

**BEREC Report on the outcome of the public
consultation on the draft BEREC Guidelines on
Geographical surveys of network deployments.
Art 22 (2), 22(3) and 22(4) of the EECC.**

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Executive Summary

The draft BEREC Guidelines on Geographical Surveys of network deployments : Article 22 (2), 22 (3) and 22 (4) (BoR (20) 168) were approved for public consultation at the third BoR ordinary meeting of 2020.

These Guidelines provide guidance to NRAs/OCAs on common approaches and procedures regarding paragraphs 2, 3 and 4 of Article 22. These parts of the article describe optional policies that NRAs/OCAs may undertake in order to inform private and public agents of the non-availability of existing or planned VHCN networks or networks offering at least 100 Mbps download speed in areas with precise boundaries (“designated areas”), and furthermore to invite agents to declare their intentions to deploy VHCNs in these areas.

The Guidelines aim at providing a common understanding of these provisions, guidance on how to designate areas and on the procedures to be followed in publishing information and inviting agents to declare their intentions to invest in order to ensure that such procedures are efficient, objective, transparent and non-discriminatory, whereby no undertaking is excluded *a priori* (as required by Art 22 (4) EECC).

Stakeholders were invited to submit their inputs from the 6th of October 2020 to the 5th of November 2020. Six responses from operators and operator associations were received. They all welcomed the opportunity to participate in the consultation and several of them were broadly in accordance with the Draft Guidelines. The responses argued for extending the length of periods allowed in the invitation procedures and expressed some concerns about the publication of forecast data. In that respect, several of them reminded BEREC that the forecast data and future plans may lack reliability, especially when forecasting periods are long and some expressed the view that the information requirements mentioned in the Guidelines could be seen as an important workload for the operators.

BEREC has considered all the responses in delivering this report and amended the Guidelines in the light of the responses, where it has been considered necessary, as presented in what follows.

All contributions are published on the BEREC website.

1. Introduction

In this document comments are grouped according to the Guidelines' section they refer to.

During the period from the 6th of October to the 5th of November 2020, BEREC received 6 contributions from the following stakeholders¹:

1. European Competitive Telecommunications Association (“ECTA”)
2. European Telecommunications Network Operators’ Association (“ETNO”)
3. FTTH Council Europe (“FTTHc”)
4. GSMA
5. Liberty Global
6. Open Fiber

BEREC is grateful to receive the submissions and has carefully considered them. Accordingly, BEREC sets out its summary of assessments and responses in this report. The stakeholders’ responses are published on BEREC’s website. No confidential submissions have been received.

All stakeholders welcomed the opportunity to comment on the Draft Guidelines and several of them showed a broad agreement with the provisions.

2. Comments on the Introduction to the Guidelines

ECTA shows its disagreement with the title of the Guidelines, stating that it should contain a reference to Article 22(5) since the Guidelines mention this part of the article in several paragraphs.

BEREC Response 1

As paragraph 4 in the Draft² explains the Guidelines deal on the consistent implementation of Article 22, paragraphs 2, 3 and 4, which is also recognised in ECTA’s response as the focus of the Guidelines. BEREC considers that it is not in the scope of the Guidelines to explain or make recommendations on how the survey of broadband reach or designated areas may be considered by the authorities cited in Art 22 (5), and, therefore the Guidelines do not deal on paragraph 5 of the Article. Therefore, Art 22(5) should not be mentioned in the title.

Changes to Guidelines: No change to the title.

¹ Listed below in alphabetical order.

² Hereafter, unless otherwise stated, the references to paragraph numbers in the Guidelines corresponds to the numbering in the Draft Guidelines (BoR (20) 168).

Liberty Global and FTTHc show their agreement with paragraph 10 in the Guidelines which explains that Art 22 procedures are not a substitute to State Aid Assessment.

ECTA also has comments of a general nature. It would like for the Guidelines to make more emphasis on paragraph 4, not to simply defer to applicable national rules, and to remove any language suggesting recommendations as it considers that this is necessary to ensure a minimal consistent approach to applying the provisions. Finally, it suggests to incorporate the graph in Annex 1 in the body of the text and to refer to it in multiple points.

BEREC Response 2

BEREC has searched through the document to find where it has simply deferred to applicable national rules. Only paragraph 74 does this. It states that: “*The procedures to invite agents to declare intentions to deploy VHCN and/or 100Mbps should follow existing national administrative law*”. Therefore, BEREC does not agree with ECTA that Guidelines simply refer to applicable national rule and do not place emphasis on paragraph 4, which is, in fact, the object of a full section.

Regarding the second comment of ECTA it should be noted that all BEREC guidelines establish recommendations, and that in the case of Art 22 (2,3 and 4), the policies are new and optional for MS. Both characteristics call for Guidelines that provide general orientations and which allow some flexibility for Authorities in MS to consider the best way to implement the provisions.

BEREC provides stricter guidance where it is convinced that the guidance is reliable and sustained by best practice.

Changes to Guidelines: Include the graph in Annex 1 in the body of the text.

