



## **Liberty Global response to BEREC's draft guidelines regarding Article 22(2)-(4) of the Code**

Liberty Global welcomes the opportunity to comment on BEREC's draft Guidelines on Geographical surveys of network deployments Article 22(2), 22(3) and 22(4) — which follow the release of the Core Guidelines<sup>1</sup> in March 2020. Liberty Global previously responded to BEREC's call for input on the Core Guidelines in July 2019 and November 2019.

### Principles of appropriateness and proportionality

As we have noted in previous submissions to BEREC, Liberty Global supports new provisions of the Code which enable national regulatory authorities/other competent authorities (NRAs/OCAs) to gain better insight into the current reach of broadband networks. This information will allow policy makers to make better-informed decisions when implementing policies to achieve the EU's broadband connectivity goals. Liberty Global also supports policies that encourage private investment in telecommunications infrastructure — particularly in very high capacity networks (VHCN) such as Liberty Global's upgraded HFC networks — and which ensure the efficient and appropriate use of private, EU and state funds. Whilst we acknowledge that there will be some (limited) areas in which private investment will never be viable — and which may require State intervention — the use of public funds should be avoided as much as possible. State subsidies have a distortive effect on competition and disincentivize private investment. They should therefore be used as a measure of last resort, and limited to the small percentage of areas where it is proven beyond any doubt that there is no prospect of private deployment.

We also support BEREC's initiative to issue guidance to NRAs/OCAs on the procedures for designating areas and for inviting parties to declare their investment intentions, with the view to ensuring consistent application of the Code provisions. Divergence between Member States in the use of designation procedures could discourage investment and risks increasing the digital gap across the EU. However, we wish to reiterate the need for caution regarding the use of forecasts, and to highlight the importance of maintaining confidentiality over the sensitive information that will be collected via this process. We further note, as already recognised by BEREC, that the use of the designation and invitation procedure should not substitute the existing State aid assessment procedures and should not create unnecessary burden on operators. In this regard, it is important that the designation and invitation procedure is used only when appropriate and proportionate (as required under Article 21 of the Code).

### Forecasts should be used with caution and not in isolation

The purpose of Article 22(2)-(4) of the Code is to enable NRAs/OCAs to identify areas where there is no existing or future planned VHCN or networks offering at least 100Mbps download speeds. This information will then be taken into account, amongst other things, when allocating public funds and designing national broadband plans, and may be used by undertakings and public authorities when

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<sup>1</sup> BEREC Guidelines on Geographical surveys of network deployment, BoR (20) 4, 5 March 2020.



determining whether to invest in a particular area.<sup>2</sup> To identify these areas, NRAs/OCAs will rely on deployment forecasts provided by operators. However, and as noted previously, future network deployment and upgrade plans are highly changeable and are therefore unreliable. There are many internal and external factors which influence the incentive and ability to execute deployment plans, including availability of capital, changes in demand and supply, ability to gain civil planning and building permits. These factors are also themselves subject to change. Furthermore, forecast information can only be required by Member States 'to the extent that it is available and can be provided with reasonable effort'. The forecasts, which were provided truthfully and in good faith, may therefore still over- or understate the planned level of investment in a particular area.

Whilst BEREC has left it open for NRAs/OCAs to determine the length of the forecast period, it recommends yearly updates and (ex ante or ex post) verification procedures as a means to overcome this uncertainty. In our view however, it will remain very difficult to rely upon or verify any forecasts for a period longer than three months due to the inherent changeability of deployment and upgrade plans — particularly at the level of detail recommended in BEREC's Core Guidelines. In this regard, we reiterate that in the pre-planning and planning stage, operators generally only have high-level information, not precise locations, in relation to future deployment plans (e.g. in a particular region, or suburb). Address level data for longer-term forecasts is unlikely to be available. We therefore encourage BEREC to make clear in the Guidelines that the forecasts should be used with caution.

#### Support consideration of additional criteria for designated areas

Liberty Global considers that the geographic surveys and forecasts should not be used in isolation to allocate public funds, to design national broadband plans or to inform investment plans. Rather, consideration should be given to wider factors that will affect the economic viability of rolling out VHCN or other next generation networks offering over 100 Mbps download speeds (such as population/household density, urban growth rates). This will reduce the risk of market distortion — particularly distortions caused by any inevitable gaps in the forecast information. In this regard, we support BEREC's consideration of further criteria for defining designated areas, e.g. by expected profitability of the network.

