

**BEREC Report on the outcome of the public  
consultation on the draft BEREC Guidelines on  
the minimum criteria for a reference offer**

5 December, 2019

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## Introduction

This report summarises the responses sent by stakeholders to the public consultation on the draft BEREC Guidelines on the minimum criteria for a reference offer. The public consultation was open from 19<sup>th</sup> of June to 19<sup>th</sup> of July 2019 with the objective to get input from all stakeholders (consumers, operators, other companies of the telecommunications sector, equipment manufacturers, associations etc.) on the minimum criteria to be included in the reference offers to be taken into account by National Regulatory Authorities (NRAs) in order to contribute to a consistent application of the transparency obligations throughout Europe.

The present report summarizes the feedback received on the proposed BEREC approach (namely, the establishment of a set of core minimum criteria to be included in the reference offers by all NRAs and additional criteria to be used if deemed necessary), as well as on the particular core elements presented, as expressed by the stakeholders in their contributions.

In response to the consultation, BEREC received 10 contributions from the following stakeholders:

1. Alliance of Telecommunications Terminal Equipment Manufacturers (VTKE)
2. British Telecom (BT)
3. European Competitive Telecommunications Association (ECTA)
4. European Telecommunications Network Operators' Association (ETNO)
5. Liberty Global
6. Open Fiber
7. Openreach (wholesale-only subsidiary of BT)
8. Polish Chamber of Ethernet Communication (KIKE<sup>1</sup>)
9. Polish Chamber of Electronic Communication (PIKE<sup>2</sup>)
10. A confidential contribution.

## 1. Executive summary

According to Article 69 of the European Electronic Communications Code<sup>3</sup> (EECC, thereafter), BEREC shall issue guidelines on the implementation of the Union regulatory framework for electronic communications relating to the minimum criteria for a reference offer to contribute to the consistent application of transparency obligations. The rationale for issuing these guidelines is to replace Annex II to Directive 2002/19/EC<sup>4</sup> concerning local loop unbundling with a more flexible approach, which is also to be further reviewed where necessary in order to adapt to the technological and market developments.

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<sup>1</sup> KIKE is an organisation gathering and representing mainly small local operators in Poland, historically using Ethernet LAN technology.

<sup>2</sup> PIKE is an organisation gathering and representing mainly cable operators in Poland.

<sup>3</sup> Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code.

<sup>4</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).

In this vein, BEREC focused its public consultation on general questions/issues relating to the proposed approach<sup>5</sup> and, respectively, to the specific comments pertaining to the set of envisaged core elements:

- Terms and conditions for the provision of network access;
- Details of the operational process;
- Service supply and quality conditions;
- General terms and conditions of the agreement.

All the stakeholders welcomed the opportunity to provide input to the draft BEREC Guidelines on the minimum criteria for a reference offer.

A general overview shows that there are, typically, two opposite stances taken by the various stakeholders who contributed to the public consultation. On the one hand some of them called for a more detailed BEREC approach (in particular ECTA and the confidential contribution), arguing for the need of further guidance in particular/certain areas (mentioned in the sections below) while on the other hand the others (in particular ETNO, Liberty Global, KIKE, PIKE) consider that BEREC's proposed level of detail is too prescriptive, generating a negative impact on the negotiation processes between operators if adopted in the form presented. A more nuanced view is provided by BT, Open Fiber, and Openreach. Most respondents stated that they are in general supportive of BEREC's approach, but followed on with suggestions for improvement.

Several relevant aspects mentioned by a couple of stakeholders, stemming from their previous experiences, refer to the importance of best practices in negotiations with respect to reference offers, particularly mentioning the consultation process with the industry, the technical certification processes for specialized interventions either by SMP operators or their sub-contractors and specific issues relating to the location of access points. Details on all the aforementioned could be a welcomed addition to BEREC's view/approach, as expressed by some stakeholders.

The following sections (2 to 4) summarize the comments, observations and recommendations expressed within the contributions submitted during the public consultation. BEREC's replies to the comments received are presented as well. Section 5 concludes.

Complete non-confidential responses from stakeholders can also be found on BEREC's website.

## **2. General comments pertaining to the BEREC approach or other general comments**

BT expresses its general agreement with respect to the main aim of the Guidelines and BEREC's proposed approach, especially since, as a transnational operator, it has observed

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<sup>5</sup> As mentioned in the introduction, the proposed BEREC approach is to have a minimum set of criteria which are considered core and, at the same time, to leave the needed flexibility to the NRAs in order to add various other criteria deemed necessary based on national circumstances.

different inconsistencies throughout Europe (for example, relating to repair time, provisioning time, service level guarantees - SLGs, pricing) and sometimes discriminatory practices by the SMP operators in certain countries, particularly relating to markets 3b and 4.

