

# **BEREC GUIDELINES**

## **on Intra-EU communications**

07 March 2019

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## ***Introduction***

The BEREC Guidelines for intra-EU communications are meant to clarify the provisions for regulating intra-EU communications services pursuant to Article 50 of the BEREC Regulation 2018/1971<sup>1</sup>, which amends Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 (TSM-Regulation), to ensure common regulatory approach and assist in their consistent implementation.

These Guidelines are complementary to the provisions set out in the Regulation and are not presented as an official legal interpretation of those provisions. NRAs are to take these Guidelines into utmost account when implementing the provisions of Article 5a of Regulation 2015/2120 as amended.

## ***A. Scope of the intra-EU communications Regulation***

### ***Regulated intra-EU communications services***

1. According to Article 2 (2) sub-para 3 TSM Regulation “regulated intra-EU communications”<sup>2</sup> means any number-based interpersonal communications service originating in the Member State of the consumer’s domestic provider and terminating at any fixed or mobile number of the national numbering plan of another Member State, and which is charged wholly or partly based on actual consumption. BEREC notes that no distinction is made between fixed or mobile communications in this definition. Therefore, this regulation applies to both types of communication<sup>3</sup>.
2. BEREC also notes that the regulation applies to “consumers” only, which means natural persons who use or request electronic communication services for purposes outside his/her trade, business, craft or profession<sup>4</sup>. Therefore, tariffs for business customers are excluded from the price regulation.
3. BEREC understands the scope of this regulation covers services charged wholly or partially based on actual consumption (metered) which include:
  - Per unit price for calls/SMS to EEA destinations
  - Out of bundle per unit price for calls/SMS to EEA destinations
  - Calls provided with a set up charge
  - Services with consumption-based deduction (e.g. prepaid tariffs) in which the volume of the services is not pre-specified (e.g. for a monthly allowance) but depends on the actual consumption of services based on a per-unit-of-consumption retail price.

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<sup>1</sup> [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2018.321.01.0001.01.ENG](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.321.01.0001.01.ENG)

<sup>2</sup> When referring to intra-EU communications it also includes communications to and from Iceland, Liechtenstein and Norway (EEA).

<sup>3</sup> In general public payphones are also covered by the Regulation.

<sup>4</sup> Article 2 of DIRECTIVE (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (EECC).

4. BEREC considers that the services under the following tariffs are out of the scope of the definition of regulated intra-EU communication according to Article 2(3) TSM Regulation:

- Bundles, such as unlimited tariff plans or tariffs with a fixed volume allowance for intra-EU communications or a bundle of services also containing (some) intra-EU communications services, which do not typically entail consumption-based charges and have no specific per-unit-of-consumption retail price.
- Add-ons that contain against a fixed fee a volume allowance including for example EEA only minutes/SMS or combined with minutes/SMS terminating outside the EEA.

5. BEREC considers that consumers who have bought a fixed volume of international and/or intra-EU communications as an add-on to their existing subscription, e.g. a fixed monthly usage of such services for a specific monthly price, should be able to fully use such add-ons, also after 15 May 2019 and until they are depleted.

6. According to Article 2 (2) sub-para 4 TSM Regulation *“number based interpersonal communications service” means an interpersonal communications service which connects with publicly assigned numbering resources, namely, a number or numbers in national or international numbering plans, or which enables communications with a number or numbers in national or international numbering plans.* According to Article 2 (5) of Directive (EU) 2018/1972, ‘EECC’, *“interpersonal communications service” means a service normally provided for remuneration that enables direct interpersonal and interactive exchange of information via electronic communications networks between a finite number of persons, whereby the persons initiating or participating in the communication determine its recipients(s) and does not include services which enable interpersonal and interactive communication merely as a minor ancillary feature that is intrinsically linked to another service.* Recital 18 of the EECC also states that *the mere use of a number as an identifier should not be considered to be equivalent to the use of a number to connect with publicly assigned numbers, and should therefore, in itself, not be considered to be sufficient to qualify a service as a number-based interpersonal communications service. Number-independent interpersonal communications services should be subject to obligations only where public interests require that specific regulatory obligations apply to all types of interpersonal communications services, regardless of whether they use numbers for the provision of their service. It is justified to treat number-based interpersonal communications services differently, as they participate in, and hence also benefit from, a publicly assured interoperable ecosystem.*

