



Joint ETNO / GSMA response to the BEREC public consultation on the Draft BEREC Report on Terminating Contracts and Switching Provider

January 2019

1. *Do you have any comments or observations regarding the processes set out in Section 2 above, related to the switching of provider for different categories of ECS and the safeguards that are provided to consumers?*

- ETNO and GSMA find it surprising that BEREC has decided to look into contract termination and provider switching while the relevant regulation has been updated and significantly tightened – even including new far-reaching provisions on telecom bundles – in the new Directive (EU) 2018/1972 establishing a European Electronic Communications Code (EECC).
- The updated rules in the EECC are based on an impact assessment including some conclusions that could be challenged. For example, if an end-user abstains from switching to a new operator because he is satisfied with the current operator, this must not be considered as a “switching barrier” but rather as a very positive finding. In any case, suggesting further tightening of switching provisions would be highly inappropriate.
- We do not see a need to further adjust the EECC rules on this subject matter or to add new obligations. Accordingly, for the sake of legal certainty and proportionality, we suggest that Member States apply the rules laid down in the EECC and refrain from adding rules where possible.
- As far as Section 2 of the draft BEREC report is concerned, the results are too generic and it is not clear which processes and approaches across different services are available in each Member State. The report does not contain empirical research into experiences of end-users and providers. It is not clear whether BEREC's research also focused on processes for (small) business users. Furthermore, there is no qualitative assessment concerning the processes in each Member State. These results are therefore not very meaningful and no useful conclusion can be drawn from them. Therefore, the conclusions in Section 4 regarding the key factors and the biggest obstacles that consumers face in each Member State are not sufficiently substantiated in our view.
- Section 2 emphasizes the importance of the validation and authorisation of a consumer request to switch. The report exposes considerable differences in the customer validation and authorisation processes in different Member States. However, in Section 4 of the report BEREC does not consider this as a key factor or an obstacle.
- An ETNO and GSMA's member operating in the Dutch market noted that the description of the switching process in the Netherlands at page 8 of the report is not accurate. Notably, the self-regulation agreements regarding a switching service for internet services or packages with internet as well as fixed telephony and packages including television services is led by the Receiving Provider (RP). Only in a very limited number of cases (e.g. when an end-user changes address), the consumer has to cancel its services with the Transferring Provider (TP). There is also a switching service in place for (small) business users.

2. Do you have any comments or observations regarding the rules (practices, decisions or legal requirements) that have been put in place in the MS to facilitate termination of service and switching between communications provider as set out in Section 3 above?

- In this section, two goals are mentioned. First, the aim to provide a high-level summary and analysis of the different practices, decisions or legal requirements which apply in Member States related to all kinds of issues. Second, to assist Member States in identifying best practices to serve as an information guide to those NRAs seeking to take measures or introduce new initiatives.
- The rules set out in this section do not make a distinction between legal obligations and self-regulation. It may be assumed that legal obligations arising from European rules have been implemented in all Member States. The fact that NRAs have not provided responses in respect of all categories of ECS does not necessarily mean that there are no obligations in place. At least an assessment should be made of the legal obligations that should be implemented in each Member State.
- Furthermore, in the report it is not clear which rules in a Member State are referred to and what these rules actually mean. Nor is it indicated to what extent certain measures are effective in a Member State. To effectively accomplish those goals, an extensive overview of legal obligations and self-regulation, subdivided into consumers and (small) business customers, as well as an assessment of the effectiveness of the rules in place, are needed.
- For instance, the report mentions that the Netherlands has rules regarding slamming. In the Netherlands, however, consumers are much better protected legally than (small) business customers. In order to protect small business end-users against slamming with respect to number portability, a policy rule entered into force in 2017. In addition, currently a public consultation is being conducted on a legislative proposal for switching, which introduces the obligation that the explicit consent of the end-user is always needed in writing when concluding a distance contract by phone with a business end-user.

3. Do you have any comments or observations regarding the key factors and obstacles to switching different categories of ECS, set out in Section 4 above? In particular, what, in your view, are the possible solutions that could be applied to solve these issues?