3. Comments on Section 2: Designation of Areas

3.1. Comments on section 2.1: Information required to designate areas

ECTA considers that BEREC should require area designation (and not only the data it is based on) to be current in paragraph 25.

BEREC Response 3

Area designation is an optional policy that MS may take and it is important when MS designate areas that the information used is up to date as paragraph 25 states.

Since area designation is an optional policy and since there are important differences among MS regarding the coverage of VHCNs, Section 2.3 states that the time and the frequency of area designation should depend on the authority's choice. Moreover, flexibility is needed, since there are several national policies directed to promoting VHCN coverage besides area designation, (for example state aid projects), and some coordination amongst those, at least regarding calendars, is necessary.

Changes to Guidelines: No changes are required in paragraph 25 (paragraph 27 in final Guidelines).

Regarding the use of forecasts to designate areas, ECTA states that it is unambiguously clear that authorities cannot discard forecast information- where it has been produced- to designate areas, and requests BEREC to delete contradicting guidance in paragraph 26, 27 and 28.

BEREC Response 4

Authorities may use forecast information to designate areas, and BEREC encourages them to do this to have a prospective definition. See paragraph 27 in the Draft Guidelines.

If forecast information is available, Authorities cannot discard it at their wish, but can only discard it if the information is assessed as not reliable as paragraph 28 in the draft Guidelines implies. This is reasonable as the forecast data needs to be reliable before it is used and is also in line with the comments received by several stakeholders and ECTA itself, requesting that data be verified before designating areas.

Changes to Guidelines: No changes are required in paragraphs 26, 27 and 28 (paragraphs 28, 29 and 30 in the final Guidelines).

Open Fiber requires that the main database forecast information is verified and even binding, and that if necessary that authorities require operators to invest in order to cover entirely the area with commitment arrangements and proper sanctioning. In case the operator is unable to commit to the entire area, it should be clarified whether it is appropriate to put the entire area up for tender or to divide it into sub-areas. Open Fiber underlines that the diagram in Annex 1 presumes that forecast information in phase one will go without any verification process, whilst this is essential to prevent insufficient coverage in certain areas. ECTA states that verification should be generally foreseen and not limited to forecasts as paragraph 28 suggests. Finally, the FTTHc requires the Guidelines to acknowledge that forward looking assessments work less well in identifying areas where network will not get built.

BEREC Response 5

BEREC agrees with Open Fiber that verification of the main survey (phase one) forecast data is important before an area is verified- this is why paragraph 104 in the Core Guidelines (BoR (20) 42) BEREC emphasises the need to verify phase one forecast data. BEREC will include a reference to the Core Guidelines in BoR (20) 168.

Also, BEREC agrees with ECTA that broadband map data should be reliable, and because of this, BEREC is also delivering the Guidelines regarding the verification of broadband mapping data³. Paragraph 6 in the Draft Guidelines on Verification states that: “ensuring the quality of the data that nurtures broadband maps is an integral part of the processes leading to the publication and updating of broadband maps”

However, the Annex diagram is just describing the phases of a process, not the requirements of each phase and paragraph 28 is merely focussed on forecasts and does not imply that the current broadband reach data should not be verified as ECTA interprets.

Finally, regarding the FTTHc comment, in paragraph 30 of the Draft Guidelines, BEREC has already recognised the uncertain nature of forecast data, which may change with time as new information becomes available.

Changes to Guidelines: The following footnote is included in paragraph 28 (paragraph 30 in the final Guidelines). “*Section 2.6.2 in BoR (20) 42 deals with the verification of the main survey forecast data. Paragraph 104 states that “NRAs/OCAs should aim to verify the information on forecasts of broadband reach, as far as this is reasonable and legally available”.*”

Finally, the GSMA, states that paragraph 29 should require that authorities use the information from state aid registries rather than leaving this optional.

BEREC Response 6

BEREC agrees with this, and will update paragraph 29 accordingly.

Changes to Guidelines: In the final Guidelines, paragraph 29 (paragraph 31 in the final Guidelines) is written as: “*In addition, the competent authority should use information from state aid registry of funded very high capacity network investments when it is considered appropriate*”.

3.2. Comments on section 2.2: Definition of area boundaries and sizes

3.2.1. Comments on 2.2.1 Delimitation of designated areas

The FTTHc welcomes the notion that designated areas need to be stable, not only because of the administrative burden of unstable areas, but also from the point of view of predictability and regulatory credibility. ECTA points at a contradiction between paragraph 42 requiring “*clear and stable boundaries*” and paragraph 44 by which authorities shall ensure appropriate size of the area.

³ BoR (20) 230

BEREC Response 7

BEREC does not understand where the contradiction identified by ECTA lies: areas should have clear and stable boundaries and should also have an appropriate size.

Changes to Guidelines: No changes required.