Overall, BT is supportive of the proposed BEREC approach and stresses two other relevant aspects: on the one hand, regulation of reference offers is often needed as, without it, SMP operators would be unrestricted in exercising their market power (as the experience shows) and, on the other hand, the adoption of the set of minimum criteria envisaged by BEREC should not be used or create incentives for SMP operators to reduce the scope of any additional obligations imposed (or to be imposed) by an NRA.

BT proposes a series of concrete changes and amendments to the presented criteria, noting that they should reflect differences between products targeted for the mass market and, respectively, to the business markets. Most of BT's proposals refer to the high quality markets, some of them being potentially applicable to the consumer markets, as well. Details on BT's proposal are presented in the following sub-sections.

Additionally, BT suggests the inclusion of another category of core elements (a fifth one) to be provided for in a reference offer, namely "*Pricing, compensation and billing*" with the aim of presenting the relevant charges/prices, compensation and billing processes.

Finally, BT explains that main elements from the CPs and best practices specifically applicable to wholesale broadband access (WBA) and wholesale leased lines (WLL) markets should be included in the Guidelines, taking the opposite standpoint to ECTA (please see below). Moreover, BT encourages BEREC to develop a benchmarking report on the set of minimum criteria included in reference offers across Europe. In BT's view, this report should be mainly focused on the following services: broadband/bitstream over Ethernet, Ethernet leased lines, VoIP and other wholesale services to be developed in future as a result of technological advances.

ECTA presents its views pertaining to the relationship between the transparency and non-discrimination obligation.

Firstly, regardless of the common regulatory practice to impose the transparency and non-discrimination obligations together, ECTA highlights that the transparency obligation, including the obligation to publish a reference offer, is a self-standing remedy which need not be reduced to "an ancillary" one. In this vein, the Guidelines should clearly convey the message of the independent nature of the transparency obligation, which is not limited to the publication of the reference offer. Moreover, instances when the transparency obligation is reduced to a requirement between the SMP operator(s) and the NRAs<sup>6</sup> are considered highly problematic by ECTA. Such regulatory measures are seen as breaches of the requirements pertaining to the transparency remedy.

ECTA strongly advises BEREC to consider particularly the "unbundled purchasing requirement in Article 69(2) [of the EECC] as a cornerstone of the reference offer design". The imposition of incomplete, not detailed enough or non-verifiable conditions with respect to the

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<sup>6</sup> ECTA presents a recent example in the Italian case IT/2019/2181-2182 concerning the proposal to limit transparency obligations with respect to bitstream services in competitive municipalities.

acquisition of the necessary facilities for the requested services will determine fake transparency, with significant distortive consequences to the market dynamics. Thus, enforcing of the effective application of the “unbundled purchasing requirement”, as well as sanctions in case of non-compliance are called for by ECTA.

Secondly, if transparency obligations are used in conjunction with non-discrimination remedies, their effectiveness highly depends on how the non-discrimination obligations are designed and understood, ECTA states. One of the main messages which ECTA has been trying to convey and strongly supported throughout its activity is related to the fact that non-discrimination is not applicable solely to third parties, but also (mainly) between third parties and SMP operator(s), including their own operations, subsidiaries, affiliates and/or partners. In this line, “an explicit obligation for the SMP operator’s downstream operations to purchase their wholesale inputs on the basis of the same reference offer made available to third parties, and for that obligation to be enforceable by the NRA” is requested.

Other potentially problematic aspects mentioned by ECTA are:

- volume discounts applied discriminatory to the benefit of the SMP operators’ retail arms/downstream activities and/or one alternative operator;
- the hesitancy of some NRAs (regardless of the reasons behind) in modifying unilaterally the SMP operators’ reference offers;
- significant delays in the approval of reference offers by NRAs, resulting in regulatory uncertainty or potential retroactive changes;
- publication of the reference offers by SMP operators in a restrictive manner (for instance, closed portals, obligation to sign non-disclosure agreements etc.);
- contractual provisions not being included in the reference offers, potentially determining non-discrimination at the contractual stage.

Therefore, in ECTA’s view, BEREC should bear in mind all the aforementioned concerns and “provide examples and strategies for reference offer requirements that minimise the risk of discriminatory treatment of access seekers, whether direct or indirect.”

ETNO, on the other hand, advises BEREC to have a very general approach to the minimum criteria so that all operators are able to use them. In this vein, BEREC should not touch upon technical or procedural issues, IT systems, process and/or technical solutions, while the details of the agreements between operators can be established only on a contractual basis. Therefore, ETNO supports the general criteria, as presented in the draft Guidelines.

ETNO mentions also that changes in the reference offer brought by regulators should determine zero or minimum costs of implementation for the operators, while the latter should be free to adjust their processes and/or IT systems as they consider fit, without being hindered by the provisions in the reference offers. To this end, the NRAs are to be engaged in close dialogues with the operators, evaluating their proposals.