7. BEREC therefore notes that this regulation applies to number-based interpersonal communications services which are fixed and mobile voice services, as well as SMS services. Furthermore, BEREC considers that applications that use fixed or mobile numbers of the national numbering plans of another Member State to connect customers on a public switched telephone network and provide customers with an interpersonal communications service are also within the scope of this regulation. Considered out of the scope are M2M-services or a non number-based communications service. This definition, in itself, is technology neutral, meaning that it is irrespective of the technical means used by a provider to connect voice telephony calls and SMS services between users and networks.

8. Calls and SMS from roaming customers<sup>5</sup> originating in a visited country are not considered to be intra-EU calls or SMS, but international roaming services. These are therefore not covered by this regulation, but by the Regulation (EU) 531/2012 of the European Parliament and the Council of 13 June 2012 on roaming on public mobile communications networks within the Union (Roaming Regulation).

### ***Geographical scope of the intra-EU communications Regulation***

9. The Regulation applies to communications originating in the domestic country of a consumer and terminating at any fixed or mobile number of the national numbering plan of another EU Member State, including the outermost regions<sup>6</sup> which are part of the EU Single Market. The territorial scope of the Single Market of the European Union is defined by the Articles 349 and 355 of the Treaty on the Functioning of the European Union (TFEU)<sup>7</sup>. It is strongly advised to consult the EU Treaty in this regard. For calls and SMS originating in Norway<sup>8</sup>, Iceland and Liechtenstein the Regulation will be applicable as soon as it is incorporated in the EEA agreement.

### ***B. Price caps on intra-EU communications***

10. Article 5a TSM Regulation limits the maximum retail price (excluding VAT) charged to consumers for regulated intra-EU communications from 15 May 2019 to EUR 0.19 per minute for calls and to EUR 0.06 per SMS message.

11. 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.

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<sup>5</sup> Customers using roaming services while travelling abroad, e.g. Italian consumer travelling to Belgium and calling a mobile number in France.

<sup>6</sup> <http://www.europarl.europa.eu/factsheets/en/sheet/100/outermost-regions-ors->

<sup>7</sup> For a recent judgment in the telecom area concerning Article 355 (2) on OCTs the reader may wish to consult paras 73 to 82 in the judgment in case C-327/15 TDC. For an interpretation of Article 355 (1) TFEU on outermost regions, the reader may consult the judgment in Case C-132/14 & co and the Opinion of Advocate General in that same case.

<sup>8</sup> In Norway the Regulation will be implemented at national level from 15 May 2019, imposing identical obligations on Norwegian providers of international communications.

12. Providers may apply charging intervals for regulated intra-EU calls up to 60 seconds unless further national legislation specifies otherwise.
13. If a provider applies a set-up fee to intra-EU calls, the total cap of EUR 0.19 per minute still applies. This means that the combined total charge for a 60-second call, including the charge per minute and any applied set-up fee may not exceed EUR 0.19 (excluding VAT) per minute.
14. SMS must be billed per message. The price cap should apply to SMS with maximum 160 characters or the equivalent in byte.
15. The technical possibility to enable regulated intra-EU communications must be offered without any additional (direct or indirect) costs to the consumer. Providers are therefore not allowed to levy any general charge to enable regulated intra-EU communications.

### ***C. Alternative tariffs***

16. In accordance with Article 5a (2) TSM Regulation, alternative tariffs are tariffs for international communications that can be offered in addition to the regulated tariffs set forth in Articles 5a (1) TSM Regulation. BEREC considers that alternative tariffs should refer to services which are 'charged wholly or partially based on actual consumption' (see Guideline 3 for more information on intra-EU communications services which are 'charged wholly or partially based on actual consumption').
17. According to Article 5a (2) TSM Regulation, providers may offer alternative tariffs i.e. covering non-EEA countries and including intra-EU communications where the prices of intra-EU communications may exceed the caps laid down in Article 5a (1) TSM Regulation. Consumers should have the option to choose such tariffs. The pre-condition to free a provider from its obligation not to exceed the caps is that the consumer deliberately chooses such a tariff. An example for such alternative tariffs could include per minute billing with a charge of EUR 0.25 for both intra-EU calls and calls originating within EEA and terminating outside the EEA.
18. BEREC considers that alternative tariffs for intra-EU 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. Other advantages, such as subsidised terminal equipment or discounts on other electronic communications services, offered by providers to consumers, are a normal part of competitive interaction and should not affect the applicability of the price caps for regulated intra-EU communications.
19. If a consumer is contacting his/her operator with the purpose to opt for an alternative tariff, he/she must be informed, before choosing this tariff, about the nature of the advantages which would thereby be lost.