3.2.2. Comments on 2.2.2 Further criteria for the definition of a designated area

Open Fiber, the GSMA, the FTTHc and Liberty Global agree with the recommendation that Authorities may designate homogeneous areas trying to put together zones of similar ex ante profitability levels, taking into consideration available information such as population density, in particular. Open Fiber also proposes taking into consideration the average cost of construction, and the GSMA requests the *ex-ante* profitability criterion to be incorporated in paragraph 44, where the recommendations about size are made.

On the contrary, ECTA states that Section 2.2.2 has no discernible basis in statute and is likely to render application of art. 22(2) less, rather than more consistent. ECTA requests that the Guidelines call on authorities, where relevant, to make distinct area designations for residential and business coverage.

BEREC Response 8

Section 2.2.2 in the Draft Guidelines is soft guidance that Authorities may use when defining designated areas, so that those are homogeneous. The whole purpose of Art 22(2) is to identify areas so that this enhances private and public investment in VHCNs. Therefore, it is reasonable, in so far this is possible, to define areas that are homogeneous from the point of view of “expected profitability” as the section suggests. Indeed, as ECTA requires, if the Authority has knowledge of a specific area being a business or residential area, it could use this information in defining the area, since those indicators are also related to expected profitability. BEREC does not agree to include data on construction costs in paragraph 44, despite its importance, because this will be not available to NRAs/OCAs at local level. Finally, BEREC disagrees to include the *ex-ante* profitability criterion in the recommendations to decide on size of the area, because the *ex-ante* profitability criterion is a softer recommendation.

Changes to Guidelines: Paragraph 47 (49 in the final Guidelines) is written as: “*Hence, in addition to performance of existing and planned networks, (...). These criteria may include structural socio-economic and demographic characteristics, such as population density, as well as urban or morphological characteristics, such as the typology of buildings (single dwelling or multi-dwelling buildings) and thus of neighbourhoods, or whether an area is a residential or business one. They can also include economic and investment conditions, such as number of operators with networks in the area, passive infrastructures’ availability or existing wholesale offers*”.

Finally, ETNO is concerned with the workload that the draft Guidelines foresee for operators, not only the main survey (BoR (20) 42) but also area designation and insists that the collection of data regarding other criteria, as well as the information described in paragraph 67 do not rely on operators.

BEREC Response 9

Article 22 is a new and ambitious policy based on the data provided by operators. Having said this, BEREC wants to note that operators should not be expected to collect the information described in paragraph 67, yet if they know this information NRAs/OCAs could consult them in order to complete their database. The information on population density and alike should be sourced from National Statistical Institutes.

Changes to Guidelines: No changes are required.

3.3. Comments on section 2.3: Frequency of area designation

ECTA disagrees with paragraph 52 which states that the Authority can decide how often it wants to designate areas, as in ECTA's views this is not compatible with art.22 (2) and the need to maintain sound, proportionate and efficient administrative practices.

In ECTA's views area designation should be aligned with broadband reach surveys (which take place once a year), and any departures from this should be strictly proportionate and requests that paragraph 56 should be amended to this effect. Contrarily, the FTTHc disagrees with paragraph 54, as it suggests an annual review. According to the FTTHc there should be no required periodicity for area designation.

Several stakeholders comment on the frequency of area designation. Liberty Global agrees with the idea that the area designation should not be too frequent (paragraph 55) and considers that the relationship between the cadence of designation procedures, geographical surveys on broadband reach and surveys relating to state aid procedures should be made clearer in the Guidelines.

BEREC Response 10

The designation of areas is an optional policy that Authorities may use. Moreover, there are important differences among Member States with respect to the coverage of VHNC networks. Because of both characteristics, in BEREC's view there should not be a common European calendar or frequency for area designation and every Authority should decide on this. Moreover, BEREC agrees that the cadence of different policies is important, but this is subject to national specificities so this should be considered by every Authority, reinforcing the flexible approach of the Guidelines.

Regarding the FTTHc comment on paragraph 54, it should be noted that BEREC is not suggesting an annual review of designated areas, but that this is only included as an example in a specific circumstance.

Changes to Guidelines: No changes are required.

3.4. Comments on section 2.4: Publication of designated areas

All stakeholders made comments about the confidentiality of operators' data and several pointed at the need of delivering some information to create transparency for parties that have expressed interest in deploying to a particular area so that they can assess the likely competition that they will face. ECTA welcomes paragraphs 60 and 64 and invites to include in the latter a reference to the need to protect the business case of operators' alternative to the incumbent, in particular new entrants and emerging competitors.

ETNO welcomes paragraphs 69, 91 and 107 and asks for a reference in the draft guidelines to the definition of business secrets of the European Commission. ETNO disagrees that there is a case by case assessment of the confidentiality of a certain information and insists that this it is a prerogative of operators to assess this so that Authorities have to demonstrate that a piece of information is not confidential.

Liberty Global strongly disagrees with the disclosure of information implied in paragraph 58, which states that the relevant authorities should provide sufficient information to allow agents to establish the localization of addresses or grids within the designated area which are already or have plans to be covered by VHCNs/networks capable of 100Mbps.