NRAs’ roles pertaining to guarding the unitary and coherent application of the reference offers’ provisions, the efficient use of resources (for instance, if requested elements by the access seekers included in the reference offer are not used, the obligation to provide them should be removed) and a potential “demand threshold” justifying the maintenance of the provision

obligation of the respective services/associated facilities etc. are other relevant aspects mentioned by ETNO.

With respect to the obligation of publication of the reference offers, typically on the operators' websites, ETNO considers that reassessment is needed. Assuming that detailed information with respect to the networks roll-out and/or provision of future services is involved, such a practice could "constitute a breach of general competition law". Thus, ETNO proposes that if future market behaviour is to be revealed in order to follow the provisions of reference offers, to avoid competition distortions in the markets, BEREC is to provide NRAs with guidance in alleviating such concerns and amending of existing obligations.

Whereas, Liberty Global considers strongly that the reference offer should provide operators with a lot of flexibility in their approaches, which is not necessarily reflected in BEREC's draft, as it seems to set rigid and detailed criteria to be included in the reference offers. Should the proposed drafting be maintained, Liberty Global draws BEREC's attention to the fact that a sufficient amount of time will be needed for the operators to implement the envisaged proposals. To this end, Liberty Global argues that a high level/general terms approach for the reference offers should be more effective, supporting the timely negotiation processes between the SMP operators and the access seekers (as ACM's experience shows), as well as preventing disputes<sup>7</sup>. The main reasons for the stance are the following: "more detailed reference offers take more time", "there is no one-fits-all solution", "proportionality and appropriateness" and "flexibility in design is highly important".

Concerning the timely negotiation processes, Liberty Global stresses that the best option would be to have a highly general reference offer – to be published within 6-9 months, at the same time leaving the details of the negotiations up to the participants/bilateral discussions. Should BEREC go forward with the discussed level of detail, the publishing time is to be adapted at 12-18 months depending on the status of the regulated operators (i.e. if it is the first time when they provide access or if they have already done it before).

With respect to the proposed transparency-related remedy, it is Liberty Global's view that the core elements to be included in a reference offer are dependent on the competition problems identified and, as a consequence, the remedy should be customized accordingly. This prerogative should be left to the NRAs.

Liberty Global stresses that a prescriptive/detailed reference offer is not proportional and also not appropriate for the regulatory purposes, as it might impose limits on market players. Technological changes and innovations could also be incorporated in the reference offers fairly easy unless they are very prescriptive.

Moreover, as there is a continuous learning aspect to be taken into account in the improvement and rendering of processes more effective/efficient, the flexibility of quickly implementing these modifications is of utmost importance.

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<sup>7</sup> "Liberty Global urges BEREC to instead adopt a flexible approach that allows operators to develop their network architecture and systems over time and to cater to individual access seeker needs, whilst also providing certainty for access seekers over key terms and conditions of access".

Finally, Liberty Global fully supports the need for consistency, leading to legal certainty.

Open Fiber considers that the BEREC document is well structured and contains all the key elements needed.

Openreach provides a general statement in which it explains that the design of each reference offer needs to reflect, on the one hand, a workable/unitary framework for the provision of services and, on the other hand, an adaptable part in order to encompass technological developments, systems changes and provide flexibility for particular circumstances. Best practice, in the respondent's view, would be to have the reference offer formed of a series of documents, each one reflecting the level of detail corroborated to the (lack of) flexibility specific to the information provided within. It would be good that the detailed parts of the reference offers are provided through a dialogue with the industry in order to reflect the realities of the markets and meet the needs of the regulated operator/access seekers. In this line, Openreach fully supports BEREC's approach aiming for the minimum, considering that additions to the list of criteria would bring less value added.

KIKE considers that BEREC Guidelines focus on common elements of all regulated services in a detailed manner, an approach which has been used/tested in the Polish market<sup>8</sup>. As KIKE explains, at the beginning of market opening, this specificity of the reference offer had a positive impact on negotiations' efficiency and transparency. However, it leads to two problems: lack of flexibility to offer better conditions for an alternative operator and long-lasting adaptation of cooperation rules to new market conditions<sup>9</sup>. Therefore, the presented minimal set of criteria is considered too specific and, consequently, would work defectively on regulated markets. It would limit flexibility of conditions for particular alternative operators imposing one cooperation model for all operators regardless of their size and business profile, impeding negotiations.

In this line, KIKE is of the opinion that conditions of a reference offer should differ in case of small and medium operators, on the one side, and of large ones, on the other side. Detailed and complex access conditions, especially regarding technical conditions, may prevent small and medium operators from getting access to regulated services in a reference offer. Moreover, it would eliminate negotiations from the process of entering in an agreement, a negative effect taking into account the current state of competition on regulated markets.

Additionally, KIKE calls on BEREC for an explicit mention regarding the non-application of the BEREC Guidelines to symmetric obligations.

KIKE's points of view and opinions presented above are also expressed by PIKE.

