



ecta RESPONSE

**TO THE PUBLIC CONSULTATION BY BEREC
ON THE**

**DRAFT BEREC GUIDELINES ON
GEOGRAPHICAL SURVEYS OF
NETWORK DEPLOYMENTS**

BoR (19) 182

21 NOVEMBER 2019

1. Introduction

1. **ecta**, the **European competitive telecommunications association**,¹ welcomes the opportunity to comment on the Draft BEREC Guidelines on Geographical Surveys of Network Deployments² that BEREC has drawn up pursuant to Article 22(7) of the European Electronic Communications Code³ (hereinafter ‘Code’ or ‘EECC’).
2. The Code entrusts the implementation of geographical surveys to national regulatory authorities (hereinafter ‘NRAs’) or other competent authorities (hereinafter ‘OCAs’), as applicable in each Member State.
3. By introductory remark, **ecta** wishes to emphasize that the interplay between different types of authorities, and notably the framework for data sharing between them, would benefit from greater elaboration in the guidance document. Only by ensuring that already available information is effectively and efficiently used can the survey process operate in an optimal manner and administrative burdens for operators be reduced to the minimum possible. This, in **ecta**’s view, must be a constant objective for the use of this new tool.
4. Moreover, art. 22 EECC links the implementation of geographical surveys to various subject matters within the purview of the Code, including, where relevant, the definition of relevant geographic markets in the context of market regulation, as well as beyond it, notably when referring to the application of the State aid rules.
5. Eager to contribute to advancing the Union towards the vision of a Gigabit society, **ecta** and its members seek greater clarity from BEREC on the use of surveys in those contexts. While surveys can and should provide authorities with a better analytical basis for their decisions – something that **ecta** has persistently fought for –, their implementation and use should complement, not displace thorough substantive reasoning.
6. Notably in the context of economic regulation, **ecta** would welcome greater clarity from BEREC on this point. The purposes of the guidelines in this regard should not be to repeat well-known guidance, especially in the field of State aid control, but to delineate especially the limitations of survey data in the context of regulatory review and intervention liable to have market shaping consequences.
7. Conversely, **ecta** is of the view that BEREC’s level of ambition regarding detailed technical harmonisation as expressed variously throughout the document is at odds with the legislative mandate set out by art. 22(7) EECC.
8. **ecta** has previously participated to the two workshops organised by BEREC on the subject. The arguments set out below build on the views presented in those meetings.
9. The remainder of this contribution is structured in three parts. Chapter 2 outlines **ecta**’s key messages on geographical surveys as presented in the consultation document, before a third chapter provides responses to the specific questions raised by BEREC. A fourth and

¹ <https://www.ectaportal.com/about-ecta>

² BoR (19) 182, 3.10.2019.

³ Directive (EU) 2018/1972, (2018) OJ L321/36.

final chapter adds a number of comments on specific elements in the consultation document.

10. As a final introductory remark, **ecta** wishes to underline that comments on the consultation document have at times been made difficult by a lack of clarity in drafting.⁴ Reserving its final position on those aspects, **ecta** encourages the text to be revised so as to become accessible to all guidance takers, be they authorities, operators or other concerned parties.⁵

2. Key ecta messages

2.1. The scope of the mandate of art. 22(7) EEC

2.1.1. *The appropriate level of harmonisation*

11. Article 22(7) EEC requires BEREC to issue guidelines for national regulatory and other competent authorities (hereinafter collectively ‘competent authorities’) facilitating consistent implementation of their obligations in respect of geographical survey and forecasts, to foster consistent application thereof.
12. In clarification of this mandate, recital 62 of the Code provides that competent authorities shall be guided by ‘BEREC guidelines on best practice to approach such a task’.
13. Contrary to this unequivocal guidance provided by the EU legislature, **ecta** notes that BEREC at various points throughout the consultation document expresses a maximalist approach to harmonisation.
14. BEREC thus states its understanding of art. 22 as requiring ‘the BEREC Guidelines to seek harmonization *and make mandatory a minimal number of QoS-1 indicators*’⁶ and later echoes this by setting for it the objective ‘to progress towards a *significant level of harmonization* of the theoretical mobile coverage calculations’⁷.
15. **ecta** is concerned, notably in view of the ‘potentially significant costs that any new or modified data requirements may place on data providers and authorities’ that BEREC correctly recognises,⁸ that the guidance as currently drafted significantly exceeds its legislative basis and threatens to entail considerable disruption to both existing administrative and business practices, without having clarified on what grounds the proposals set forth have been identified as best practice.