BEREC Response 11

First, Article 22 requires the publication of designated areas. The whole purpose of this publication is to enable agents to make and reconsider investment plans. These are the areas where there are no VHCN & networks offering at least 100 Mbps or no known prospects for those. Therefore, the publication of designated areas releases no information about the areas where networks have been deployed, other than their boundaries.

In BEREC's view, but for a few cases, is quite unlikely that by showing the boundaries of the designated areas any business secret is revealed. Therefore, this should not raise a general concern but BEREC acknowledged that there may be specific problems, in particular where small subzones may be covered within a larger designated area. Because of this, paragraph 69 in the Guidelines warns Authorities about confidentiality concerns and provides guidance about possible ways to avoid the dissemination of sensitive information by carefully delineating the area boundaries and by informing about the percentage of addresses covered with VHCNs&100Mbps without revealing the precise location of the covered addresses in the designated area. Therefore, BEREC has already considered Liberty Global's concern and proposed ways in which it can be dealt with.

Regarding ECTA's request to include a reference to the need to protect the business case of alternative operators, in particular new entrants and emerging competitors, BEREC recalls the previous two paragraphs: i) it is unlikely that the boundaries of designated areas reveal any business secrets and ii) paragraph 69 in the Guidelines already warns Authorities about confidentiality concerns and describes how to deal with those.

BEREC reminds ETNO that Section 2.7.2 in BoR (20) 42 deals with confidentiality and the consideration of business secrets. For clarity, BEREC will include a reference to this section of the Core Guidelines in the final Guidelines. Moreover, BEREC acknowledges that national regulatory authorities and other competent authorities must respect European and national rules on commercial confidentiality. Thus, there is no need for BEREC to specify what procedures shall be put in place in order to take into account the operators' point of view regarding the confidentiality of any data.

In drafting section 2.7.2 in BoR (20) 42, BEREC used the definition provided in the Guidance on the preparation of public versions of EC Decisions adopted under the Merger Regulation. This definition is in line with other sources from the European Commission, such as the Guidance on confidentiality claims during EC antitrust procedures.

Changes to Guidelines: In the final Guidelines, Paragraph 71 includes this footnote. *“For further reference, please check Section 2.7.2 in the Core Guidelines, which deals with confidentiality and business secrets.”*

Finally, ECTA has a series of comments on the publication of designated areas. First regarding paragraph 61, ECTA considers that publications should be administratively efficient and involve no substantial supplementary effort in addition to designation. Moreover, on the choice of publication format, ECTA considers that Authorities should consider openness, ease of access and cost effectiveness

ECTA also asks for the Guidelines to prohibit targeted messages to the extent that they imply selecting recipients and to include the idea of a national access point for all area designations. ECTA would also like a clarification on the concept of *“related web portals”* in paragraph 62.

ECTA requests paragraph 66 to be removed as this is not an appropriate subject of BEREC guidance.

BEREC Response 12

BEREC agrees with ECTA that authorities should consider openness, ease of access and cost effectiveness when publishing data. The publication of designated areas should not impose any additional cost for operators.

BEREC agrees with ECTA that the notion of *“targeted messages”* is confusing and can be interpreted as discriminatory, and will delete it from paragraph 63.

“*Related web portals*” in paragraph 62 are the mapping portals of the Authorities. NRA web portals and related web portals are accessible to everyone.

Regarding paragraph 66, BEREC reminds that the whole purpose of the invitations and publication of designated areas is to enhance investments in VHCNs, and that the information the paragraph refers to is useful to assess the business case of these investments, so BEREC disagrees with ECTA’s proposal to delete the paragraph.

Changes to Guidelines:

Finally, paragraph 61 (paragraph 63 in the final Guidelines) is written as: “*The competent authority may consider the best system and format of publication by taking into consideration the type of boundaries of designated areas,–the efforts of releasing this information and considering data openness, ease of access and the cost-effectiveness of the public exercise.*”

Paragraph 64 (paragraph 66 in the final Guidelines) is written as: “*The competent authority might also inform undertakings and public bodies of the publication of designated areas by press release or newsletter.*”

4. Comments on Section 3: Invitations to declare investment intentions

4.1. Comments on section 3.1: Procedures for the first invitation

4.1.1. Comments on 3.1.1 Subjects of the invitation and procedures to publish the invitations

The FTTHc agrees with paragraph 77, but states that there should be a clear assumption that all stakeholders will be under the same rules.

ECTA states that invitations should take the form of public consultations rather than “being subject to” and requests paragraph 79 to be redrafted in this way. ECTA also requests that paragraph 80 is moved to section 2.4 about publication of designated areas.

BEREC Response 13

BEREC agrees with the FTTHc that all stakeholders should be under the same rules. Paragraph 5 in the Guidelines states that “*procedures are efficient, objective, transparent and non-discriminatory, whereby no undertaking is excluded a priori (as required by Art 22 (4) EECC)*”.

BEREC agrees with ECTA’s comments on paragraphs 79 and has considered the possibility of moving paragraph 80 to section 2.4 concluding that, since the paragraph deals with the publication of the invitations, it is best placed in the current section which deals with the procedures to publish invitations.

