



ecta RESPONSE

**TO THE PUBLIC CONSULTATION BY BEREC
ON THE**

**DRAFT BEREC GUIDELINES ON
GEOGRAPHICAL SURVEYS OF
NETWORK DEPLOYMENTS
ARTICLE 22(2), 22(3) AND 22(4)**

BoR (20) 168

5 NOVEMBER 2020

1. Introduction

1. **ecta**, the **European Competitive Telecommunications Association**,¹ welcomes the opportunity to comment on the second set of draft BEREC Guidelines on Geographical Surveys of Network Deployments² that BEREC has drawn up pursuant to Article 22(7) of the European Electronic Communications Code³ (hereinafter 'Code' or 'EECC').
2. The designated focus of the draft are paragraphs 2, 3 and 4 of the provision on geographical surveys.
3. Before proceeding to its substantive comments, **ecta** observes that the title and the scope of the guidance document do not seem to cohere, and that BEREC's overall approach to developing this guidance appears blurry.
4. This is of significant importance as this reduces the guidance value for market participants, and especially for competitive providers of electronic communications operating under far greater resource constraints than historical incumbents.
5. Intended to shape and promote consistent application of a provision that may not only impact network deployments, but also a variety of other company and policy decisions, **ecta** considers this unfortunate.
6. The information that is the subject of guidance is of utmost commercial and competitive relevance. Its processing and availability to competitors, who often deliver innovative and superior products, is essential to maintaining a thriving competitive environment and enable fair, non-exclusionary investment competition.
7. While BEREC repeatedly emphasizes the objective of investor transparency, the consultation draft presents no clear guidance on disclosure and publication, or on the assessment of commercially available information, despite competent authorities being legally obliged to facilitate reuse. Also the equally obligatory provision of information tools to end-users is left untouched.
8. While the sixth paragraph thus receives no explicit consideration, the consultation draft does include multiple references to art. 22(5) EECC, without this being reflected in the title of the document.
9. As a result, the label is apt to mislead and the content of the guidance is not commensurate with the statutory requirement for BEREC to guide on all obligations facing competent authorities under the provision, as laid down in art. 22(7) EECC.
10. BEREC does, however, provide wide-ranging commentary on a number of provisions that do not comprise any binding elements for competent authorities.
11. Not unsympathetic to an integrative reading resulting in consistent guidance, **ecta** calls on BEREC to ensure that all relevant aspects of article 22 be appropriately covered, as

¹ <https://www.ectaportal.com/about-ecta>

² BoR (20) 168, 1.10.2020.

³ Directive (EU) 2018/1972, (2018) OJ L321/36.

required, and their competitive relevance and sensitivity fully acknowledged. This should notably include clearer emphasis on the fourth paragraph of the provision and its different procedural strands.

12. In presentational terms, **ecta** considers that the draft document requires substantive linguistic revision and accuracy checking to provide intelligible, useful guidance and to ensure that certain elements of the guidance do not actually contradict the Code, or create new ambiguities about some of its elements.
13. **ecta** also encourages BEREC to systematically remove and replace language suggesting no more than recommendations. Even absent direct enforceability, **ecta** considers that the guidelines should articulate a shared view among BEREC members of what competent authorities should do in applying them. This is of particular relevance both with regard to competent authorities outside the electronic communications sector that receive new competences and obligations under art. 22 EEC as well as to ensuring a minimally consistent approach to applying the provision.
14. To promote the guidance value of the draft, **ecta** also encourages BEREC to incorporate the process overview graphic into the body of the text. This could be done at multiple points corresponding to the relevant stage on which the text provides guidance as it progresses.
15. Given the extensive cross-referencing to the 'Core Guidelines' as well as the mandate of art. 22(7), **ecta** further suggests that BEREC undertake to ensure integration of all guidance relating to art. 22 in one document. Failing to do that, BEREC should at a minimum enhance usability by providing accurate and full references to the first part.
16. More generally, **ecta** believes, and calls on BEREC to guarantee, that the guidelines must achieve more than to simply defer to already applicable national rules. Instead, in a domain as critical to societal wellbeing and development as electronic communications, there needs to be a consistent push to also improve and enhance the procedural standards applicable to authorities enabling and overseeing economic activity.
17. This is particularly important where these authorities, directly or indirectly, shape market outcomes through their activities. The lack of specific standing practices at Member State level that BEREC documents⁴ does not prevent such guidance from being elaborated, as long as other best practice examples can be suitably adapted to declaration procedures ('invitations') under paragraph 2. **ecta** would indeed welcome BEREC placing greater emphasis on proportionate, targeted and effective procedures, including to limit information workload, in the context of geographical surveys and beyond.
18. Finally, a revision of the draft guidance should clearly capture the legally distinct nature of second phase invitations, which, if used, enable authorities to compel responses.
19. This is essential to ensuring effective overbuild protection and, in **ecta's** view, needs to prompt effective sanctions for non-compliance, especially on operators abusively failing