A confidential stakeholder highlights the same idea transmitted by ECTA with respect to the independence of the transparency and non-discrimination obligations, even though they are typically imposed in tandem, stating that the sole requirement to publish a reference offer cannot be regarded as a fulfilment of the transparency obligation. Moreover, the obligation to publish a reference offer is not to be considered secondary to the transparency obligation, as

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<sup>8</sup> The reference offers used by Orange Polska SA [incumbent] are very detailed and actually include also contract templates.

<sup>9</sup> Namely, the administrative process of changing the reference offers.

its role is extremely important in incentivising market entry and providing legal certainty with respect to deployment of networks and/or provision of own services.

Another point that the confidential contributor made relates to stressing that the goal of the reference offer is to provide all the necessary information so that the access buyers/seekers are able to replicate the retail offers of the SMP operator effectively. To this aim, the reference offer needs to be detailed and unbundled enough. The same idea was presented earlier in the text according to ECTA's submission.

Finally, in the contributor's opinion, BEREC needs to state that any deviation from the Guidelines (i.e. decrease of the amount of details provided in the BEREC Guidelines when drafting the reference offers) is to be assessed by the NRAs.

#### **BEREC's response:**

Given the fact that some respondents (also representing opposite interests) want a more detailed RO while others ask for less details, BEREC considers that it proposed overall the right level of details for the RO. BEREC reiterates its concept of a core set of requirements that all NRAs should include in the RO and additional requirements that an NRA can include if considered necessary. This is in line with the legal provision of minimum criteria harmonising the ROs across the EU/EEA while at the same time providing NRAs with sufficient flexibility to fine-tune the RO to national circumstances. BEREC's understanding is that the RO cannot be unilaterally changed and that the substance of the RO cannot be touched without notification to and/or the NRA's approval.

On the relationship between the transparency and non-discrimination obligations, while acknowledging the standpoints presented, BEREC highlights that the aim of the current Guidelines is more focused, particularly approaching the publication of a RO, as part of the application of the transparency obligation. Therefore, the broader relationships arising between various types of obligations, together with their actual application according to the SMP decisions, would be beyond the Guidelines.

Finally, regarding the proposal of one stakeholder for BEREC to develop a benchmarking report concerning the minimum criteria included in the regulated RO in various European countries, BEREC welcomes the idea in principle. Once the Guidelines are adopted and put into practice, depending on its priorities and corresponding work programmes, BEREC will assess such an approach.

### **3. Comments to the “Objectives” – Policy Principles, Monitoring and review and Scope of the minimum criteria**

Concerning the scope of the minimum criteria, having in mind the information provided in the BEREC common positions (CPs) on best practices in remedies on markets for wholesale local access (WLA), wholesale broadband access (WBA) and wholesale leased lines (WLL) and considering it as a starting point for the minimum criteria which could be included in a reference

offer, ECTA notes that the currently proposed minimum criteria mainly reproduce the information presented in the CPs. In this view, ECTA is questioning the reasoning behind the current proposals, arguing about the lack of proper evaluation/assessment of the functioning of transparency best practices and appropriateness of the list of informational items to be included in the reference offers. Moreover, the conclusion reached by BEREC in 2018 according to which only minor modifications needed to be brought to the best practices in order to increase the number of their applicants is considered by ECTA not based on concrete information/evidence regarding the reasons and scope of non-implementation. More specifically, ECTA considers that no insights into the actual functioning of the minimum information requirements is provided, especially in the context in which they are proposed as a core set of the minimum criteria. “ECTA therefore encourages BEREC to pay special attention to the specification of the circumstances in which it considers particular options to be appropriate and to regularly evaluate these specifications as part of its monitoring work”.

Additionally, ECTA raises the issue of NRAs flexibility to adapt the relevant information to specific, national circumstances considering the fact that BEREC is requested, as mentioned before, to specify circumstances in which certain options are preferable/advisable. Therefore, ECTA suggests that BEREC is guided by the principle of ensuring effective use of network access in drafting its Guidelines. To this end, the proposed draft Guidelines need to be adapted, in order to guard the ability of the access seekers both to replicate SMP’s offer and to differentiate their services from the SMP operator’s and promote/support innovation. Effective use of network access should not refer solely to the market needs<sup>10</sup>, but to the needs of the beneficiaries/access seekers<sup>11</sup>, explicitly stating and confirming “the need for differentiation by challenger operators”.

To conclude, ECTA notes the following musts for a harmonized reference offer:

- be publicly available, without any formalities or pre-requisites;
- cover all relevant terms and conditions – particularly all wholesale charges (one-off or recurring, all services level guarantees provided and the effective penalties for non-provision/non-delivery of services);
- contain the actual contract<sup>12</sup> (see, for instance, the practice of the Spanish NRA);
- include a provision stating explicitly that the SMP’s retail arm or affiliates of any kind are under the same terms/conditions provided in the reference offer as any other access seeker and do not benefit from preferential (economic) treatment;
- respect the unbundling condition provided for in article 69(2) – “sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested”;
- cover all the needed information to make the use of the requested services effective.

