

# **BEREC GUIDELINES**

## **on the minimum criteria for a reference offer**

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## 1. Introduction

According to Article 4 of the BEREC Regulation<sup>1</sup>, BEREC shall issue guidelines on the implementation of the Union regulatory framework for electronic communications, in particular, as referred to in Regulations (EU) No 531/2012<sup>2</sup> and (EU) 2015/2120<sup>3</sup> and Directive (EU) 2018/1972<sup>4</sup>, on minimum criteria for a reference offer, in accordance with Article 69 of Directive (EU) 2018/1972 (hereinafter referred to as “the EECC”). In accordance with Article 69 of the EECC these guidelines (hereinafter also referred to as “the Guidelines”) should contribute to the consistent application of transparency obligations. In developing the Guidelines, BEREC shall pursue the general objectives laid down in Article 3 of the EECC and shall have regard to the needs of the beneficiaries of access obligations and of end-users that are active in more than one Member State, as well as to any BEREC guidelines identifying transnational demand in accordance with Article 66 of the EECC and to any related decision of the Commission.

The rationale for issuing the Guidelines is to contribute to the consistent application of transparency obligations and to replace Annex II to Directive 2002/19/EC<sup>5</sup>, concerning local loop unbundling, with a more flexible approach. The EECC states that the Guidelines should be further reviewed where necessary in order to adapt them to technological and market developments.

In accordance with Article 69 of the EECC on obligation of transparency, the Guidelines should be issued by 21 December 2019, after consulting stakeholders.

## 2. Objectives

### 2.1. Policy Principles

In accordance with Article 69 of the EECC the rationale for issuing guidelines on the minimum criteria for a reference offer is to, inter alia, contribute to a consistent application of

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<sup>1</sup> Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009

<sup>2</sup> Regulation (EU) No 531/2012 of the European Parliament and of the Council of 13 June 2012 on roaming on public mobile communications networks within the Union (recast)

<sup>3</sup> Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union

<sup>4</sup> Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code

<sup>5</sup> Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive)

transparency obligations. BEREC shall pursue the objectives in Article 3 of the EECC and shall have regard to the needs of the beneficiaries of access obligations and of end-users that are active in more than one Member State, as well as to any BEREC guidelines identifying transnational demand in accordance with Article 66 and to any related decision of the Commission.

Obligations of transparency can be of particular relevance in order to ensure and promote non-discriminatory behaviour from market players designated with significant market power ('SMP'). According to Article 69 of the EECC, a requirement to publish a reference offer may in particular be appropriate where an undertaking has obligations of non-discrimination, and the reference offer shall in that respect be sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested.

The objectives of obligations of transparency of terms and conditions for access and interconnection, including prices, are according to Recital 182 of the EECC to speed up negotiations, avoid disputes and give confidence to market players that a service is not being provided on discriminatory terms. Furthermore, openness and transparency of technical interfaces can be particularly important to ensure interoperability.

Recital 183 of the EECC provides for a more flexible manner to achieve the objectives already laid down in Annex II of Directive 2002/19/EC<sup>6</sup>, concerning local loop unbundling, and access products for providers of digital television and radio services<sup>7</sup>, in order to take the variety of network topologies, access products and market circumstances into consideration.

In that sense, these Guidelines on minimum criteria for a reference offer have a broader objective, than the minimum list of items to be included in a reference offer, set out in Annex II of the repealed Directive 2002/19/EC. However, local loop unbundling continues to be a key element of a reference offer, since access to this wholesale service is still considered in the majority of Member States as an important remedy for enabling alternative operators to compete effectively with incumbents.

In accordance with Recital 183 of the EECC, Annex II of Directive 2002/19/EC is therefore to be replaced with new and in a future perspective more "fit for purpose" guidelines on minimum criteria for a reference offer.

In line with the Article 69 requirements, it is necessary to assure that the Guidelines pursue the general objectives in Article 3 of the EECC. Thus, focus is made, inter alia, on promoting competition in the provision of electronic communications networks and associated facilities, including efficient infrastructure-based competition, and in promoting connectivity and access to, and take-up of, Very High Capacity Networks ('VHCN') by all citizens and businesses of the Union.