Changes to Guidelines: Paragraph 79 (paragraph 81 in the final Guidelines) has been drafted as: *“Approaching (some) undertakings and public authorities directly does not meet the requirements of objective, transparent and non-discriminatory procedures of Article 22 (4) EECC. It could be thought that, with a view to increased commitment and therefore potentially faster deployments of VHCNs, a direct approach to the group of addressees would be suitable. Nevertheless, this would increase the necessary effort to carry out procedures according to Article 22 (3) EECC, as all relevant undertakings and public authorities to potentially invest in the designated area must be identified and contacted directly by the competent body. The likelihood of overlooking investors increases all the more. Therefore, the invitations need to take the form of a public consultation”.*

ECTA, requests that paragraph 78 is amended to include all public authorities, in a similar fashion to paragraph 77 does for stakeholders.

BEREC Response 14

BEREC agrees with ECTA and will further clarify in the Guidelines that all public authorities should be considered for the invitations. The mentioning of some kinds of authorities in paragraph 78 was only meant as an example.

Moreover, BEREC will clarify that the notion of public authorities includes both public authorities and public bodies.

Changes to Guidelines:

In the revised text, paragraph 78 (paragraph 80 in the final Guidelines) is drafted as: *“The same applies to public authorities: all should be considered for the invitation. The targeted group for an invitation to declare an intention can be seen as wide and should not only include public authorities responsible directly for promoting broadband, but also all other public authorities, for example municipalities and public broadband offices”.*

The following footnote is added to paragraph 8 (paragraph 9 in the final Guidelines). *“Within these Guidelines the term “public authorities” refers to both public authorities and public bodies”.*

Regarding paragraph 81, the FTTHc, ETNO and the GSMA consider that a 30 day period is too short for operators to declare intentions to invest and request that this is replaced by a 60 day period and that in any case it should be proportional to the information requested.

ECTA requests that there should be a two-week exclusion period between area designation and the call for invitations, otherwise, if everything is done at the same time, the invitation period should last at least six months. Formal deficiencies should lead to the process being reset.

BEREC Response 15

BEREC agrees with the idea that a 30-day period may not be enough for operators to declare intentions to invest at a very granular level, as the Guidelines require. Therefore, BEREC will replace this by 60 days.

Moreover, BEREC agrees with ECTA that area designation and the invitation procedures should not take place at the same time, and that there should be sufficient time between the two events so that operators can consider the area designation to draw their investment plans. BEREC considers that a minimal period of 2 weeks should be required for this and will amend the Guidelines accordingly.

Finally, BEREC does not agree with ECTA that formal deficiencies should lead the process to be reset, as this would result in a cumbersome, complex and non-efficient procedures.

Changes to Guidelines:

In the revised text, paragraph 81 (paragraph 83 in the final Guidelines) states: *“Lastly, it should be clear when and over which period the invitation to declare an intention to invest in VHCNs should be published. The first and most important requirement to invite is to designate areas. After having designated areas, the competent authority may start the invitation procedure. There should be a minimal two-week period between the publication of designated areas and the first invitation public consultation so that investors can evaluate the information and draw investment plans”*.

A new paragraph is included after this (paragraph 84 in the final Guidelines), which states: *“After having started the procedure in accordance to recital 63 EECC, the parties who may declare their intention should have sufficient time to provide a thoroughly considered response. BEREC is of the view that a period of at least 60 days should be considered for potential investors to declare their intention”*.

4.1.2. Comments on 3.1.2 Information to require in the first invitation

Regarding paragraph 82, ECTA requests that verification of information is not limited to undertakings but also includes public authorities and that there is more guidance on the possible verification methods, drawing on the list in paragraph 89.

BEREC Response 16

BEREC agrees with ECTA that the verification of information should not be limited to undertakings but also include public authorities and will amend the Guidelines accordingly.

In BEREC’s view, Section 2.6.2 in the Core Guidelines and the required information in Paragraph 82 provide sufficient elements and guidance on possible verification methods regarding forecasts of network deployments. The verification of forecast data will depend on the information available to the Authority and the specificities of each case, and each Authority should consider those in verifying forecast data. Please, see footnote 55 in BoR (20) 42.

Changes to Guidelines: Paragraph 82 (paragraph 85 in the final Guidelines) is now written as: *“According to Article 22(3) EECC, the competent authority shall specify, when inviting to declare intentions to invest in designated areas, the information to be included in the responding submissions, in order to ensure at least a similar level of details as that taken into consideration in any forecast pursuant to paragraph 1 of Article 22 EECC. Since competent authorities will have a responsibility with respect to the information they provide in the invitations’ procedure, and in order to ensure the accuracy and precision of the information, competent authorities should include in their requirement elements enabling them to verify the credibility of the statements made by respondents”.*

Regarding the use of forecast information, ECTA also requires BEREC to elaborate on the standard of compatibility between art. 22(1) and (3) with regards to forecasts, and generally to clarify BEREC’s guidance on the use of forecast information.