⁴ BoR (20) 168, para. 6, at 2f.

to disclose forthcoming activities, which may compromise competitors' business case. This difference in implications fails to be recognised by the consultation draft and should be clearly articulated in the final text, as well as in the process overview in annex.

20. The following sections address issues relating to the proposed guidance on area designation (section 2) and to invitations to declare investment intentions (section 3).

2. Area designation

21. As regards BEREC's proposed guidance on information required to designate areas in which no VHCN/100+Mbps deployments are envisaged over the forecast period,⁵ ecta observes that:

- i. It appears **inappropriate not to require area designations**, 'i.e. their geographical definition or publication', **to be current**,⁶ especially when considering that the draft explicitly, and appropriately, refers to 'geographic units inducing no ambiguity'⁷ as the basis for delineating areas. ecta considers that all relevant information concerning designation must be current and asks BEREC to clarify this and delete the third sentence of paragraph 25;
- ii. The draft's **indications on the use of forecast information in area designation are contradictory**, ranging from pure optionality⁸ to a strict requirement.⁹ ecta interprets art. 22(2) as implying that where the determination involves forecast information, such information has indeed to be used. Statutory wording makes it unambiguously clear that competent authorities are not free to disregard forecast information—where such information has been produced—when designating areas ('... authorities may designate an area ... on the basis of information gathered and **any forecast** prepared pursuant to paragraph 1'¹⁰). ecta therefore calls on BEREC to delete contradicting guidance at paragraphs 26 and 27 and remove the ambiguity in paragraph 28;¹¹
- iii. The **limitation of verification mechanisms to situations in which competent authorities carry out 'surveys of forecasts' is unclear and inappropriate**. ecta believes that suitable verification mechanisms should generally be foreseen and invites BEREC to remove their limitation to 'surveys of forecasts'. If BEREC were to maintain this wording, its meaning and implications should be clarified.

⁵ BoR (20) 168, section 2.1, at 5ff.

⁶ BoR (20) 168, para. 25, at 6.

⁷ BoR (20) 168, para. 43, at 8.

⁸ BoR (20) 168, para. 26, at 6.

⁹ BoR (20) 168, para. 28, at 7.

¹⁰ Art. 22(2), 1st sentence EECC.

¹¹ ecta considers that where participants to a forecast exercise in the context of a geographical survey provide inaccurate information, which leads to an area not being designated and thus preventing the invitations procedure under art. 22(3) from being launched, competent authorities should apply dissuasive penalties pursuant to art. 29(1) EECC.