Having noted BEREC’s mention on the potential cost savings for the consumers brought about by a harmonized approach to the reference offers at European level<sup>13</sup>, Liberty Global explains

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<sup>10</sup> As mentioned in article 69(2) of the EECC.

<sup>11</sup> As mentioned in article 69(4) of the EECC.

<sup>12</sup> The reasoning provided is that, firstly, discrimination-related concerns are removed, secondly, the contract does not include restrictions to the provision of the services regulated through the reference offer and, thirdly, NRAs are in a position to impose modifications on the contractual terms as they consider fit to pursue the regulatory aim of non-discrimination.

<sup>13</sup> BoR(19)95, pages 3-4.

its concerns regarding their realization based on the different market definitions applicable in various Member States (MSs), which might lead to one operator being regulated in one market and not regulated somewhere else, implying that full harmonization cannot be done due to national differences and, considering that the pan-European operators typically have separate national affiliates operating in a certain country, the reference offers will be different anyway.

Nevertheless, in Liberty Global's view, costs savings might be realized in relation to the reference offer procedure – namely, including best practices concerning the actual setting of a reference offer and negotiating individual access agreements, clarity on the responsibilities of each party and alike. Importantly, access seekers should also be the subjects of specific timeframes, as they might put pressure on the access providers regardless of whether they are able or not to take up the agreed/negotiated access services.

**BEREC's response:**

Regarding the scope of the RO BEREC points out that Article 69 of the EECC refers to SMP obligations. BEREC agrees that the RO should follow clear principles and that all relevant provisions must be included. Based on Article 69 para. 2 that states that the RO shall contain a description of the relevant offerings broken down into components according to market needs, BEREC considers that this links the degree of detailedness to national markets. Also, given the different format of access contracts, BEREC does not see a need to specify in the Guidelines that the actual contract should be included in the RO, however, the NRAs have the flexibility to add this as an obligation. BEREC also considers the practice of making available the RO on special websites (or via other electronic methods with restricted access) for reasons such as security reasons to be acceptable at discretion of the NRA.

## **4. Comments to the “Minimum criteria for a reference offer”**

### **4.1. Terms and conditions for the provision of network access**

Concerning the terms and conditions for the provision of network access, particularly with reference to the description of network access products, services and facilities to be provided, including the relevant technical characteristics, VTKE strongly recommends a description of the network termination point, according to the provisions of Article 2 (9) of the EECC.

BT considers that “*Technical specifications*” can be used instead of “Terms and conditions for the provision of network access”, as it is more specific. As a consequence of BT's proposal of changing the order of the minimum criteria<sup>14</sup>, this would be the second batch/category of core elements to be provided in reference offers.

Secondly, BT suggests that the text under the first bullet point should be slightly modified from:

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<sup>14</sup> Please see section 4.4. of the current document.

- “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);”

to:

- “a description of the overall network architecture of the access products, services and facilities to be provided, [...]”.

Thirdly, having endorsed the other bullet points presented by BEREC and proposed the move of the last bullet point to the general terms and conditions of the agreement category, BT would like to add:

- Specifications of equipment to be used on network (already include by BEREC at point 3.2.; BT proposes to move it here);
- Co-location services<sup>15</sup> (new);
- Uncontended and symmetrical dedicated access (new);
- Service-agnostic connectivity, enabling control of traffic speed and symmetry (new);
- Minimum technical specifications for different product types – e.g. delay, jitter, packet loss, contention ratio and so on (new)<sup>16</sup>.

ECTA argues against the formulation of “usage restrictions” by BEREC as it considers that the proposed drafting seems to legitimise the presence of such restrictions in reference offers. As proven in several instances before, usage restrictions were deemed anti-competitive and, accordingly, corrected by NRAs, which implies that, by no means, should usage restrictions “be a starting point for determining wholesale access conditions in reference offers”, stresses ECTA. Thus, it proposes the removal of such formulation from the Guidelines. However, if BEREC decides to maintain this idea, then a clear distinction should be made between technical (objective) and commercial usage restrictions, that are to be prohibited from the outset.

With respect to the locations at which network access will be provided, ECTA reminds/points to the provisions of the 2010 EC Recommendation on regulated access to Next Generation Access Networks (NGA)<sup>17</sup> which talk about consultation on viable access points with the potential access seekers, noting that the reference offer should be reflective of the process, and which emphasises access to physical infrastructure as the key element to promote competition. In this context, ECTA stresses that BEREC should approach physical/wavelength wholesale access as an essential part of the reference offers, to the benefit of innovation and competition. Moreover, ECTA holds that the reference offer should contain a procedure through which access seekers could formally request new wholesale inputs/technical innovations to the SMP operator(s)’ currently provided services, requests which are to be considered thoroughly. Reversely, if the SMP operator is planning to introduce some technical innovations, they should be announced in advance, as to ensure that access takers/buyers are able to adapt their services and replicate the SMP operator’s downstream services at retail level.