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<sup>6</sup> As pursuant of its Article 9 "Obligation of transparency"

<sup>7</sup> It should be noted that in light of Annex II to the EECC regarding "conditions for access to digital television and radio services" wholesale broadcasting markets are already adequately covered by the EECC and do not need to be covered by the Guidelines on the minimum criteria for a reference offer

The Guidelines assures benefits for pan-European operators, access seekers<sup>8</sup> and consumers (end-users). Pan-European operators and access seekers can expect to rely on the core set of elements of a reference offer, which should give rise to cost savings from which consumers can benefit (if passed on). Transparent regulatory rules across Europe would also contribute to the regulatory certainty. Minimal set of criteria guarantees competitive and efficient access conditions for operators seeking regulated access to networks of SMP operators. Thus, consumers can benefit from variety of alternative offers based on wholesale reference offer inputs. A further benefit from the Guidelines is that flexibility is maintained for national regulatory authorities (hereinafter referred to as “NRA”), who will still be able to adjust the reference offer to the specific national situation in terms of detail – in other words an NRA may be able to include more than the core set of criteria if justified in their country.

Finally, according to Article 69 Paragraph 2 of the EECC the reference offer shall be sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested. That offer shall contain a description of the relevant offerings broken down into components according to market needs, and the associated terms and conditions, including prices. Therefore BEREC decided to design the Guidelines with covering minimum criteria for a reference offer organized by sections.

## **2.2. Monitoring and review**

In accordance with Article 69 Paragraph 4 of the EECC, BEREC shall review the Guidelines on the minimum criteria for a reference offer where necessary in order to adapt them to technological and market developments.

BEREC does not fix a specific timeframe and deadline for next review of the Guidelines. Any practical need for reviewing should be assessed on a regular basis on the criteria from the Article 69 Paragraph 4 of the EECC, i.e. the periodicity of the “assessment of the need to review” should reflect general trends to date regarding the pace of technology change relevant to access markets. Thus and to secure regulatory certainty, BEREC will conduct a workshop within the first year after adoption of the Guidelines to assess if there is a practical need and demand for reviewing and updating the Guidelines. Monitoring will be continued regularly based on an internal questionnaire sent to NRAs.

## **2.3. Scope of the minimum criteria**

According to Article 69 Paragraphs 1, 2 and 3 of the EECC, an NRA may impose on undertakings, among others, obligations of transparency in relation to interconnection or access wholesale services. If the undertaking has also obligations of non-discrimination, the NRA may require the undertaking to publish a reference offer, which shall be sufficiently unbundled (as described above) and may specify the precise information to be made available, the level of detail required, and the manner of publication.

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<sup>8</sup> Including pan-European operators

Therefore, in developing the Guidelines, the scope of the minimum criteria for a reference offer should cover any interconnection or access wholesale services regulated by NRAs, according to articles 67<sup>9</sup> and 68<sup>10</sup> of the EECC and the Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation.<sup>11</sup>

The current Commission Recommendation on relevant product and service markets foresees in its Annex the following four relevant product and service markets susceptible to *ex ante* regulation, without prejudice to the identification of other markets susceptible to *ex ante* regulation in application of the three-criteria test established in the Recommendation:

- Market 1: Wholesale call termination on individual public telephone networks provided at a fixed location
- Market 2: Wholesale voice call termination on individual mobile networks
- Market 3:
  - a) Wholesale local access provided at a fixed location
  - b) Wholesale central access provided at a fixed location for mass-market products
- Market 4: Wholesale high-quality access provided at a fixed location

As a starting point in determining the scope of the minimum criteria for a reference offer BEREC may, in accordance with Article 69 Paragraph 1 of the EECC, require undertakings to make public specific information such as accounting information, prices, technical specifications, network characteristics and expected developments thereof, as well as terms and conditions for supply and use, including any conditions altering access to or use of services and applications, in particular with regard to migration from legacy infrastructure, where such conditions are allowed by Member States in accordance with Union law.