20. According to Article 5a (3) TSM Regulation, consumers with consumption-based tariffs for international communications, that include third countries and intra-EU communications, should have the opportunity to stay on alternative tariffs. BEREC is of the opinion that, to enable consumers with alternative tariffs to make an informed decision, providers of intra-EU communications should at least make them aware before 15 May 2019 of the new provisions (via SMS, monthly bill or app notification), including their obligation to switch consumers to the regulated tariffs on 15 July 2019, unless consumers specifically request to keep their existing alternative tariffs (i.e. tariffs in place before 15 May 2019). BEREC recommends that providers send a reminder to consumers on alternative tariffs in a reasonable time before they are automatically switched to the regulated tariffs. This would be the case of consumers having alternative tariffs in which at least one of the intra-EU communication services has a higher unit price than the price-cap. BEREC notes that consumers having tariffs as set out in Guideline 4 are covered by the regulation to the extent as they must have the opportunity to request a switch to a regulated tariff.

21. According to Articles 5a (1) TSM Regulation, a switch from or to a regulated tariff for international communications has to be made free of charge, within one working day and shall not entail conditions or restrictions with regard to other elements of the subscription. The switch to a regulated tariff should not impact other elements of the subscription such as the domestic tariff, but the switch may result in a change of prices for international communications services included in the alternative tariff or tariffs described in Guideline 4. BEREC expects switching between alternative and regulated tariffs to occur in a proportionate manner.

22. Should operators introduce any changes to their intra-EU communications tariffs, which are not required to comply with the provisions of the TSM Regulation, consumers are entitled to withdraw from their contracts in accordance with the national legislation.

#### ***D. Charges in currencies other than the Euro***

23. The caps set out in Article 5a (1) TSM Regulation are expressed in Euro. When converting these caps to currencies other than Euro, operators should use the method set out in Article 5a (5) TSM Regulation. In summary, price caps apply from 15 May of every year and the rate in Euro is converted to the national currency using the average of the reference exchange rates published by the European Central Bank in the OJEU on 15 January, 15 February and 15 March of that same year. For example, for the period 15 May 2019 - 14 May 2020, the average of the exchange rates published on 15 January, 15 February and 15 March 2019 should be used.

24. The maximum price caps set out in Article 5a (1) TSM Regulation may be calculated to the maximum number of decimal places permitted by the official exchange rate. This sets the maximum that can be charged in the national currency. In practice, providers may wish to quote charges in whole numbers of currency units, although this is not compulsory. In such a situation, the numbers should be rounded down. Rounding up of these numbers to above the level of the relevant cap is not permitted under any circumstances. Prices including VAT could be calculated with the maximum number of decimals before rounding down the total charge (including VAT).

### ***E. Value-added services/Calls to toll-free numbers/Misuse and fraud***

25. BEREC considers that a value-added service is a premium rate service (PRS) where the charge for the voice call or SMS is bundled with the price of a specific service being purchased.

26. BEREC considers that the caps referred to in Guideline 10 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 are informed about how any PRS expenditure is tariffed, charged and controlled.

27. When consumers are calling other EEA countries' toll-free numbers, the price caps referred to in Guideline 10 should apply. Contrarily, calls to Universal International Freephone Numbers (UIFN)<sup>9</sup>, if available, should be provided to consumers without any charge.

28. Where it is justified by reasons of fraud or misuse with calls or SMS, providers of electronic communications services may, on a case-by-case basis, take measures such as discontinuing offering calls and SMS to such numbers according to their interconnection agreements and national regulations. BEREC considers that providers of electronic communications services should inform their responsible NRA of such cases and, if it is appropriate, NRAs may carry out the common procedure set out in BEREC Guidance paper on Article 28(2) Universal Service Directive<sup>10</sup> for cross-border cases of fraud or misuse.