BEREC Response 17

BEREC draws attention to BEREC response 4 in this document, which addresses the comments on BEREC’s guidance on the use of forecasts. Second, BEREC will modify paragraph 86 in the Guidelines to clarify the standard of compatibility between art 22 (1) and (3), requiring the duration of forecasts to be comparable.

Changes to Guidelines: Paragraph 86 (paragraph 89 in the final Guidelines) states: *“Although, in order to ensure a good quality level of transmitted information and deployments’ planning, it is recommended to define a forecast period covering the submitted information for which the duration is comparable to the duration of any forecast period defined pursuant to Article 22(1) EECC.”*

Liberty Global, the GSMA and ETNO request BEREC Guidelines not to place an unnecessary regulatory burden regarding the use of forecast information and remind that this information can only be required *“to the extent that it is available and can be provided with reasonable effort”*. According to Liberty Global detailed information might act as a deterrent to expression of interest, and ETNO requires the Guidelines to ensure that the workload of invitations remains reasonable and proportional. The GSMA reminds BEREC that in different Member States related tasks are allocated to different institution and that this should be taken into account by the NRAs in order to avoid adding any superfluous process, as well as any surcharge for the operators in terms of information to be provided.

BEREC Response 18

As Response 9 states, Article 22 is a new and ambitious policy, and the data provided by operators is at its core. Indeed, a response to an Art 22 invitation to declare intentions to invest requires inevitably the submission of forecast data, and for this data to be informative of

deployment plans, it needs to be sufficiently granular (in so far this is possible, see paragraph 88) and reliable (see paragraph 89).

Moreover, paragraph 26 includes the reference to Art 22 (1) stating that “*national regulatory and/or other competent authorities shall request undertakings and public authorities to provide such information to the extent that it is available and can be provided with reasonable effort*” and the same notion is included in paragraph 89 which suggests to collect pieces of information to assess the credibility of forecast data, if those are available and can be provided with reasonable effort.

Regarding the GSMA comment, BEREC refers to Response 2 in the BEREC Report on the outcome of the public consultation on the draft BEREC Guidelines to assist NRAs on the consistent application of Geographical surveys of network deployments (BoR (20) 41). This stated that:

“BEREC understands the need for data requests to be streamlined, so that the same information is not requested by different bodies or to deliver for different functions and recommends that each data proposed in the GL is collected once and is not subject to several requests, unless properly justified. However, this statement has no bearing on the institution or institutions managing the data sets as these tasks may be performed by one or more than one institution. It is for MSs to decide on the best institutional design for the collection and management of data.

Moreover, note that Art 20 (2) EEC considers the sharing of data among public bodies when data is needed to fulfil responsibilities under Union Law.”

Finally, to make paragraph 88 fully consistent with the Core Guidelines requirements in granularity, BEREC will also consider that data can be submitted at small grid level.

Changes to Guidelines: Paragraph 88 (paragraph 91 in the final Guidelines) states: *“Primarily, the information on planned deployment should be provided at the address level or small grid level (grids of at most 100 m x 100 m or equivalent polygons). If the agent is not able to specify its plans at this level, it can be allowed to declare it on a lower level of granularity (e.g. street, part of the municipality, etc.). Such approach should be allowed also if the primary mapping is done on the lower level of granularity than the address points. Eventually, agents should specify in their answers to the invitation the number of addresses they consider they are able to cover.”*

The FTTHc agrees with BEREC’s approach towards forecast verification to provide checks against misleading information while importantly, clarifying an understanding that future business plans are fungible. ETNO and the GSMA welcome paragraph 32 where BEREC recognises that long term forecasts for planned deployments are uncertain, and because of this express that the granularity of data for the first year in the forecasting year should be low. Liberty Global expresses that detailed forecasts can only be produced for a 3-month period, and that address level data is likely to be unavailable beyond this. On the contrary, ECTA requests that information on planned deployments should as a rule be provided at address

level (paragraph 88 states “primarily” instead), and upward deviations should only be accepted where explicitly justified, and administered in a non-discriminatory manner.

BEREC Response 19

BEREC acknowledged the FTTHc, ETNO and the GSMA comments and agrees that long term forecasts are uncertain. At the same time, the granularity of the forecast data is important to make this useful and informative of the reach of deployment plans. Because of this, BEREC recommends that data is primarily provided at address or small grid level, but recognises that, at times, it can be allowed that information is provided at a lower granularity.

In BEREC’s view, a flexible approach is needed to allow for some forecast information to be submitted, especially since Art 29 EECC provides for specific penalties where responses to the invitations knowingly or grossly negligently provide misleading, erroneous or incomplete information.

Changes to Guidelines: No changes are required.

Finally, ECTA requires that the wording ‘*interesting level of visibility on the planned deployments*’ in paragraph 87 is clarified as to how this is to be applied and assessed, and considers that the second indent under paragraph 89 should be assimilated to the fourth indent of this paragraph, and that, overall, timetabling information should include details of the envisioned bringing into service (retail, wholesale) and, for co-investment projects, reflect the information required by art. 76 EECC.

