Question 7: Are there other circumstances at which NRAs should consider intervention under Article 28(2)? Please give reasons for your response.

Answer: ETNO believes that although the problem has been identified in the BEREC Document under consideration a further and more detail analysis should be made to reach viable solutions to prevent perpetrators of fraud and misuse from benefitting from their behaviour and, at the same time, protect the interest of consumers as well as the interest of operators.

An example which needs further consideration involved those cases in which blocking may only be applied to blocks of numbers ranges, and as a consequently such blocking could have unintended detrimental consequences by affecting innocent parties.

Moreover, it would be advisable that NRAs cooperate to the evaluation and resolution on the fraudulent services in the case of access from abroad. We should not forget that fraud agents may act at different points of the value chain, not just on access, involving all parties (operators, service and content providers).

Finally, we insist that NRAs should bear in mind that blocking access can only be done under those circumstances where it is technically feasible to do so.