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<sup>9</sup> Universal International Freephone Numbers (UIFN) are ITU assigned numbers that enable an International Freephone Service (IFS) customer to be allocated a unique freephone number(s) that is the same throughout the world.

<sup>10</sup> BoR (13) 37 Article 28(2) Universal Service Directive: a harmonised BEREC cooperation process - BEREC Guidance paper.



## ***F. Sustainability***

29. According to the intra-EU communications regulation, an NRA may, in specific circumstances, grant a derogation from the price regulation of intra-EU communications services. Namely, a derogation shall be granted to a provider that shows that, due to specific and exceptional circumstances, distinguishing it from most other Union providers, the application of the price-caps would significantly impact its capacity to sustain its existing prices for domestic communications.

30. According to the recitals of the regulation, providers which generate a particularly high share of their revenues or operational profits with intra-EU communications or whose domestic margins are low compared to industry benchmarks could be more vulnerable. In light of the level at which prices are regulated, the regulation stipulates that it is highly unlikely that an operator will not be able to sustain its domestic pricing model. However, the regulation allows for a derogation to a provider that demonstrates, against a relevant benchmark established by BEREC, that it is significantly more affected than most other providers in the Union and that the regulation's impact would significantly weaken its capacity to maintain its charging model for domestic communications.

31. BEREC considers that the derogation assessment should be conducted in two steps. First, the NRA should proceed with the benchmarking analysis and second, it should assess the impact on the domestic pricing model. These two steps should be sequential and cumulative.

32. Sequential in the sense that the NRA would first check, through the benchmark analysis, whether the operator is significantly more affected than most other providers in the Union and if this is the case, the NRA shall then assess the sustainability of the applicant's domestic pricing model. If the applicant fails to prove that it is significantly more affected than most other providers in the Union, the NRA does not have to examine the impact on the domestic pricing model for electronic communication services anymore and can reject the application.

33. Cumulative means that both criteria shall be met. For example, if an applicant proves that it is significantly more affected than most other providers in the Union but fails to prove that the regulation will affect the sustainability of its charging model for domestic communications, it shall not be granted any derogation.

### ***BEREC benchmark for intra-EU communications***

34. According to the legal provisions, BEREC has established a benchmark to be used by NRAs for assessing whether an operator applying for a derogation is significantly more affected than most other providers in the Union.

35. According to the recitals of the regulation, an operator may be more affected if it generates a particularly high share of its revenues or operational profits from intra-EU communications or its domestic margin is low compared to industry benchmarks. BEREC notes that a separate benchmark per intra-EU communications service needs to be defined (i.e. a benchmark for fixed calls, a benchmark for mobile calls and a benchmark for SMS) because there are usually differences in the usage patterns and the penetration of each service.

36. BEREC notes that using revenues or operational profits or domestic margins for defining a benchmark entails some difficulties because, due to the common practice of bundling services, calculating revenues, operational profits and domestic margins per service are based on a number of assumptions made by operators. These assumptions may differ between operators and this may impact the benchmark definition. For the estimation of service volume, no assumptions are required, therefore BEREC considers that it is more appropriate to define a benchmark that is based on the share of regulated (see Guideline 3) intra-EU communications services volume. As the revenue from a specific service is influenced by the volume of this service, this approach is considered appropriate and pursuant to the regulation.

37. Taking the above into account, BEREC has defined the following three benchmarks:

- a. A benchmark for the proportion of regulated intra-EU fixed minutes as a percentage of total fixed minutes provided by an operator.
- b. A benchmark for the proportion of regulated intra-EU mobile minutes as a percentage of total mobile minutes provided by an operator.
- c. A benchmark for the proportion of regulated intra-EU SMS as a percentage of total SMS provided by an operator.

Total number of fixed minutes refer to all calls originated from the customer base of the fixed services applicant operator (both residential and business) including domestic and international calls. The same applies for total mobile calls and SMS including those originated in roaming.

