Full fibre for a digital and sustainable Europe

FTTH Council Europe contribution to the public consultation on the draft BEREC Guidelines on the Coordination of Civil Works (Article 5(6) of the Gigabit Infrastructure Act)

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Introduction

The FTTH Council welcomes BEREC's efforts to provide clarity and structure for exemptions of the coordination of civil works for publicly funded works and entities under Article 5(6) of the Gigabit Infrastructure Act (GIA). We recognise the importance of efficient, cost-effective network deployment for achieving Europe's digital targets and ensuring that end-users benefit from robust, future-proof connectivity. However, if the result of coordination is delayed deployment, this is a very high price to pay for European users.

The FTTH Council is an industry organisation with a mission to accelerate the availability of fibre-based, ultra-high-speed access networks to consumers and businesses. The Council promotes this technology because it will deliver a flow of new services that enhances the quality of life, contributes to a better environment and increased competitiveness. The FTTH Council consists of more than 160 member companies. Its members include leading telecommunications companies and many world leaders in the telecommunications industry (additional information at www.ftthcouncil.eu).

The draft guidelines by BEREC (Body of European Regulators for Electronic Communications) on the coordination of civil works as required by Article 5(6) of the Gigabit Infrastructure Act (GIA) seeks to address three main areas as mandated by Article 5(6) of the GIA:

- Apportioning the costs associated with the coordination of civil works.

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- Criteria for dispute settlement bodies (DSBs) in resolving disputes under Article 5.
- Criteria for ensuring sufficient capacity for foreseeable future needs if coordination is refused.

This response will address these three main points in turn. However, the most important aspect of the sharing of civil infrastructures concerns an issue not elaborated in these guidelines and that concerns the delays to deployment which co-ordination can cause. These delays may be caused strategically in the case of SMP operators.

It is the overwhelming experience of FTTH Council operator members that where coordiantion of civil works is invited, significant delays in deployment inevitably ensues. A very focussed and streamlined dispute resolution process may mitigate these effects but BEREC should also consider means to eliminate these delays, such as allowing the party deploying to volunteer additional capacity as an alternative to coordination. There is a particular concern that SMP operators may misuse coordination provisions to delay or duplicate competitive deployments and negate any first-mover advantages by private investment. The BEREC guidelines should provide a structured, principle-based approach to coordinating civil works for gigabit infrastructure, aiming to ensure fair cost-sharing, efficient dispute resolution, preservation of investment incentives for private investors and future-proof network capacity.

The guidelines should consider the most efficient practices already adopted in Member States, and the BEREC guidelines should explicitly mention, as a best practice, the Italian experience where the laying of additional mini-ducts during the construction of new infrastructure acts as an alternative to coordination with third parties. The FTTH Council believes that giving the publicly funded entity the voluntary option of deploying sufficient future-proof capacity is a valid alternative option rather than managing co-ordination processes.

Dispute resolution should be managed by acknowledged neutral experts. The process should be open and transparent and take account of parties relative market positions (economically dominant firms

may be treated differently because the risk of strategic abuse of these provisions by dominant operators is higher). This can mitigate and accelerate resolution of subsequent disputes. Dispute resolution should be proportionate to the issue/circumstance. Dispute resolution must establish processes and procedures that ensure decision-making is clear and transparent and above all, taken quickly. With stable procedures and experience, the pace of decision making will accelerate. Over time, predictable outcomes taken in a timely manner can mitigate against dispute arising in the first instance.

Unless these guidelines can mitigate the delays being introduced by the need to coordinate civil works, operators will view these measures with a high degree of scepticism.

Finally, BEREC only analysis is of the coordination between two telecom operators. Here competition problems will arise especially if one of the operators concerned has SMP or other forms of market power. Such competition problems (especially execution of strategic overbuild) cannot be solved by voluntary apportioning of costs..

