



Liberty Global response to draft guidelines on minimum criteria for a reference offer

Liberty Global welcomes the opportunity to comment on BEREC's draft Guidelines on the minimum criteria for a reference offer, published on 19 June 2019. As addressed in our response to the WP2019, Liberty Global strongly supports BEREC's commitment to engage with stakeholders on issues that are relevant to them.

Under article 69 (2) of the Electronic Communications Code (Code) national regulatory authorities may require operators with significant market power (SMP) to publish a reference offer as part of transparency obligations imposed under SMP regulation. There are a number of requirements regarding what should be included in the reference offer. Firstly, it must be sufficiently unbundled to ensure access seekers are not required to pay for facilities that are not necessary for the service requested. Secondly, it must contain a description of the relevant offerings, broken down into components according to market needs, and the associated terms and conditions (including prices). National regulatory authorities are also required to ensure that key performance indicators are specified, where relevant, and corresponding service levels. Recital 182 of the Code states that the goals of these provisions are to speed up negotiation, avoid disputes and ensure non-discrimination.

Having regard to the above, BEREC is responsible for publishing guidelines in order to contribute to the consistent application of the transparency obligations. Recital 183 of the Code notes that the aim of these guidelines is to ensure that the goals of article 69 of the Code can be better achieved, in a more flexible manner.

Certainty and flexibility for all market players is key

Liberty Global strongly supports the Code objective of ensuring transparency of terms and conditions of access and interconnection imposed under SMP regulation through the use of reference offers.¹ On top of speeding up negotiation, avoiding disputes and giving confidence to market players that services are not being provided on discriminatory terms, we agree with BEREC that reference offers also provide operators with certainty when negotiating with access seekers.²

With regard to the minimum criteria for a reference offer, Liberty Global considers that a flexible approach — as noted in recital 183 of the Code — caters best to the needs of both access seekers and providers; and can facilitate a prompt and efficient process. However, at this stage, BEREC's draft Guidelines appear to set a rigid and highly detailed set of minimum terms. We do not consider that this reflects the right balance.

In the event that BEREC adopts the proposed Guidelines, Liberty Global stresses the need to ensure that operators have sufficient time to develop the terms. The current practice of 6-9 months would be insufficient, particularly for operators that have not previously offered such access services, and

¹ We note that reference offer obligations may only be placed on SMP operators, except in exceptional circumstances and with approval of the European Commission (article 68 (3) of the Code).

² BoR (19) 95, page 4.



would create high non-compliance risk on access providers, in a manner that is not proportionate to the goals of the regulation.

A high level offer will ensure a speedy process and prevent disputes

The process of developing a reference offer, and the underlying services and systems is not a small or easy task. For this reason, 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.

Liberty Global considers that the key objectives of article 69 of the Code are best achieved with an approach which allows access provider to publish a high-level 'offer', which contains a smaller number of key terms and conditions of access — and which serves as a starting point for negotiations between the access provider and access seekers. In that context, the role of the reference offer is to facilitate prompt and efficient conclusion of access agreements between an access provider and access seekers. This negotiated access approach has been adopted by the Dutch regulatory authority, and in our view is the most pragmatic solution to ensuring fast and smooth access to wholesale services.

Strict and detailed requirements for reference offers reduces the ability for access seekers and access provider to find an agreement that works for all parties. Always applying the exact same conditions for all access seekers is likely to favour some access seekers over others, and thereby likely to undermine the competitive process. Highly detailed reference offer are also likely to make it more difficult to negotiate. For example, items that were not included in the original reference offer (as they had not been settled upon etc.) may later be seen as 'new' terms or requirements by access seekers — and often rejected — which would reduce the ability to implement product and process changes and improvements.

Liberty Global considers the reference should outline a minimum set of key terms and conditions, and should not be exhaustive. The reasons for this are as follows:

- More detailed reference offers take more time
- There is no one-fits-all solution
- Proportionality and appropriateness
- Flexibility in design is highly important

More detailed reference offers take more time

The level of detail in a reference offer will also impact the speed at which it is able to be published. If access providers are required to have settled on all or most details of the contract and the product specifications, considerably more time is needed. It would also lead to a longer pre-negotiation process between the regulator, access seekers and the access provider. Naturally, a longer period also creates uncertainty both for access seekers (in terms of the likely investments required for access) and access provider.



In our view, the best solution is to impose a shorter period for publication of a high-level reference offer (6-9 months), and then to allow negotiated access on the remaining terms within a reasonable period. However, if BEREC ultimately decides to publish the proposed, highly detailed reference offer minimum criteria, then it should ensure that operators have sufficient time to develop the terms. This period should be 12-15 months at a minimum, with more time to be provided for operators that are providing access to their networks for the first time (~15-18 months).

No one-size-fits-all solution

There is no one-size-fits-all approach to ex ante regulation across Europe, and this also applies to reference offers. What are considered to be the 'key' terms and conditions of a reference offer will therefore depend on the competition problems that have been identified by the national regulatory authority. These will vary by Member State (geographic market) and service (product market). Reference offers should therefore not be too prescriptive and should be tailored to the competition problems that are sought to be addressed.

In our view, it is for national regulatory authorities to determine the more detailed reference offer requirements; based on the specific national situation and in line with the authorities' national market analysis decisions. Accordingly, we consider BEREC should refrain from attempting to create a one-size-fits-all reference offer.