38. For the definition and yearly updating of each specific benchmark, operator-specific information across all Member States (including EEA countries) on the following is required:

- a. The proportion of regulated intra-EU fixed minutes as a percentage of total fixed minutes provided by each operator.
- b. The proportion of regulated intra-EU mobile minutes as a percentage of total mobile minutes provided by each operator.
- c. The proportion of regulated intra-EU SMS as a percentage of total SMS provided by each operator.

39. The above-mentioned benchmarks should be defined taking into account the distribution of operator specific information on these proportions. BEREC is of the view that the threshold for deciding whether an operator is significantly more affected should be derived on the basis of the 95% upper percentile. In other words, if, for example, an operator demonstrates that the proportion of regulated intra-EU fixed calls for its customers falls within the top 5% of operators in the Union, then the first test is satisfied. BEREC considers that the benchmarks could be defined with the input from a representative sample of operators.

40. The BEREC benchmark is presented in Annex 1 and will be updated on a yearly basis. For this yearly update, BEREC will use the data that NRAs will collect as part of their monitoring obligations.

41. Applicant operators will need to compare their most recent actual yearly volumes with the Benchmark proportions defined in Annex 1. For example, if an application is submitted in April 2019 the applicant's proportions should be calculated using data for the period 1 April 2018 - 31 March 2019. If data for this period is not available, then operators could consider using data for the most recent 12-month period.

42. If, for example, the applicant's proportion for mobile intra-EU metered calls on total domestic, roaming and international mobile calls is equal or above the BEREC benchmark (see Annex 1), the operator is eligible for the second step of the analysis. This applies correspondingly to fixed calls and mobile SMS.

### ***Impact on the domestic pricing model***

43. As mentioned above, an NRA needs to conclude whether the domestic pricing model of an applicant will be significantly impacted by the regulation. BEREC considers that, in order to examine the level of this impact, an NRA needs to compare the impact on the margin from all regulated intra-EU communication services with the total margin from communication services of the operator. BEREC considers that the impact assessment should differ between cases of positive and negative intra-EU communication services margin.

44. In case the margin from all regulated intra-EU communication services is estimated to be negative due to the introduction of the regulation, BEREC considers the following assessment to be applied by NRAs: If the absolute value of the reduction in the margin of an operator from all regulated intra-EU communication services is estimated to be higher than 3% of its overall estimated margin from communication services, then it could be considered that this operator faces problems to sustain its domestic charging model.

45. If the margin from all regulated intra-EU communication services is estimated to be positive due to the introduction of the regulation, BEREC considers the following assessment to be applied by NRAs: If the absolute value of the reduction in the margin of an operator from all regulated intra-EU communication services is estimated to be higher than 9% of its overall estimated margin from communication services, then it could be considered that this operator faces a significant impact on its domestic pricing model.

46. In case the overall estimated margin from communication services of the applicant is negative, the NRA should conclude that the domestic pricing model of an applicant will be significantly impacted by the regulation. In such cases, the applicant would qualify for a derogation for regulated intra-EU communication services.

47. For this test, an NRA needs to have data for the applicant regarding the following:

- a. an estimate of the margin the applicant would have for the year that the application concerns from all regulated intra-EU services in case of no intra-EU communication regulation ( $\text{Margin}_{\text{noreg}}$ ). BEREC considers that, at least for the first year the prices, the volume and the costs would be close to the relative figures of the year before the introduction of the regulation and therefore the margin for the period 1 April 2018-31 March

2019 or 1 January 2018 - 31 December 2018 could be used as a proxy. If an operator considers, that due to specific reason this approach is not appropriate, it should provide its estimation accompanied with the relevant data that explain this deviation.

- b. an estimate of the margin the applicant would have from all regulated intra-EU services for the year the application concerns without derogation ( $\text{Margin}_{\text{reg}}$ ). The applicant should estimate its revenue using the level of the price-cap and volumes that will incorporate the volume increase that may be expected due to price decreases. For the cost estimation, the applicant could use unit cost data or other cost data referring to the previous financial year.
- c. an estimate of its overall communication services margin. BEREC considers that the communication services EBITDA of the applicant for the previous financial year could serve as an estimation for this metric. If an operator considers, that due to specific reason this approach is not appropriate, it should provide its estimation accompanied with the relevant data that explain this deviation.