BEREC Response 20

BEREC agrees with ECTA that the wording “*interesting level of visibility on planned deployments*” in paragraph 87 is unclear and suggestive of data being published, which was not BEREC’s intention in this paragraph. Therefore, BEREC will substitute this by “sufficient knowledge on the planned deployments”.

Finally, there is no interference between the procedures provided for in Article 22 and those provided for in Article 76 of the EECC. BEREC has published guidelines on Art 76 which establish procedures and these Guidelines deal with different dispositions in the EECC.

Changes to Guidelines: Paragraph 87 (paragraph 90 in the final Guidelines) has changed to: “*In order to address the objectives cited in the introduction of this subsection, and in order to obtain sufficient knowledge on the planned deployments, it is recommended to require at least the following elements: (...)*”

4.1.3. Comments on 3.1.3 Information to disclose after the first invitation when the competent authority is issuing a second invitation

Open Fiber states that forecast information is sensitive and should be kept confidential, and that any information released in the invitation process (first or second) has a potential to cause gaming by operators and a distortion of the market.

Finally, ECTA asks for a clarification on “*additional information*” and “*all agents under request*” in paragraph 91, and to ensure that this limitation does not give rise to an exclusionary effect.

BEREC Response 21

BEREC recognises that the forecast information is sensitive and paragraph 122 in BoR (20) 42 states that: “*Some examples of information that could qualify as business secrets and may be deemed to be confidential in the context of GS are: Operators’ deployment forecasts (...)*”. Moreover, paragraph 91 in the Draft Guidelines reminds Authorities of their duty to safeguard business secrets of parties responding to the first invitation and recommends that information is published in an aggregated or anonymous form. Paragraph 92 elaborates on examples of anonymous information.

In the revised guidelines, BEREC will make it clearer that paragraph 91 also refers to the parties responding to the second invitation.

Paragraph 92 in the Draft Guidelines provides examples of what BEREC considers additional information. Some of those are: number of parties who declared intentions to invest in the first invitation, percentage of area (or addresses) to be covered within the designated area, announced presence of a wholesale operator, announced presence of a public undertaking.

BEREC concurs with ECTA that “*all agents under request*” can be understood as a certain subset of agents having a right to request data, whilst others do not. This was not the intention of BEREC, as all agents should have the right to request such data. BEREC will update the paragraph to avoid any ambiguities.

On gaming possibilities, please see BEREC Response 24.

Changes to Guidelines. Paragraph 91 (paragraph 94 in the final Guidelines) has been redrafted as: “*However, the competent authority may consider publishing additional information. This may be important when the information is relevant in allowing agents to better consider their investment intentions and to respond to the second invitation. Yet, at the same time, the competent authority must carefully consider their duty to safeguard business secrets of parties responding to the first (and second) invitation, and because of this, such information can only be published in an aggregated or anonymous form*”.

4.2. Comments on section 3.3: Information to be disclosed ex post, after the invitation process (regardless of whether it includes only one invitation or two)

ECTA made several comments to section 3.3 in the Guidelines, regarding different paragraphs. According to ECTA:

- i) Paragraph 105 should ensure that request-based information sharing with BEREC and the EC under the second subparagraph of Art 22 (5) should only occur subject to the same conditions
- ii) paragraph 106 should ensure that all parties having provided information are made aware of its sharing under that subparagraph;
- iii) paragraph 107 should include unequivocal reference to the receiving authority and its obligations;
- iv) in paragraph 108, the notion that the competent authority should acquire ‘a good understanding of the [receiving] authority and its requirements’ should be deleted, since it has no statutory basis and involves a degree of subjective assessment uncalled for by the provision. Also, the implementation of reasonable aggregations, should be required only “*as possible and appropriate*”.

BEREC Response 22

Paragraph 106 in the Draft Guidelines explains that the contents of Section 2.7.1 in the Core Guidelines, which deal on the sharing of information between different public Authorities are relevant to the provision of information regarding responses to the invitation procedures. Section 2.7.1 includes sufficient unequivocal reference to the issues raised by ECTA regarding paragraphs 105, 106 and 107: the safeguarding of the confidentiality by any Authority receiving information and the need to inform agents on the sharing of information.

BEREC disagrees with ECTA’s views on paragraph 108 and refers to paragraph 135 in the Core Guidelines that states that “*Before providing access to GS data, NRAs/OCAs shall, on a case-by-case basis, make sure to obtain a good understanding of the expectations of the authority and its requirements. NRAs/OCAs shall always analyse the disclosure risk of information and consider reasonable aggregations*”. The consideration of the receiving authorities’ requirements and needs are indispensable to assess whether the request for data is properly motivated.

Changes to Guidelines. Paragraph 107 (paragraph 110 in the final Guidelines) has been redrafted as: “*When relevant public authorities need detailed data, the receiving competent authority must be aware of any confidentiality concerns of the parties responding to the invitations, and shall in all cases ensure the same level of confidentiality and protection of business secrets as for the originating authority. However, confidentiality concerns shall not prevent the sharing of information between the competent authority and the other authority in*

a timely manner for the purposes of reviewing, monitoring and supervising the application of the EECC”.