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<sup>15</sup> Similar content as in the Directive 2002/19/EC concerning local loop unbundling is proposed, and details on when applicable for certain category of product/services.

<sup>16</sup> The aim is to ensure that effective competition is developing on different segments in the markets.

<sup>17</sup> The provisions are to be found at:

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010H0572&from=EN>.

Finally, having noted its appreciation for BEREC's proposal regarding the terms and conditions for access to ancillary, supplementary and advanced services, ECTA suggests a series of additions for the reference offers, as follows:

- access to addresses databases;
- access to line eligibility databases and/or line eligibility testing systems;
- access to civil infrastructure databases<sup>18</sup>;
- processes of establishing and managing appointments between the technicians of the SMP operator and the customers of the alternative operators;
- mitigation of unjustified repair requests.

In line with the general comments made (presented above), ETNO (in contrast to ECTA) proposes the change of the fifth bullet point from:

- “terms and conditions for access to ancillary, supplementary and advanced services (including operational support systems, information systems or databases for preordering, provisioning, ordering, maintenance and repair requests and billing), including their usage restrictions and procedures to access those services;”

into

- *“terms and conditions for access to ancillary, supplementary and advanced services (including operational support systems, for information systems and for billing) and procedures to access those services;”*

Concerning the technical standards for network access, Liberty Global stresses that, with respect to cable access, access seekers are likely to want to negotiate technical standards according to their business strategy and technical capabilities.

Specific to the locations at which access will be provided is the fact that the exact point(s) of interconnection are, most of the times, chosen based on the access seekers' options/preferences and capabilities, Liberty Global explains. From this standpoint, the appropriateness of the inclusion of this information in the minimum criteria for reference offers is questioned.

Then, concerning the ancillary, supplementary and advanced services, the terms and conditions of access are regarded as specific/precise and time consuming to develop. Therefore, Liberty Global proposes not to include such information in the minimum criteria and, should it be included, operators will need more time to comply.

KIKE proposes the complete removal of the elements pertaining to the technical standards for network access, as well as to the procedure and conditions to request relevant information for the supply of the relevant regulated access product or service.

KIKE also notes the addition highlighted below to the fifth bullet point presented by BEREC:

- *“**general** terms and conditions for access to ancillary, supplementary and advanced services (including operational support systems, information systems or databases for pre-ordering, provisioning, ordering, maintenance and repair*

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<sup>18</sup> “Some ECTA members consider that the SMP operator engages in strategic behavior by filling ducts with their own cables, even where this is not objectively necessary to support the SMP operators' genuine business needs”.

*requests and billing), including their usage restrictions and procedures to access those services;”*

A confidential stakeholder reiterates briefly the arguments presented by ECTA with respect to the choice of “usage restrictions”. It considers that BEREC should state clearly that potential restrictions are to be analysed by NRAs only punctually, with the aim of maintaining/supporting the effectiveness of access.

With respect to the terms and conditions for access to ancillary, supplementary and advanced services, the confidential contributor suggests BEREC to further specify in the Guidelines detailed information which might be needed for alternative operators to offer effectively their services on the retail market (for instance, customers’ location, info about the relevant IT systems, line eligibility and availability, applicable volume discounts, relevant technical conditions and processes similar to the ones applicable to the SMP operator’s retail arm and so on).

#### **BEREC’s response:**

As only one respondent suggested a different grouping of the core elements, BEREC did not change the current order. BEREC also wants to reiterate that the RO is the expression of the transparency obligation, therefore certain proposals dealing with imposition of the access and/or the non-discrimination obligation could not be dealt with in these Guidelines.

BEREC takes up the suggestion to specify “usage restrictions” by adding “technical”.

With respect to the request for the description of the network termination point suggested by VTKE, BEREC refers to the Guidelines according to the provision of Article 61 (7) of the EECC, on which BEREC is currently working. **The public consultation on the draft Guidelines is running/ran between 7<sup>th</sup> of October and 21<sup>st</sup> November 2019.** Therefore, as a natural consequence, BEREC will not touch upon the subject here.

## **4.2. Details of the operational process**

BT has the following specific proposals:

- Specific time scales for pre-ordering, ordering, provisioning, maintenance and repair requests (already partly introduced by BEREC in the bullet points under 3.2.; BT presents a combination of the aspects already mentioned by BEREC);
- Procedure for technician intervention (certified technician or SMP technician), incident reporting and liabilities (new).

As for the rest of the aspects considered relevant by BEREC, they are confirmed by BT. This set of criteria should be ranked third in logical order, as suggested by BT.

ECTA is supportive of BEREC’s proposed issues to be addressed under the details of the operational process. As an additional point, ECTA mentions that a certification process for the SMP operator’s network activation and repair works is an efficiency requirement that already

produced benefits in several member states<sup>19</sup>, while NRAs should be empowered with conducting audits concerning the operational processes of the SMP operator(s)<sup>20</sup>.