Main Points

1. Ensuring Pro-Competitive Cost Apportionment

The FTTH Council appreciates the emphasis on fair and transparent cost-sharing methodologies for coordinated civil works, including the use of proportionality and benefit-sharing principles. However, we urge BEREC and national regulators to:

Prioritise Predictable, Non-Discriminatory Formulas: The guidelines should encourage the use of cost apportionment methods that are simple, predictable, and minimise opportunities for legacy players to impose excessive costs on new entrants. For example, proportional allocation based on actual infrastructure use or stand-alone cost estimates should be the default, with clear safeguards against overcompensation or under-recovery.

Mandate Transparency in Cost Data: Access to reliable, standardised cost data is essential for fair negotiations and dispute resolution. BEREC should require parties to disclose relevant cost components and justifications, subject to appropriate confidentiality protections, to prevent information asymmetry from disadvantaging smaller market entrants. The treatment of legacy civil infrastructures cannot be equated to new build infrastructures and an appropriate depreciation model should reflect these costs.

With regards **Additional/Incremental/Direct Attributable Costs**: the FTTH Council agrees that costs directly caused by the coordination request (e.g., special planning, deeper trenches, delays) should be borne by the requesting party. For **Shared/Common/Non-Directly Attributable Costs** such cost allocations should be fair, transparent, and promote efficient infrastructure competition, investment, and economic viability for all parties. The cost allocation will depend on context.

2. Strengthening Dispute Resolution for Market Fairness

Rapid, impartial dispute resolution is vital for maintaining momentum in network deployment and ensuring a level playing field. Relative market positions should be considered because dominant operators are a higher risk to misuse coordination provisions. We support the proposed one-month resolution deadline but recommend:

- **An absolute prioritisation on efficiency:** The guidelines should specify that in all instances, delays caused by coordination should be avoided. The decision should be based on an unbiased assessment of the facts and should treat all parties to the investments fairly. Third parties, including local authorities and municipalities should have no standing under this provision (they might want co-ordination but it leads to long delays). The reasoning behind the decision should be clearly articulated, making it easy for all parties to understand the rationale. Decisions should align with existing laws, guidelines, or previous decisions to ensure consistency in how similar cases are handled. The decision should be grounded in the evidence presented during the dispute

resolution process, relying on facts. The decision should be delivered quickly and be practical and implementable, ensuring that parties can comply with the terms outlined.

- **Clear Burden of Proof and Information Disclosure:** The guidelines should specify that incumbent operators or infrastructure owners bear the burden of justifying refusals or cost allocations, and that all parties must fully disclose relevant information at the outset. Entrant operator owners that have newly built infrastructure should face a different burden of proof that better reflects their business model and position in the market.

- **Publication of Precedents:** To promote regulatory certainty and deter anti-competitive practices, anonymised decisions and reasoning from dispute settlement bodies (DSBs) should be published systematically, enabling all market participants to understand the criteria and likely outcomes.

3. Guaranteeing Sufficient Future-Proof Capacity

One particular concern in the consultation is that building and offering capacity is considered only where there is a refusal to co-ordinate, that is, it is a fallback option. The FTTH Council believes that allowing the publicly funded entity that is deploying infrastructure, the option to volunteer sufficient future-proof capacity should be an acceptable alternative.

There will need to be an assessment to forecast future needs and demand for infrastructure services. Operators should design infrastructure and facilities with scalability in mind to allow for expansion or adaptation as future needs arise, ensuring that systems can grow without major overhauls.

A challenge will be fostering collaboration among different infrastructure sectors (and the FTTH Council highlights the role of other infrastructures covered under the GIA including transportation, utilities, public infrastructures) to create integrated solutions for VHCN builders.

We encourage BEREC to:

- **Adopt Ambitious Capacity Benchmarks:** Capacity calculations should be based on reasonable estimates for future demand, including the needs of multiple operators and evolving technology standards. This approach will ensure that new entrants and innovative service providers are not excluded by capacity bottlenecks or legacy design choices. However, as above mentioned, alternative solutions such as allowing the publicly funded entity that is deploying infrastructure, the option to volunteer sufficient future-proof capacity should be an acceptable alternative

- **Align with State Aid and Open Access Principles:** Where public funding is involved, capacity and access obligations must be fully consistent with EU state aid rules and open access requirements, ensuring that taxpayer-funded infrastructure remains open to all qualified market participants on fair terms.