5. Other comments

The GSMA and ETNO asked what is the link between designated areas and the ones used where geographic segmentation applies for remedies, if any.

BEREC Response 23

A priori no link between the mentioned areas is expected, as the areas serve different purposes. Designated areas are meant to inform potential investors of the areas where there is no VHCNs & 100 Mbps networks or prospects for those, and areas defined in the context of any market definition procedure or to establish remedies respond to competition criteria.

Note that Art 64 in the EECC requires NRAs to, where relevant, take into account the results of the geographical surveys conducted in accordance to Art 22 (1) when defining relevant markets.

Changes to Guidelines: No changes required.

The FTTHc expresses that it is unlikely that entities considering deployments will rely on information delivered by an NRA/OCA to identify a market opportunity and that there are risks of coordinated effects following from the invitations to declare planned deployments.

BEREC Response 24

BEREC agrees with the FTTHc that information delivered by an NRA/OCA will on its own be not sufficient for an entity to consider deployments, however such information will surely allow for the identification of possible investment opportunities.

Article 22 arranges for the two optional sequential invitation process which, according to recital 63 in the EECC, *“will create transparency for undertakings and public authorities that have expressed their interest in deploying in this area, so that, when designing their business plans, they can assess the likely competition that they will face from other networks”*. The Guidelines consider the sequential process of issuing the first and the second invitation and the need for some limited transparency within the process and, thus, permit the publication of relevant anonymized information. Yet, even if information is anonymized and the disclosure of agents’ intentions remains unrevealed (therefore, hindering coordinated effects), there may still be a risk for those raising before the invitations and Authorities need to be vigilant on this.

Changes to Guidelines: No changes required.

There are a series of comments regarding Art 29 EECC, which delivers specific sanctions when operators fail to provide information according to the invitations' procedures. According to ECTA, such sanctioning regime is essential to ensure effective overbuild protection and the draft guidelines should clearly address the distinct nature of the second phase invitation.

Open Fiber also appreciates the introduction of this sanctioning system, but is concerned that it is not sufficiently stringent, as operators could attribute the non-realization of their investments to reasons external to their investment plan (i.e. low service penetration rate). They proposed that operators enter agreements with public bodies by which they commit to invest in certain areas, and that such agreements should have specific sanctions.

ETNO is concerned with respect to the situation that after the first or second invitation, a particular operator finds out that in a certain area, where this operator has declared intentions to invest, there is more competition than previously expected. ETNO requests that the Guidelines clarify that, in these situations, operators should be allowed to withdraw their declaration without being fined according to Art.29.

BEREC Response 25

First, it is not in the actual BEREC's remit to write Guidelines on Article 29 EECC. Second, BEREC finds it quite unlikely that operators find out after the invitations' procedures that in a certain area where they had intentions to invest, there is more competition than they previously expected. *A priori* these are areas where at the time of invitations being issued there are no known prospects for VHCN & 100 Mbps deployments. Therefore, in general, areas with low commercial interest. Finally, BEREC considers that it is for each Authority to take into consideration the operators declarations, the final deployments and the events that take place during and after the invitations process to consider if any penalty is due following Article 29 EECC.

Changes to Guidelines: No changes required.

Finally, there are comments regarding the different BEREC Guidelines on surveys of networks of broadband reach. First, ECTA requests that all the Guidelines are integrated in one document, to help with the readability of those. Second, ECTA also argues that the BEREC Guidelines do not present clear guidance on disclosure and publication, and that the obligatory provision of information tools to end-users is left untouched.

BEREC Response 26

BEREC is considering integrating all the Guidelines in one document. Yet, it should be noted that each Guideline is self-contained dealing with different issues, yet they are all related. BEREC has incorporated in the current Guidelines additional cross-referencing of documents.

On the second comment, BEREC reminds ECTA that Section 2.7 in BoR (20) 42 dealt with the matters regarding the publication of the broadband map, the issue of confidentiality and data aggregation. This document was under public consultation in 2019 and then BEREC took

into consideration all the comments received regarding these matters, including the comments on the information tools to end-users.

Changes to Guidelines: No changes required.

Finally, ETNO requests for changes in the definition of premises passed in BoR (20) 42 and explains that before conducting the geographical surveys, the Authorities should define the database and clearly specify the criteria and information to be included in the information submissions.

BEREC Response 27

BEREC acknowledges this comment but notes that this is not in the scope of the present public consultation.

Changes to Guidelines: No changes required

Annex 1

List of received contributions

Name of the contributor	Country	No. of pages⁴
ECTA	Belgium	9
ETNO	Belgium	4
FTTHc Europe	Belgium	3
GSMA	Belgium	2
Liberty Global	The Netherlands	5
Open Fiber	Italy	6

⁴ All the pages of the submissions have been considered, including cover and presentation pages, where applicable.