Proportionality and appropriateness

Liberty Global further considers that a prescriptive reference offer is disproportionate and not appropriate for the desired goals of regulation. Detailed reference offer requirements are likely to unnecessarily restrict market players, particularly in a highly dynamic market such as telecommunications. Whilst the Code leaves room for review of the reference offer criteria to take into account technological and market developments, flexibility in the reference offer criteria and a negotiated access approach would ensure that these developments are more quickly and easily incorporated into access agreements.

Flexibility in design is important

It takes considerable time and resources to design and implement access services and processes. Throughout this process there are continual learnings and improvements to be made. Given that design elements can often (quickly) change during the implementation process, it is important that operators have the flexibility to implement technical changes, as well as product and process improvements. Otherwise, there is a risk that the reference offer will either become out-of-date or it will reduce the flexibility of access providers. This is particularly the case for operators providing access to their network for the first time.

Limiting the reference offer to high-level terms and conditions allows access providers to outline their initial design plan, in terms of technical architecture. More detailed product specifications can then be included in separate, more detailed appendices/annexes, as is common practice in the telecommunications industry.



Need for procedural and legal certainty

Liberty Global welcomes increased consistency in the application of reference offer obligations by national regulatory authorities. A key consequence of consistency being legal certainty. As a pan-European operator, this is of particular importance to Liberty Global.

BEREC refers in its draft Guidelines to potential cost savings for pan-European operators as a result of outlining a core set of elements for reference offers. However, Liberty Global — as a pan-European operator — does not expect that such cost savings will be realized in practice. Firstly, market definitions may differ per country so a pan-European operator may be regulated in one country but not in the other. Secondly, as we consider that reference offers cannot be fully harmonized due to national differences, the reference offer will nonetheless differ between territories. Thirdly, since pan-European operators tend to operate separate national entities and networks (with different internal procedures etc.), reference offers will differ per national entity.

On the other hand, one of the key areas in which we consider that legal certainty can be improved — and where resulting cost-savings may be realized — is in relation to the reference offer procedure. In particular, Liberty Global calls on BEREC to include best practice guidance on the process that should be set out by regulators, access providers and access seekers in setting a reference offer and coming to individual access agreements.

Greater consistency and clarity on the role and responsibilities of each of the parties would be welcomed. In our experience, lack of clarity whether proposed timeframes for publication of the reference offer, completion of negotiations with access seekers and readiness for service provisions are adequate could lead to significant legal and commercial uncertainty. Ultimately, it allows access providers to be held liable if access seekers do not engage in a manner that allows them to meet the specified timeframes.

This issue is particularly aggravated when access seekers themselves are not subjected to specific timeframes, e.g. to take up services within a period of time post-access agreement. This enables access seekers to increasingly place pressure on access providers (and national regulators) for service readiness at significant cost to the access provider, when they themselves are not ready to take up the services.

Specific terms

Liberty Global notes that BEREC has based its draft Guidelines on Annex 1 of the Common Positions on Market 3a, 3b and 4, plus a number of additions (particularly around service levels and quality). Whilst we agree with the inclusion of a number of these terms, others are likely to be more problematic. The table below outlines Liberty Global's specific comments to the terms contained in section 3 in the draft Guidelines:



3.1 (point 2): Technical standards

Cable access can be provided based on a number of different standards, access seekers are highly likely to want to negotiate on technical standards to ensure consistency across their business.

3.1. (point 5): Ancillary, supplementary and advanced services

The terms and conditions of access to these services is highly detailed and granular, and take a long time to develop. Inclusion of this information in the reference offer is only likely to lead to severe delays in publishing more key terms and conditions, such as price. Moreover, if this information is required to be included in the reference offers, operators will need to be given sufficient time to develop the terms.

3.2. Operational processes

Operational processes for access provision are likely to take a long time to develop, and will be highly detailed. Inclusion of this information in the reference offer is only likely to lead to severe delays in publishing more key terms and conditions, such as price. Moreover, if this information is required to be included in the reference offers, operators will need to be given sufficient time to develop the terms.

3.3. Service level and quality

Some of the terms and conditions listed relating to quality of access services are extremely detailed, and are likely to take a long time to develop. Inclusion of this information in the reference offer is only likely to lead to severe delays in publishing more key terms and conditions, such as price. Moreover, if this information is required to be included in the reference offers, operators will need to be given sufficient time to develop the terms.

Generally, service supply and quality conditions will need to be tailored to the specific access product, and have historically — due to the level of detail and technical nature — been set out in detailed annexes to the reference offer (rather than in the reference offer itself).

3.4 (point 1): Dispute resolution procedure

In our experience, the dispute resolution procedure is likely to be an area where access seekers are likely to have their own preferences.



About Liberty Global

Liberty Global is the world's largest international TV and broadband company, with operations in 10 European countries under the consumer brands Virgin Media, Unitymedia, Telenet and UPC.

We invest in the infrastructure and digital platforms that empower our customers to make the most of the video, internet and communications revolution.

Our substantial scale and commitment to innovation enable us to develop market-leading products delivered through next-generation, fibre-based networks that connect over 21 million customers subscribing to 44.7 million TV, broadband internet and telephone services. We also serve over 6.4 million mobile subscribers.

In addition, Liberty Global owns 50% of VodafoneZiggo, a joint venture in the Netherlands with 4 million customers subscribing to 10 million fixed-line and 5 million mobile services, as well as significant content investments in ITV, All3Media, LionsGate, Formula E racing series and several regional sports networks.