

Subject: Public consultation on the coordination of civil works according to Article 5(6) of the Gigabit Infrastructure Act

Open Fiber S.p.A. (hereafter OF), a wholesale-only operator engaged in the development of a national FTTH fiber optic network in Italy, welcomes the public consultation on the Guidelines for the coordination of civil works provided by Article 5(6) of the Gigabit Infrastructure Act (GIA). Please find below our contribution to the consultation.

1. Introduction

OF believes that the draft guidelines should take greater account of the most efficient practices already in place in some countries, in some cases aligned with the objectives of the GIA. It is considered that Article 5 should be read in conjunction with Article 1.3, which allows Member States to maintain their regulatory framework without making any changes. As explained in this document, we believe that the BEREC guidelines should explicitly mention, as a best practice, the case of laying additional mini-ducts during the construction of new infrastructure, before consulting the market to identify third parties interested in co-excavation.

2. The Italian laws and the GIA

Article 23 of Law No. 118 of August 5, 2022 (2021 Italian Annual Law on the Market and Competition) required Agcom to provide the guidelines for the coordination of civil engineering works and access to infrastructure under construction governed by Article 5 of Legislative Decree No. 33 of February 15, 2016, No. 33 implementing Directive 2014/61/EU.

With Order 452/22/CONS, Agcom adopted the above guidelines, providing for two alternative options (undertakings):

- Coordination for the development of infrastructure for electronic communications networks (so-called Guidelines A): undertakings communicate to the market with a sufficient advance notice of their intention to carry out civil works. Within a specific timeframe, the undertakings and interested parties agree on technical and economic terms and conditions to execute the civil works, so-called co-excavation.
- Voluntary installation of additional infrastructure (so-called Guideline B) by the undertaking: without communicating its intention to carry out civil works to the market,

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undertakings install additional physical infrastructures (spare capacity) to meet the access requests by third parties.

The option Guideline B, like its alternative option (Guideline A), makes available infrastructure to third parties, but in a more streamlined manner. Guideline B makes available additional physical infrastructures (spare capacity), as Guideline A, skipping the procedures to consult third parties and strike an agreement with them.

In this regard, it should be noted and clarified that the installation of additional mini-ducts for third-party access (Guideline B), as an alternative to initiating a procedure to identify parties interested in sharing the excavation (co-excavation or Guideline A), differs substantially from the BEREC proposal referred to in paragraph 4.6 of the consultation document. While in the Italian model, the laying of mini-ducts takes place during the network planning phase without consultation with third parties, in the BEREC proposal, the laying of mini-ducts for third parties takes place after the undertaking has refused the request of co-excavation.

Furthermore, in the Italian case, the laying of additional mini-ducts for third-party access can take place throughout the national territory, i.e., both in areas subject to public intervention and in areas of private investment.

3. The benefits of the Italian regulatory scheme

By providing flexibility, voluntary non-mandatory forms of coordination in cases where there is no clear technical or economic advantage for co-excavation, the adoption of Guideline B is a much more efficient solution than the solutions explicitly mentioned in Article 5 GIA (laying of additional mini-ducts in the event of refusal of access). Whenever the undertakings consider that the coordination of works with third parties slows down the execution of the works unacceptably, they will adopt Guideline B. The reasons for the greater efficiency of the Italian solution compared to the co-excavation solution are the following:

- It allows third parties access to the infrastructure without slowing down the worksites on the part of the proponent, an effect that inevitably occurs whenever there is joint excavation, resulting in longer construction times;
- The installation of mini-ducts for third-party access during the construction phase by the undertaking (Guideline B) makes available infrastructure also for future market needs that did not emerge during the consultation phase. In the case of co-excavation, on the other hand,

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the interested third party must express its interest within a narrow time frame of the consultation. If, at this stage, no third parties are expressing an interest in co-excavation, the proponent will not have built infrastructure for third parties, and it will be difficult to reuse this new infrastructure.

4. Conclusions

Open Fiber requests that the principle set out in Article 1.3 of the GIA be reiterated in the guidelines, namely that the right to maintain the national regulatory framework without making any changes to it be recognized, where national legislation has introduced stricter and more detailed measures than the minimum requirements established by the GIA. In the case of Italy, the legislation is not only more detailed but also more efficient.

It is also requested that the guideline explicitly mention the case of laying additional mini-ducts during the construction of new infrastructure, even before consulting the market to identify third parties interested in co-excavation, as one of the possible options for the proponent and typically more efficient or equally efficient than sharing the construction site or refusing co-excavation and laying additional mini-ducts.

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