ETNO suggests changing the title from “Details of the operational process” to “*General terms of operational processes*”.

With respect to the fifth bullet point (“changes to IT systems to the extent that it impacts alternative operators;”), ETNO’s proposal is, once more, to exclude the IT systems from the scope of the Guidelines. As explained in its submission, particular changes in IT systems with impact on certain alternative operators can be transmitted by the SMP operator solely to the concerned parties.

Liberty Global notes that development of relevant provisions for operational process are time consuming and, as well, highly specific, which warrants their potential introduction in the minimum criteria for a reference offer inappropriate. As mentioned several times before, Liberty Global highlights that more time should be given to the operators, should BEREC maintain its proposed approach/point of view.

Open Fiber stresses the importance of the migration processes from legacy products and infrastructure, especially in the context in which quite often the access services to the incumbent’s physical infrastructure are unsuitable for the network deployment of competitors. In this line, Open Fiber asks BEREC to include a provision according to which SMP operators are obliged to follow specific, different from others, procedures and charge certain prices for significant orders (“massive orders”, as Open Fiber puts it). As examples, several aspects which could be impacted/should be different are the (elimination of) caps on the number of access requests, adaptation of service level agreements (SLAs) to the volume of the purchase, pricing discounts.

Openreach points out that, with respect to the details of the operational process, the proposed BEREC Guidelines emphasize the responsibility of the regulated operator, whereas various customer considerations could need significant adaption of the outcome<sup>21</sup>. Such details should not be part, in the respondent’s view, of the BEREC Guidelines.

On the “changes to IT systems”, Openreach mentions that further guidance on BEREC’s side is needed, as minor changes or updates or enhancement of the systems should not be included in the reference offer, such an action deterring the timeliness and incentive for innovation from the SMP operator’s perspective. Moreover, Openreach is of the opinion that BEREC’s Guidelines should rather make reference to an obligation of including specifications about IT “outages” (particularly, on timing issues).

KIKE considers that the elimination of most of the aspects presented by BEREC would be opportune, namely the rules of allocation of space between the parties when supply facilities

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<sup>19</sup> Belgium, Italy and the Netherlands are provided as examples.

<sup>20</sup> To verify: “(i) whether the conditions of the reference offer are respected, including the absence of discrimination between access seekers/takers, (ii) the terms on which the SMP operator self-supplies to its downstream arms, and (iii) generally to police all aspects of the non-discrimination obligation.”

<sup>21</sup> For instance, concerning the rules of allocation of space between parties when supply facilities or co-location space is limited, the delivery location of the requested services should be left as an open choice for the customers, provided all the relevant information regarding available co-location products is shared.

or co-location space is limited, the changes to IT systems to the extent that it impacts alternative operators and the specifications of equipment to be used on the network. As regards the rest of BEREC's proposals, the changes shown below are noted:

- *“pre-ordering, ordering and provisioning;*
- *“~~details of the necessary interoperability tests;~~”*

A confidential contributor calls on BEREC to state explicitly that the minimum criteria comprised in reference offers need to lead to “effectively adequate” access of the alternative operators allowing them to compete efficiently at retail level. In this regard, potentially more guidance is needed on BEREC's side than the listing of the elements to be included in a reference offer.

#### **BEREC's response:**

BEREC considers that its proposed level of minimum criteria is adequate and does not want to go neither beyond nor below the text consulted. The changes proposed by stakeholders would also not alter the basic scope and sense of the particular criteria.

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

For the last set of minimum criteria, in BT's view, the specification of/differentiation between standard and enhanced SLAs is proposed, as they refer to products which are, in principle, meant to serve different categories of retail customers (business vs residential). Additional to BEREC's drafting under the first bullet point, BT would like to change from:

- “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)”;

to:

- “*service level agreements (SLAs) – [differentiated, as mentioned before] covering areas such as repairs for ordering, delivery (provisioning), service (availability) and maintenance (repair), including [...].*”

Furthermore, the explicit mention about provisioning should be added in brackets to the delivery under the third bullet point – “*Service level guarantees (SLGs) for ordering, delivery (provisioning), service (availability) [...].*”

ECTA agrees with the proposed BEREC approach. With respect to the mentioned service level guarantees (SLGs), ECTA is of the view that effectively deterring penalties have to be imposed as a consequence of not meeting the contractual clauses or the agreed SLGs.

Concerning the procedures in the event of amendments being proposed to the service offerings, ECTA stresses that all amendments have to be consulted with the access seekers and “subject to explicit NRA approval.”

ETNO stresses that any change/amendment in the services supplied are to be included in the reference offers' provisions only if they have not been published/announced already by the concerned NRAs.

With respect to the service supply and quality conditions, Liberty Global notes the high level of detail of some of the provisions. Typically, these elements will need to be customized on a case-by-case basis and, therefore, their inclusion in the minimum criteria for a reference offer could generate difficulties and delays, Liberty Global holds. Moreover, in practice, all these details have been established in annexes of reference offers rather than in the document itself.

