

## Open Fiber contribution to the public consultation on the Draft BEREC Guidelines on Geographical surveys of network deployments Article 22 (2), 22 (3) and 22 (4)

Open Fiber welcomes the opportunity to contribute to the public consultation on the Draft BEREC Guidelines on Geographical surveys of network deployments Article 22 (2), 22 (3) and 22 (4) ("Draft") and expresses its overall agreement with the Draft designed in accordance with article 22 of the EECC.

However, Open Fiber would like to highlight some concerns about a relevant topic such as the main characteristics that the identification process of the "designated areas" should have.

The Italian experience has shown that the investment declarations made by operators on an address basis have led to the identification of geographic areas that are often not homogeneous and uniform internally. Frequently, (several thousand) municipalities have been characterized by the coexistence of addresses identified as "white" and "black" (so, respectively, addresses that are covered and not covered). In the image n. 1 below, it is evident that there is overlapping between white addresses (the yellow spots) and black ones (the violet spots) in the same area. In the Image n. 2, there is more or less the same issue, with white addresses (the grey spots) and black ones (the black spots) in the same area. Such a chaotic situation has led to inefficiencies in the investment decisions of different operators in the same area.

### Image 1 – Infratel Public Consultation

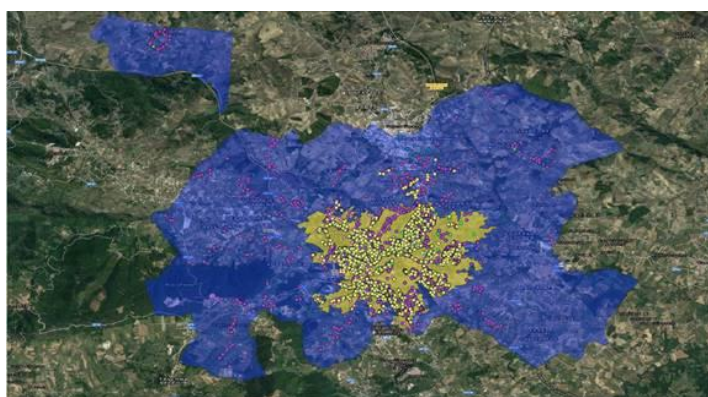


Image 2 - Frascati Municipality



Moreover, Open Fiber would like to underline that the designated areas should have clear boundaries, as said by BEREC in the Draft. In particular, "*clear boundaries can be defined based on geographic units inducing no ambiguity, and can for example refer to administrative units, postal code sectors or statistical units*".

In order to overcome issues in identifying homogeneous and clear boundaries of designated areas, such as the ones indicated above, NRAs should adopt specific criteria of homogeneity.

For instance, as suggested in the Draft, the NRAs should identify areas with minimum and maximum dimensions, so as to ensure uniformity within the same area. In addition to the size parameter, the NRAs could make use of additional homogeneity criteria, such as the population density or the average cost of infrastructure building per house. The use of the above-mentioned criteria would undoubtedly foster the identification of areas that are internally homogeneous as well as comparable with each other.

In addition, Open Fiber would like to stress that the problems, which have emerged from the development of NGA networks, will recur even more strongly in the case of VHCN fiber networks, whose deployment is even more expensive. Due to the huge investment required for the construction of fiber networks, the operators will prefer to build their VHCN networks in the most profitable parts of the designated areas, leaving the residual areas (where rollout is economically unsustainable or very expensive) to third parties.

In order to overcome the aforementioned issues of inhomogeneity within each designated area, besides the use of specific homogeneity criteria, Open Fiber suggests two alternative approaches that the NRA could adopt when defining these areas.

***Approach 1: the designated areas identified on the basis of the areas declared covered during the geographical survey pursuant to Article 22 (1) (hereinafter "Phase 1")***

According to this first approach, the NRAs, based on the coverage information collected during Phase 1, should identify the designated areas, which, as mentioned, must be homogeneous inside.

The NRAs will therefore have to consider all those parts of the territory already declared as covered, verifying that the investments in these areas have actually been made.

Once the designated areas have been identified, the NRAs have to verify, once again, the investment intentions (so-called *forecasts*) of the operators in the designated areas.

Therefore, there will be designated areas in which no operator has already declared their intention to invest in Phase 1 and which will therefore be put up for tender. On the other hand, there will be designated areas that will include, in part or entirely, parts of the territory in which operators had declared their intention to invest during the Phase 1. In the latter case, the NRAs will have to verify that such forecast information is still valid and, if necessary, require the operators to adapt their investments intentions in order to cover the entire designated area.

On this point, Open Fiber intends to underline that the diagram proposed by BEREC in the Annex of the Draft assumes (incorrectly) that the forecast information provided by the operators in Phase 1 have the same characteristics of homogeneity even in phase 2 (identification of the designated areas), without any verification process. On the contrary, the verification or confirmation of the investment intentions of the operators is essential to ensure that the designated areas are uniform internally.

In our view, it is therefore necessary that the NRAs verify that the investment declarations of the operators made in Phase 1 are maintained also in phase 2 and that the confirmation of the commitments to invest concerns the entire designated area and not just a part of it. In case the operator is unable to commit to the entire territory, it should be clarified whether it is appropriate to put the entire area up for tender or to divide it into sub-areas. Of course, these sub-areas must have clear boundaries and must be internally homogeneous.

Since the European Gigabit Society strategy aims to cover 100% of the EU territory with networks capable of providing connectivity with Gigabit speeds by 2025, Open Fiber strongly believes that the homogeneity and integral coverage of the designated areas must always be guaranteed both in case of private and public intervention. It is therefore essential that the confirmation of the operators' investment intentions is strengthened by a formal commitment and a clear investment schedule.