### ***The content of the application***

48. As mentioned above the derogation application process is divided into two parts:

- (a) An initial comparison to the BEREC benchmark to establish whether the applying provider can demonstrate that it is significantly more affected than other providers in the Union. The applicant needs to provide the data to support that the proportion of its regulated intra-EU communication services traffic on its total services traffic exceeds the BEREC benchmark. As the BEREC benchmark is calculated separately for fixed intra-EU calls, mobile intra-EU calls and intra-EU SMS, the applicant should submit the information separately. The BEREC benchmark is calculated on the basis of actual data and therefore the applicant should calculate the relevant proportions taking into account the available volumes of the most recent 12-month period of the previous year (e.g. for an application submitted on 15 April 2019, the proportions will be calculated taking into account the actual volumes of calls or SMS during 1 April 2018 – 31 March 2019 or during 2018 etc. depending on data availability). For the first test to be satisfied, the applicant must be able to show, that at least for one of the intra-EU communication service, the proportion is above the threshold defined.
- (b) All the necessary information that proves that the absolute value of the reduction in the margin of an operator from regulated intra-EU communication services is estimated to be higher than 3% (in case of negative intra-EU margin) or 9% (in case of positive intra-EU margin) of its overall estimated communication services margin.

49. Regarding the second test, the applicant should submit very detailed background information/data regarding its estimations by completing the templates provided in Annex 2. This includes inter alia:

- (a) Data on the previous financial year communication services EBITDA of the applicant.
- (b) Data per service on actual volumes of regulated intra-EU communication services for the year preceding the application. A split for calls terminating to fixed networks and for calls terminating to mobile networks is required.
- (c) Data per service on actual revenues from regulated intra-EU communication services for the year preceding the application.
- (d) Demand projections per service for the regulated intra-EU communication services for the year that the application refers to. These projections should be duly justified. In case an operator fails to submit justified projections, an NRA could use the actual volume of the previous year. A split for calls terminating to fixed networks and for calls terminating to mobile networks is required.
- (e) Data (per service if applicable) on actual costs for the regulated intra-EU communication services for the year preceding the application.
- (f) Data (per service if applicable) on estimated costs for the regulated (i.e. metered and residential) intra-EU communication services for the year that the application refers to.
- (g) In case of estimations/projections, very detailed supporting documentation.

50. Any data on the applicant's costs and revenues shall be based on financial accounts, which shall be made available to the NRA and may be adjusted according to the volume estimates. The NRA may also require that the applicant provides an accountant's declaration, ensuring that the data is presented correctly and that a consistent and correct methodology for projections has been implemented.

51. Regarding actual and estimated costs, BEREC considers that the following should be submitted:

- a. The network costs per service for originating regulated intra-EU communication services.
- b. The termination costs per service for regulated intra-EU communication services.
- c. The transit costs per service for regulated intra-EU communication services.
- d. The wholesale commercial costs: These are associated with route testing/monitoring, operation and management, data-clearing, financial clearing and contract negotiation. A proportion of these costs will be included in the calculation of the intra-EU margin. The proportion will be calculated using the relevant wholesale revenues and payments

(payments will be expressed in absolute values). In particular the proportion will equal:

$$\frac{\text{Wholesale payments for all regulated intra – EU communication services}}{\text{Wholesale revenues and payments from all services provided to/from third operators}}$$

Where:

- *wholesale payments for all regulated intra-EU communication services* refers to interconnection payments (termination and transit) of the applicant for the regulated intra-EU communication services offered,
  - *wholesale revenues from all services provided to third operators* refers to interconnection and roaming revenues of the applicant for the wholesale services offered to third parties (termination, transit and inbound roaming) and
  - *wholesale payments from all services provided from third operators* refers to interconnection and roaming payments of the applicant for the wholesale services bought from third parties (termination, transit and outbound roaming)
- e. A proportion of joint and common costs incurred for the provision of electronic communication retail services. These joint and common costs should contain the following:
- (i) The billing and collection costs, including all costs associated with processing, calculating, producing and notifying the actual customer bill.
  - (ii) Sales and distribution costs, including the costs of operating shops and other distribution channels for the sale of electronic communication services.
  - (iii) Customer care costs including the cost of operating all customer care services available to the end user.
  - (iv) Bad debt management costs, including costs incurred in writing off customers' unredeemable debts and collecting bad debt.
  - (v) Marketing costs, including all expenses for advertising.