On the SLAs and delivery timeframes, Openreach agrees with BEREC that they should be openly made available. However, it highlights that some flexibility should be given in the Guidelines so that the reference offers can be easily changed/adapted in relation to the supply/provision of future services. "Therefore, the guidelines should be positioned in such a way that if there are not any agreements between parties on what SLA and Service Level Guarantees (SLGs) should be, and if there is evidence that regulatory intervention is therefore required, National Regulated Authorities could require SLA and SLG to be part of the reference offer".

Another point raised by Openreach is that SLG payments associated with delivery for new products might not be adequate, especially during the market settlement phase and, as a consequence, BEREC should also clarify this in the Guidelines.

KIKE proposes BEREC to keep only the information regarding the SLAs for ordering, delivery, service (availability) and maintenance (repair), [...] in the minimum criteria for a reference offer.

The confidential contributor reiterates the ideas expressed previously (sub-section 4.2.). Furthermore, with respect to the penalties for not respecting any of the agreed key performance indicators (KPIs), it notes that a clear guidance by BEREC regarding penalties would be welcomed.

Additionally, the confidential contributor stresses that various wording in reference offers might generate distortions and/or lead to discriminatory practices, while the NRAs are to receive adequate guidance in this respect, on the one hand, and, on the other hand, a case-by-case approach should be recognized.

**BEREC's response:**

BEREC wants to confirm that changes to the substance of the RO are subject to notification to and/or NRA's approval. However, BEREC considers that the requirements (core elements) as outlined in the draft Guidelines need not be adjusted as suggested by some respondents. With regard to the proposal to provide more guidance on penalties, BEREC points to the fact that the penalty/sanction regimes vary considerable across Member States and are outside BEREC's remit.

#### 4.4. General terms and conditions of the agreement

BT proposes that the set of minimum criteria in the Guidelines should start with the general terms and conditions of the agreement. Concretely, the order of the points should be changed, point 3.4. becoming point 3.1. Having endorsed BEREC's aspects mentioned under the bullet points in section 3.4., BT proposes the following additions and rearrangements:

- General information (new);
- Services covered by the general terms and conditions (new);
- Obligations of parties (new);
- Details of duration, renegotiation and causes of termination of agreements as well as other associated contractual terms (already included by BEREC);
- Financial conditions (terms of payment and billing procedures, a definition and limitation of liability and indemnity) (partly already included by BEREC at points 3.1. and 3.4.; BT presents a combination of the aspects already mentioned by BEREC);
- Point of contact and a dispute resolution procedure to be used between parties (partly already included by BEREC);
- Details on any relevant intellectual property rights (new);
- Glossary of terms relevant to the wholesale inputs or other items concerned (already included by BEREC).

ECTA agrees with BEREC's considerations in this section and reiterates the idea that the contract should be part of the reference offers for the main reasons provided already in footnote 13.

ETNO considers that, since the general terms and conditions are typically included in the agreements themselves, there is no need to include them in the reference offers too.

Furthermore, ETNO explains that this point should make reference to/present the conditions applying either to the migration to a new/modified reference offer or to the ceasing of supply of regulated access, as a consequence of the refusal to migrate to the new/modified services.

On the dispute resolution procedure, Liberty Global is of the opinion that access seekers have own preferences/choices in this respect.

Referring to the general terms and conditions of the agreement, KIKE expresses its reservation to all the bullet points presented by BEREC in its draft Guidelines, suggesting not to include anything specific and, at the same, proposing a slightly different formulation for the name of the category "*General **overall** terms and conditions of the agreement*".

#### **BEREC's response:**

BEREC wants to highlight that the requirements in this section are necessary in order to have common elements understood as being the core minimum criteria to be included in the ROs across Europe and in that way contribute to the consistent application of the transparency obligation. Moreover, they are also an established best practice of setting ROs' scope by most of the NRAs.

## 5. Conclusions

All comments received from stakeholders represent different and opposite interests and approaches of setting minimum criteria for a reference offer. However, this shows that the Guidelines proposed by BEREC are well balanced and generally meet both legal requirements and diverse market expectations by allowing NRAs the flexibility to add elements to a reference offer according to national market situations. A sentence was added regarding the applicability of the Guidelines and it was stated that the Guidelines acc. to Article 69 only apply to the SMP regime.

Nevertheless, BEREC acknowledges that some points may be clarified or modified to provide more robust and solid Guidelines. According to this BEREC will take on board the assessment of the feasibility of a benchmarking report concerning reference offer performance across the EU. The possibility of restricted access to some information upon NRA's discretion and a separate point on co-location was added. Finally, a clarification with regard to usage restrictions was made, i.e. they refer only to technical ones. At the end it was made explicit that a reference offer shall include all relevant terms and conditions.