***Approach 2: the designated areas are identified based on the areas covered and those in which the operators have committed to invest***

According to this second approach, NRAs should identify the designated areas by taking into account both the coverage data and the forecasts resulting from Phase 1.

In other words, the NRAs could identify the designated areas both on the basis of the areas declared covered in Phase 1, verifying the effective implementation of the investments, and also considering the forecasts that the operators declared during Phase 1. In such a case, it is essential that those forecasts are binding, so that the operators will be sanctioned if they do not respect the commitments made.

In our view, the Authority that will receive the forecast information should verify that, besides being binding, the investment intentions guarantee full and homogeneous coverage of an area with clear boundaries. Only in such a case, the Authority should consider the forecast information for the definition of designated areas.

On the other hand, if the area is not homogeneous (i.e. there are both white and black addresses inside it) or it does not have clear boundaries, the Authority will have to conduct further checks on the coverage intentions, with a view to confirm the investment intentions only if they satisfy the homogeneity criterion.

Therefore, Open Fiber believes that the forecast information must be followed by a formal commitment on the part of the operators. If the investment intentions declared during Phase 1 are not confirmed in Phase 2 (the identification of the designated areas), the operators will have to pay penalties. Furthermore, such designated areas will necessarily have to be properly modified in order to avoid the potential problem of parts of the country not being covered.

Regardless of the type of approach that the NRAs might use, Open Fiber would like to underline the importance of an efficient sanctioning system in addition to the verification process of the homogeneity already mentioned.

Article 29(2) of the EECC has introduced a sanctioning system in the context of the procedure referred to in Article 22 (3), which can be applied “*where an undertaking or public authority knowingly or grossly negligently provides misleading, erroneous or incomplete information*”. However, it has also established that “*regard shall be had, inter alia, to [...] whether, contrary to the information originally provided or any update thereof, the undertaking or public authority either has deployed, extended or upgraded a network, or has not deployed a network and has failed to provide an objective justification for that change of plan.*”

Although Open Fiber appreciates the introduction of this new sanctioning system, it is important to underline that the penalties will not be applied to operators whenever there are "justified reasons". Such a condition 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).



Therefore, in order to increase the effectiveness of the current sanction system, Open Fiber suggests that operators should enter into an agreement with the State or directly with the Local Authorities (i.e. Regions, Provinces) concerning the areas in which they are committed to investing.

Such contracts should include sanctions to be applied whenever the operators' investment declarations are not respected or if the Local Authorities do not respect the agreements, thus hindering or delaying the implementation of the planned investments in the designated areas.

In conclusion, Open Fiber strongly believes that it is important to apply a mechanism to verify the actual homogeneity of the declarations in the designated areas. It is equally important that, together with the declaration mechanism, there is also a formal coverage commitment and a clear timetable for carrying out the activities.

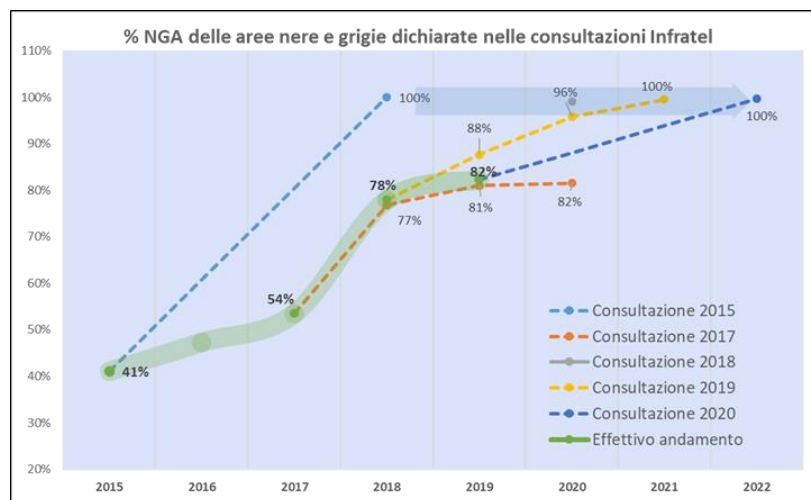
In case of failure to comply with the commitment or its time schedule by the operator, the Public Authority will have to go ahead with its own coverage project, thus putting these areas to tender.

In this regard, Open Fiber underlines that the binding nature of the operators' investment intentions is an essential element for a correct definition of the designated areas, as well as an essential tool to foster the investments in high-performance networks (VHCN) in the whole country as soon as possible.

Unfortunately, the Italian experience has shown that the forward-looking statements of the operators were resized because of the absence of an adequate sanction system.

As shown in the graph below, the NGA coverage of black and grey areas was supposed to reach the 100% at the end of 2018 (within the 2015 consultation that gave rise to the tenders on the white areas). However, at the end of 2019 the NGA coverage was still at 82%, and it is expected to reach the 100% only in 2022.

NGA coverage of black and grey areas has been delayed by at least 4 years. Consequently, about 4 million households still do not benefit from UBB services so far.



Source: Open Fiber Elaboration

It is therefore clear that the application of an effective penalty system in the event that the investment commitments are not maintained is crucial for the proper definition of the designated areas pursuant to Article 22 (2) (3) (4).

In conclusion, Open Fiber considers that NRAs should define an effective process that allows, through the identification of homogeneous designated areas with clear boundaries, the achievement of a full coverage of the EU territory with VHCN by 2025 (in line with the Gigabit Society strategy).

This objective is even more important now, as the territorial coverage is at the center of the initiatives to be supported by the European Recovery Fund. Therefore, the adoption of a mechanism to designate areas, which does not provide for clear commitments and a proper definition of such areas in terms of homogeneity, can jeopardize the ability to achieve the European objectives effectively and on time.