In addition, to determine the scope of the minimum criteria for a reference offer, it will be appropriate to take into account experiences and documents already published in the past by BEREC on this subject, under the previous EU regulatory framework. Among such relevant documents are in particular BEREC's publications on Common Positions ("CPs") based on BEREC's best practices ("BPs") in remedies on markets for (i) Wholesale Local Access (WLA), (ii) Wholesale Broadband Access (WBA) and (iii) Wholesale Leased Lines (WLL)<sup>12</sup>. These three documents contain a set of minimum information, which could be included in a reference offer. These documents, which have been in effect since 2012, have been applicable for all

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<sup>9</sup> Relates to "Market analysis procedure"

<sup>10</sup> Relates to "Imposition, amendment or withdrawal of obligations".

<sup>11</sup> Currently, the Commission Recommendation of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services

<sup>12</sup> Cf. BoR (12) 126, BoR (12) 127 and BoR (12) 128

three categories of markets and have been beneficial in working towards a consistent application of transparency obligations between NRAs.

It is noteworthy that in BEREC's report on the assessment of the need to review the BEREC CPs<sup>13</sup> it was concluded in relation to the transparency obligation regulation that only "minor changes or clarifications to these BPs may be needed to increase the number of NRAs implementing them".

Finally, the Guidelines on minimum criteria for a reference offer will permit a limited range of options (core elements for a reference offer) and specify the circumstances in which each will be appropriate. This level of harmonisation will give the NRAs the flexibility needed towards specific national and market circumstances as well as it is in alignment with Article 69 and Recital 183 of the EEC in terms of addressing "minimum criteria".

### 3. Minimum criteria for a reference offer

A reference offer shall contain a description of the relevant offerings for access, broken down into components according to market needs, and the associated terms and conditions, including prices. The reference offer shall also be sufficiently unbundled in order to ensure that undertakings are not required to pay for products, services or facilities which are not necessary for the service requested.

The reference offer should (amongst other relevant things required by a NRA) as minimum include the following core elements. As general rule the reference offer should contain all elements required to make effective use of the service requested.

#### 3.1. Terms and conditions for the provision of network access

- a description of the network access products, services and facilities to be provided, including technical characteristics (which shall include information on network configuration where necessary to make effective use of network access);
- any relevant technical standards for network access (including any usage restrictions and other security issues);
- the locations at which network access will be provided;
- a procedure and conditions to request relevant information for the provision of the relevant regulated access product or service;
- terms and conditions for access to ancillary, supplementary and advanced services (including operational support systems, information systems or databases for pre-

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<sup>13</sup> Cf. BoR (18) 24

ordering, provisioning, ordering, maintenance and repair requests and billing), including their usage restrictions and procedures to access those services;

- relevant charges, terms of payment and billing procedures.

### **3.2. Details of operational processes**

- pre-ordering, ordering and provisioning;
- processes of migration from legacy products and infrastructure, incl. moves and ceases;
- rules of allocation of space between the parties when supply facilities or co-location space is limited;
- repair and maintenance;
- changes to IT systems to the extent that it impacts alternative operators;
- details of the necessary interoperability tests<sup>14</sup>;
- specifications of equipment to be used on the network.

### **3.3. Service supply and quality conditions**

- service level agreements (SLAs) for ordering, delivery, service (availability) and maintenance (repair), including specific time scales for the acceptance or refusal of a request for supply and for completion, testing and hand-over or delivery of services and facilities, for provision of support services (such as fault handling and repair);
- the quality standards that each party must meet when performing its contractual obligations including the specification of key performance indicators (KPIs) with respect to SLAs, where relevant;
- service level guarantees (SLGs) for ordering, delivery, service (availability) and maintenance (repair), including the amount of compensation payable by one party to another for failure to perform contractual commitments as well as the conditions for eligibility for compensation;
- procedures in the event of amendments being proposed to the service offerings, which may include a requirement for notification to the NRA for such amendments, for example, launch of new services, changes to existing services or change to prices.

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<sup>14</sup> This minimum requirement does not apply to interoperability tests to be carried out during trial periods of new products being brought to market by an SMP operator

### **3.4. General terms and conditions of the agreement**

- a dispute resolution procedure to be used between the parties;
- details of duration, renegotiation and causes of termination of agreements as well as other associated contractual terms;
- a definition and limitation of liability and indemnity;
- glossary of terms relevant to the wholesale inputs and other items concerned.