The proportion of costs referred in point e should equal the ratio of total retail revenues from regulated intra-EU communication services to the total retail revenues for electronic communication services. In particular the proportion will equal:

$$\frac{\text{Total retail revenues from regulated intra – EU communication services}}{\text{Total retail revenues for electronic communication services}}$$

- f. An amount that will cover the General and Administrative costs (G&A) of the applicant. For the calculation of this amount, the appropriate mark-up would be estimated using the following formula:

$$\frac{\text{Total general and administrative costs (G\&A) of the applicant}}{\text{Total costs of the applicant (network,retail,wholesale,etc)excluding G\&A}}$$



The respective G&A will be calculated taking into account the sum of the already calculated regulated intra-EU communications services costs and the above calculated mark-up.

52. The applicant shall provide all necessary data used to determine the margins (with and without regulation) for regulated intra-EU communication services and the communication services EBITDA (in case it is not already published).

### ***Deadlines***

53. For NRAs to be able to grant derogation requests from 15 May 2019 when the Regulation takes effect, applicant operators should inform their NRAs in advance about their intention to apply for a derogation and should submit their complete application with all the necessary information and data at least one month before 15 May 2019. This should provide the NRA with enough time to properly evaluate any derogation application. If an operator submits its derogation application later than 15 April 2019, or if the application is incomplete, the NRA cannot be expected to provide a reply to the applying operator or issue a decision, if required, before 15 May 2019. The minimum deadline of one month to evaluate the application should also apply for applications received after 15 May 2019.

54. The derogation to exceed the maximum caps should be granted for a period of 12 months. In order for their derogation authorisation to be renewed after that period, the operator must update all the necessary information and submit it to the NRA, taking into account that NRAs should have at least one month to evaluate the application for the renewal of the existing derogation.

55. If an application is manifestly unfounded or provides insufficient information, the NRAs must take a final decision within a further period of two months. During this period, the NRA should give the applicant operator the opportunity to be heard, and should make a final decision authorizing, amending or refusing the surcharge(s) proposed by the operator.

56. In case they are granted a derogation, operators wishing to apply surcharges should comply with any of their national rules regarding transparency or changes in terms and conditions (e.g. advanced publication of price changes, contractual issues that require an extraordinary right to terminate contracts etc).

### ***Assessment of the application***

57. The NRA receiving an application should first compare the applicant's proportions of regulated intra-EU services traffic with the BEREC benchmark. In case the proportion exceeds the BEREC benchmark for at least one service, the NRA should proceed with examining the impact on the domestic pricing model of the applicant in order to decide whether a derogation may be granted.

58. In case  $[(\text{Margin}_{\text{noreg}}) - (\text{Margin}_{\text{reg}})] / (\text{Margin}_{\text{com}}) > 3\%$  (in case of negative regulated intra-EU communications margin) or in case  $[(\text{Margin}_{\text{noreg}}) - (\text{Margin}_{\text{reg}})] / (\text{Margin}_{\text{com}}) > 9\%$  (in case of positive regulated intra-EU communications margin) it could be inferred that the application of the price-caps would significantly impact the applicant's capacity to sustain its existing prices for domestic communications.

59. NRAs may cross-check the validity of the applicant's margin estimation. For the validation procedure, NRAs could use the following:

- a. Network origination costs should be estimated by the operator but could be contrasted by the NRA with the costs from their national cost models (bottom-up or top-down) or the Axon cost model commissioned by the EC;
- b. Transit costs should be provided by the operator but could be contrasted by the NRA using any available data (e.g. data collected for the BEREC Roaming Benchmarking Report);
- c. Termination costs should be provided by the operator but could be contrasted by the NRA using data for the weighted average termination rates published every six months by BEREC and the split between calls to fixed and mobile numbers provided by the operator in its application.
- d. Total joint and common costs and G&A costs should be provided by the operator but could be contrasted by the NRA using information on costs from financial statements.
- e. The national roaming prices included in the contracts between host MNOs and MVNOs.