22. As regards BEREC's proposed guidance on the definition of area boundaries and sizes,¹² **ecta** remarks that:

- i. The introductory considerations set out at **paragraphs 36 to 39 appear to lack in clarity**. **ecta** suggests that guidance on this point commence with the text of paragraph 40;
- ii. There is a **possible contradiction between paragraph 41**, according to which authorities should designate areas 'based on geographic units with clear and stable geographical boundaries', **and paragraph 44**, according to which authorities should ensure appropriate size or geographic level of the area. **ecta** considers that the criterion of boundary clarity is best achieved by reference to unambiguously defined geographic units, as referred to in paragraph 43, and suggests that the guidelines call on authorities to proceed from such units, clearly justifying any deviation as strictly proportionate. This should be accompanied by a requirement to use available information.
- iii. **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**. Furthermore, it appears to go far beyond the purpose of identifying underserved areas by suggesting micro-analytical dissection of geographic units according to criteria that are the preserve of market intelligence and business decision-making. **ecta** considers the proposed guidance here to significantly exceed the mandate of art. 22(7) and suggests paragraphs 45 to 50 to be deleted.
- iv. The **inclusion of covered spots in designated areas** described in paragraph 51 **is commercially sensitive**. By definition, locations enjoying VHCN/100+Mbps coverage do not fulfil the criterion of art. 22(2) and therefore must not be included in a designated area. **ecta** suggests that the guidelines should call on authorities, where relevant, to make distinct area designations for residential and business coverage.

23. As regards BEREC's proposed guidance on frequency of area designation,¹³ **ecta** considers that:

- i. **The suggestion at paragraph 52** that competent authorities can freely decide how often they want to designate areas **does not appear compatible with art. 22(2) and the need to maintain sound, proportionate and efficient administrative practices**. Area designation requires a clear grounding in fact, either on the basis of surveys or surveys and forecast data, and the guidelines should abstain, in **ecta**'s view, from suggesting that area designation could occur independent thereof;
- ii. Therefore, it is appropriate for area designation to be aligned with broadband reach surveys and **ecta** believes that the **guidelines should require reach**

¹² BoR (20) 168, section 2.2, at 7ff.

¹³ BoR (20) 168, section 2.3, at 10.

surveys to be used as the basis for designations and require departures to be strictly proportionate. Paragraph 56 should be amended to this effect and aligned with paragraph 34;

- iii. The **designation frequency should be explicitly linked**, conceptually and operationally, **to the validity period**.

24. As regards BEREC's proposed guidance on the publication of designated areas and sizes,¹⁴ **ecta** believes that:

- i. It is **essential to underline the border-defining function of published information while protecting business secrets in publication**, as BEREC does at paragraphs 60 and 64. **ecta** invites BEREC to include in paragraph 64 explicit reference to the need to **protect the business case of operators alternative to the incumbent, in particular new entrants and emerging competitors**;
- ii. The **guidelines should explicitly consider openness, ease of access and cost effectiveness as considerations by which to justify the choice of publication format** for designated areas;
- iii. **Any relevant stable geographical unit delimitations should be acceptable for reporting purposes** and the fourth bullet in paragraph 60 should be amended accordingly;
- iv. The **guidance at paragraph 61 requires clarification** both with regard to 'the *type* of boundaries of designated areas' and 'the *efforts* of releasing this information'¹⁵. **ecta** considers that publication should be administratively efficient and involve no substantial supplementary effort in addition to designation;
- v. **Designated area information should always be published on the competent authority's website**, and this should not be replaced or substituted for by other publication channels. The **concept of 'related web portals' requires clarification**. **ecta** invites BEREC to include in the guidelines **a national access point** for all area designations;
- vi. **Publication by targeted messages should be prohibited** to the extent it involves or implies any selectivity among recipients;
- vii. **The inclusion of other information**, as pointed out above, **appears not to be an appropriate subject of BEREC guidance** and paragraph 66 should therefore be removed.

¹⁴ BoR (20) 168, section 2.4, at 10ff.

¹⁵ Our italics.

3. Invitations to declare investment decisions

25. As regards BEREC's proposed guidance on procedures for first invitations to declare investment intentions pursuant to the first sentence of art. 22(3) EECC,¹⁶ ecta remarks that:

- i. A **broad construal of the addressees** of such invitations is **appropriate, but not sufficiently reflected in paragraph 78** with regard to public authorities. ecta therefore suggests that the wording be amended to effectively include all authorities, similar to paragraph 77. This is necessary to ensure an appropriately non-exclusionary approach;
- ii. **Invitations should take the form of public consultations**, rather than being subject thereto, and paragraph 79 should be redrafted accordingly;
- iii. **Publicity requirements should be consistent throughout**, so that the considerations set out above at paragraph 24, point iv also apply here. The publicity options at paragraphs 63 and 95 should equally be available in this context to ensure that all potentially relevant recipients can be reached;
- iv. The **reference to geographical information systems as a means of publishing designated areas and related invitations at paragraph 80** is misplaced and **should be moved to section 2.4**;
- v. **Launch of an invitation requires interested parties to have had appropriate opportunity to take notice of the designation**, and the guidelines should therefore require **at least a two-week exclusion period between designation and launch of an invitation**. Where authorities nevertheless endeavour to publicize designation and invitation concurrently, this minimum notice period should be added to the **invitation period**, which **should last at least six months**. Formal deficiencies should lead to the process being reset;
- vi. While **verification of information submitted** by respondents **as to its credibility** is welcome, this **should not be limited to undertakings**, as currently suggested at paragraph 82. More **guidance on the possible implementation of verification mechanisms** would be appropriate, drawing on the list enumerated in paragraph 89, after this has been controlled for overlaps with paragraph 87:
- vii. The **proposed guidance on forecast periods** is so vague as to provide little guidance and **requires elaboration of the standard of compatibility between art. 22(1) and (3)**, as well as **clarification in relation to the guidance on the use of forecast information** (cf. paragraph 21, point ii) above). The guidance should clarify that comparability does not imply forcible alignment of endpoints;
- viii. The **wording 'interesting level of visibility on the planned deployments'** at paragraph 87 **requires clarification** as to how this is to be applied and assessed. ecta furthermore considers that the second indent under paragraph 89 should be

¹⁶ BoR (20) 168, section 3.1, at 14ff.

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.

- ix. **Information on planned deployments**, according to paragraph 88, **should as a rule** (rather than ‘primarily’) be provided **at address level**, and **upward deviations should only be accepted where explicitly justified, and administered in a non-discriminatory manner**;¹⁷

26. As regards BEREC’s proposed guidance on information disclosure following procedures for first invitations to declare investment intentions pursuant to the first sentence of art. 22(3) EECC,¹⁸ **ecta** asks BEREC to:

i. **Clarify**

- **the concept of ‘additional information’**, including its reference point (i.e. what it is additional relative to);
- **the scope of the expression ‘all agents under request’**, and, if appropriate,

- ii. **Revise paragraph 91**, if appropriate, **to ensure** that the limitation suggested by the term ‘under request’ gives rise to **no selective or outright exclusionary effect**;

27. As regards BEREC’s proposed guidance on ex post information disclosure,¹⁹ **ecta** calls on BEREC to:

i. **Revise**

- **paragraph 105 to ensure that request-based information sharing** with BEREC and the EC under the second subparagraph of art. 22(5) **only occur subject to the same conditions**;
- **paragraph 106 to ensure that all parties having provided information are made aware of its sharing** under that subparagraph;
- **paragraph 107 to include unequivocal reference to the receiving authority** and its obligations;

- ii. **Delete the requirement** in paragraph 108 **for the competent authority to acquire** in each case **‘a good understanding of the [receiving] authority and**

¹⁷ Appreciative of BEREC extending this possibility also to cases of deployment information being provided at lower levels of granularity, **ecta** considers that during the establishment of geographical surveying practices and infrastructures, emphasis should be placed on striking an appropriate balance between moving towards unified databases and administrative burdens placed on operators, for which information provisioning at address level appears most appropriate at this stage, as BEREC itself has emphasized; cf. BoR (20) 42, para. 31.

¹⁸ BoR (20) 168, section 3.1.3, at 17f.

¹⁹ BoR (20) 168, section 3.3, at 19f.

its requirements', for which there is no statutory basis, and which involves a degree of subjective assessment uncalled for by the provision;

- iii. **Require the implementation of reasonable aggregations**, as possible and appropriate, in paragraph 108.

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In case of questions or requests for clarification regarding this contribution, BEREC and NRAs are welcome to contact Mr Oliver Füg, Director of Competition & Regulation at [ecta](#), at ofueg@ectaportal.com.