- As already mentioned, we do not see a need to introduce new rules, since the new obligations for IAS and NB ICS in the EECC are more than sufficient.
- BEREC should also consider that potential issues around switching and termination are not a sector-specific phenomenon. General EU contract law covers unfair commercial practices in this regard, including unfair contract duration rules. The Commissions Guidance on the Unfair Commercial Practices Directive is helpful in this regard. Telco regulation thus applies on top of a sound horizontal framework.
- However, the switching regulation in the EECC does not consider at all the potential switching barriers related to NI ICS, such as network effects for major players (“winner takes it all” principle) or lock-in effects resulting from the establishment of large digital ecosystems (bundling). Rather than considering to further tightening already established and sufficient safeguards, BEREC should rather consider these emerging challenges.
- We note that on page 32, the report concludes that “a large number of respondents did not mention any obstacles in respect of NI-ICS and so seem to perceive NI-ICS as being sufficiently flexible to facilitate a change the provider without a hindrance. We believe that this

conclusion is not well founded, and that the number of submissions received for obstacles blocking the switching of NI ICS is small because of a lack of competition in the market. Since the NI ICS market is concentrated in the hands of few big players, incentives for contract termination and provider switching are very low. Consumers have scarce interest to move to alternative smaller providers to not be left aside. In addition, all data and content produced or stored in NI_IICS applications also work as an exit barrier for switching. Therefore, data portability obligations will remain key for data switching.

- More in general on Section 4, due to the lack of a complete and differentiated overview of legal obligations and self-regulation per Member State, it is unclear what problems in respect of each of the 9 categories of ECS actually occur in each Member States, and how the biggest obstacles that consumers face in each have been determined.
- In particular, it is unclear what are the specific contractual obstacles; which actions are taken by the TP to hinder/burden switching; which specific lack of consumer information and problems regarding bundles, or technology availability have been identified. For example, it is difficult to understand which actions by the TP have been identified to hinder switching when the majority of NRAs indicate that the switching process is RP-led as a result of which contact by TP with customer is limited or minimised. Additionally, in the report it is indicated that in some Member States measures are taken against win back, while in other MS win back is also accepted because of the benefits for end-users or as a feature of competition.
- In our opinion, porting numbers and switching private and business end-users based on the end-users' explicit consent is deemed an important part of the RP-led switching and number portability processes. From the report, it can be inferred that there is a risk of slamming. More than half of the Member States have rules, practices, decisions or legal requirements regarding slamming, misleading sales and the customer validation process although it is not clear if these rules include (small) business end-users. It is therefore hard to understand that in Section 4 of the report this is not considered a key obstacle.
In a world where transactions mainly take place online and where predominantly the RP has overall responsibility for coordinating the switching and porting process; where the RP cancels on behalf of the end-user his contract with the TP; and, both the RP and TP cooperate in good faith, it is important that end-users are protected throughout the switching and porting processes, and are not switched to another provider without their consent.

4. Several NRAs identify obstacles for switching in case of bundles, do you consider that specific processes and rules for bundles may be of help to address these issues?

- The new rules for bundles included in the EECC are partly far-reaching and intrusive. Providers of IAS and NB ICS falling under the rules face significant uncertainty on how these rules will be transposed by Member States and applied by NRAs. Member States should refrain from going beyond these rules with regard to IAS and NB ICS. Nevertheless, it would be helpful if Member States properly defined bundles for the sake of legal certainty
- A reasonable definition of "barrier" is required, and the absence of switching cannot be per se considered as an issue. If customers do not switch since they are satisfied with their provider or simply are not interested, this cannot be considered as a switching "barrier". Nor is the absence of comparable services and products in competitive markets per se a switching barrier, since differentiation of services is positive and indicates effectively working competition.
- Fees in case of earlier contract termination should not be confused with illegitimate switching barriers. Consumers usually commit to longer contract duration because in return they benefit from more favorable conditions such as lower monthly fees, subsidies devices, etc. If the consumer had a right of earlier termination and the operator was not allowed to demand for a full compensation, operators could not cover their costs any more. Consequently,

operators would have a disincentive to offer contracts with long minimum contract duration. Consumer choice would decrease to the detriment of those consumers who have a lower willingness to pay.

5. Which barrier(s) to switching should NRAs focus on in the future, in order to reduce or remove?

- a. For which category of ECS is this relevant?**
- b. What should be the aim for the regulatory measure intended to reduce each of the barriers?**

- The question is misleading since it already assumes that there are switching barriers that require new or additional regulation. Please, see our response to questions 3 and 4.
- IAS and NB ICS are already much more strictly regulated with regard to any potential switching barriers compared to other areas of the digital market. It is of utmost importance that BEREC keeps a proportionate approach and considers rules in other market areas to avoid further asymmetries and fragmentation of rules across the digital single market.

6. Do you have any suggestions to improve the switching process, including any measures that providers of ECS could initiate to reduce or remove barriers to switching?

- See response to questions 1 and 3.

7. Are there other barriers to switching that are not mentioned in the report? If so, please provide relevant details.

- See response to question 3 concerning new challenges and the definition of “barrier” in the response to question 4.