***Maximum price level in excess of the price-caps***

60. Operators, whose derogation applications passes both tests, may propose surcharges to all regulated intra-EU communication services and not only to the ones for which the benchmark test is satisfied. In order to calculate the proposed surcharge on the price caps, operators would need to estimate the level of the  $\text{margin}_{\text{reg}}$  that will satisfy the equation  $[(\text{Margin}_{\text{noreg}}) - (\text{Margin}_{\text{reg}})] / (\text{Margin}_{\text{com}}) = 3\%$  (in case of negative regulated intra-EU margin) or the equation  $[(\text{Margin}_{\text{noreg}}) - (\text{Margin}_{\text{reg}})] / (\text{Margin}_{\text{com}}) = 9\%$  (in case of positive regulated intra-EU margin) taking into account the above estimated values of  $\text{Margin}_{\text{noreg}}$  and  $\text{Margin}_{\text{com}}$ . The difference between the  $\text{Margin}_{\text{reg}}$  estimated for the previous equation and the  $\text{Margin}_{\text{reg}}$  estimated initially by the applicant will equal to the total amount that the operator is eligible to receive on-top from the provision of the regulated intra-EU communication services. The proposed surcharges will be estimated by the applicant by taking account of that amount and the estimated volume of all the regulated intra-EU services provided by the applicant.

61. In case the applicant's overall estimated margin from communication services is negative, the applicant could continue to apply its intra-EU rates as of 1 January 2019 for the regulated intra-EU communication services.

62. The proposed surcharges need to be authorized or amended if needed by the NRA.



## ***G. Monitoring by NRAs***

63. According to article 5a (6) TSM Regulation, NRAs must monitor the market and price developments for regulated intra-EU communications and must report to the Commission. One of BEREC's tasks and objectives is to ensure the consistent implementation of the regulatory framework for electronic communications.

64. In order to have comparable data based on the same indicators for monitoring market and price developments and to prepare the BEREC benchmark for intra-EU communications, BEREC considers that indicators such as the number of subscribers per subscriber profile (residential or business) should be collected for fixed and mobile operators. In addition, BEREC requests that fixed and mobile operators provide volumes per service for domestic, intra-EU communications services (regulated, alternative tariffs, bundles and business tariffs) and communications services to destinations outside the EEA, as well as revenues from regulated intra-EU calls, alternative tariffs and outside the EEA communication services.

BEREC will provide a template to NRAs to collect data on intra-EU communications from fixed and mobile operators. BEREC will aggregate the data and publish a report on the findings of this exercise annually.

## **H. ANNEX**

### ***Annex 1 - BEREC Benchmark***

For the first benchmark definition, BEREC used all the available information on intra-EU communication services. In December 2017, during the discussions about the possibility to regulate intra-EU communication services, BEREC initiated a data collection procedure on intra-EU communications. Due to the relatively short period of time BEREC asked that NRAs only to request data from those operators which make up at least 80% of subscribers in the fixed voice telephony market and 80% of subscribers in the mobile voice telephony market. This activity was targeted to create a time series (2013-2017) of data covering the following high level areas of measurement:

- Actual minutes and SMS of intra-EU communications
- Revenues from intra-EU calls and SMS
- Costs of intra-EU calls and SMS
- Subscribers

Using the input from this data collection, BEREC published a preliminary and a supplementary analysis of intra-EU communications. Although some operators had difficulties in providing some of the required data, resulting in a varying level of detail in the responses, as well as differences with regard to the availability of data for the requested years, BEREC is of the view that for consumption based (metered) volumes, data for 2017 should be used for the benchmark definition. BEREC has performed some sensitivity analysis on these calculations and considers that the benchmark calculation based on metered intra-EU volumes is reasonable.

The BEREC benchmark is set to:

- i) 2.3% for mobile calls
- ii) 30% for fixed calls
- iii) 2.8% for SMS

The above percentages were calculated taking into account both residential and non-residential data as BEREC's 2017 data collection did not separate this data. Therefore, only for applications to be submitted during the first year, the applicants will need to calculate their actual proportions taking into account both residential and non-residential metered intra-EU communication services volumes.

### ***Annex 2 - Template for derogation***