We would not, however, support designating areas with combined low and high profitability profiles, as this may result in public funds being used to crowd out investment in profitable areas.<sup>3</sup> It is, of course, possible for investors to deploy networks in these combined areas (e.g. a network operator may wish to roll-out VHCN to the designated area and the neighbouring non-designated area in order to improve the business case) but this does not require areas with high profitability to be designated.

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<sup>2</sup> We note BEREC sees the designation procedure (and resulting publication) as an important optional tool to inform public and private agents of the non-availability of VHCN/100Mbps networks in different areas of the national territory (cf. para 14, draft Guidelines).

<sup>3</sup> See paragraph 46 of the draft Guidelines.



#### Frequency of data collection increases burden on operators

Paragraph 52 of the draft Guidelines states “Competent authorities may decide on whether and how often they want to define designated areas,” noting that the frequency of designation procedures will be dependent on the needs and circumstances of the relevant authority. We agree that, as noted in paragraph 55 of the draft Guidelines, using the designation procedure too frequently could discourage investment. In this regard, we consider the relationship between the cadence of designation procedures, geographical surveys on broadband reach and surveys relating to state aid procedures should be made clearer. Constantly providing similar information to the relevant NRA/OCA places a disproportionate burden on operators, particularly if there is confusion regarding the relationship between the procedures. It may also result in information that is neither additionally useful nor reliable. This is even more so the case if the NRA/OCA opts to conduct an extensive (ex ante/ex post) verification of the forecast information.

#### Deployment plans are highly confidential and should not be disclosed

As we have stated in our previous submission to BEREC, network coverage information and planned deployments are highly commercially sensitive. Disclosure of such information would result in significant legal and investment uncertainty for private operators that are in the process of executing network deployments/upgrades. Whilst we recognise that process under Article 22(3) of the Code — whereby an NRA/OCA may invite undertakings to declare their intention to deploy in a particular designated area — is optional. This information should nevertheless be treated as commercially sensitive and therefore confidential. Similarly, in the event that an undertaking has made such a declaration, the further (non-optional) requirement for other undertakings/public authorities to make such a declaration should be undertaken with significant care. This process, and particularly the information obtained, has a high potential to cause distortion of the market and gaming by operators.

We recognise however that a certain amount of information must be disclosed to achieve the goals of the designated procedure process; in particular, 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. However, we note with concern paragraph 58 of the draft Guidelines, which states that the relevant authorities should provide sufficient information to allow agents to establish the *localisation of addresses or grids* within the designated area which are already or have plans to be covered by VHCNs/networks capable of 100Mbps. We strongly disagree with the disclosure of this level of network information to (potential) competitors. As noted above, this information is highly commercially sensitive and failure to maintain confidentiality could cause significant disincentive to investment, thereby harming network deployments. Furthermore, we consider that it goes beyond what is required to achieve the objectives, and does therefore not adhere to regulatory principles of necessity and proportionality.



Finally, we note that the draft Guidelines require an extensive level of information from operators which express interest in deployment in these areas. The level of information required might, in itself, act as a deterrent to expression of interest given it requires detailed plans which operators may not be in a position to provide. Additionally, without guarantees that this information be kept confidential, it is likely that operators will simply not express interest and risk revealing commercially sensitive information. Any information that is published should be anonymised and aggregated where possible.



### **About Liberty Global**

Liberty Global is one of the world's leading converged video, broadband and communications companies, with operations in six European countries under the consumer brands Virgin Media, Telenet and UPC. We invest in the infrastructure and digital platforms that empower our customers to make the most of the digital revolution.

Our substantial scale and commitment to innovation enable us to develop market-leading products delivered through next generation networks that connect 11 million customers subscribing to 25 million TV, broadband internet and telephony services. We also serve 6 million mobile subscribers and offer WiFi service through millions of access points across our footprint.

In addition, Liberty Global owns 50% of VodafoneZiggo, a joint venture in the Netherlands with 4 million customers subscribing to 10 million fixed-line and 5 million mobile services, as well as significant investments in ITV, All3Media, ITI Neovision, LionsGate, the Formula E racing series and several regional sports networks.