⁴ Examples of issues encountered include undefined technical terminology (e.g. ‘medialization’, at para. 71, ‘perfect overlaps’, at para. 120), syntactically unclear formulations and incomplete sentences (e.g. paras 42, 102), footnotes without clearly discernible structure or purpose in relation to the text to which they refer (e.g. note 45), unclear parallel use of presumably synonymous terms (e.g. operator/network provider, at paras 42, 50), technical guidance without sufficient specificity as to the underlying assumptions (e.g. requirement for aggregation from 20m x 20m grid to 100m x 100m grid to achieve at least 95% coverage level, at para. 126).

⁵ Editorial review is also required for issues such as repetitions (e.g. para. 122 and final sentences of para. 121), lacking subdivisions (e.g. section 2.7.4 features a subheading a) without corresponding subheading b)).

⁶ BoR (19) 182, para. 35, at 15; **ecta**’s emphasis.

⁷ BoR (19) 182, para. 67, at 22; **ecta**’s emphasis.

⁸ BoR (19) 182, para. 8, at 5

16. **ecta** further notes that in view of the questionnaires and the data collected with their help,⁹ a comparative discussion as well as identification of multiple best practices would have been both feasible and appropriate. Considering the far-reaching operational and costing implications of the proposals now set forth, **ecta** also considers that earlier dialogue with industry and its representatives would have been desirable.
17. Finally, **ecta** considers that art. 22 EECC does not imply any absolute mandate to ‘improve the information on geographical broadband reach in Europe’, as BEREC suggests,¹⁰ but rather a mandate to produce information as relevant to various tasks of competent authorities under the EECC, ‘guided by the specific regulatory objective, and ... adequate for the regulatory purposes that it serves.’¹¹ Exercise of that mandate requires these authorities to ensure that requests for information to undertakings in that context are duly justified and proportionate to the performance of the regulatory task in question,¹² viz. the discharge of authorities’ obligations in respect of geographical surveys.
18. Based on the above considerations, **ecta** calls on BEREC to revise its approach to the degree of harmonisation aimed for and to give more room to best practice examples.

2.1.2. *The concept of reach*

19. Secondly, **ecta** observes that the draft guidelines, while appropriately circumscribing the mandate of surveying broadband reach in geographical terms,¹³ subsequently go on to propose three different indicators for data specification purposes¹⁴, which are subsequently used to define a delivery calendar along these indicators.¹⁵
20. **ecta** and its members are concerned that this approach exceeds the legislative mandate of art. 22(7) EECC by transforming the nature of data collection from a focus on network capability to deliver broadband services (QoS-1) to a focus on actually delivered speeds, as measured at premises level (QoS-2 and QoS-3).
21. BEREC argues reference to actual measurement to constitute a verification mechanism for the reliability of reach and performance indication.¹⁶
22. **ecta** observes that geographical reach understood, for a given technology, as the number of addresses passed by a fixed or as the footprint of addresses covered by a mobile network¹⁷ does not require any on-site measurement.

⁹ BoR (19) 182, para. 9, at 5f.

¹⁰ BoR (19) 182, para. 5, at 5.

¹¹ Recital 62 EECC.

¹² While this requirement applies in respect of both arts. 20(1)(4) and 21(1)(i) EECC, **ecta** considers that the majority of relevant information will have to be obtained pursuant to the former of these two provisions, and would therefore urge BEREC to adopt the guidance accordingly by appropriately differentiating between the two provisions at para. 23 of the draft. This is of particular importance with regard to the protection of confidential information.

¹³ BoR (19) 182, para. 10, at 6.

¹⁴ BoR (19) 182, para. 12, at 6.

¹⁵ BoR (19) 182, para. 14, at 7; **ecta** notes that this calendar continues beyond the statutory deadline in art. 22(7) EECC.

¹⁶ BoR (19) 182, para. 15, at 7.

¹⁷ BoR (19) 182, para. 22, at 11.

23. Indeed, a requirement for *de facto* measurements would, in **ecta**'s view, contradict the entire purpose of surveys both as a scoping and forward planning tool: first, because such measurements would require creating conditions that the survey is only to indicate the possibility of (i.e. establishing the actual speed delivered, as opposed to the speed that can be reasonably expected to be deliverable at an address); and secondly, because they would at the same time be extremely time- and resource-consuming to the contrary of enabling network deployment. In fact, were a measurement-based approach to be applied at scale, its completion could conceivably extend beyond the three-year timeframe that art. 22(1)(1) EECC generally foresees.
24. **ecta** therefore also considers the recurrent use by BEREC of the expressions of 'reach and performance'¹⁸ and 'coverage and performance'¹⁹ in its consultation document potentially misleading when it is not adequately clarified that these both designate theoretical values rather than a distinction between theoretical and measured values. **ecta** finds this aspect correctly specified only in Table 4 in Annex 1,²⁰ where QoS-1 is labelled as 'Calculated availability of service' and specified as 'Theoretical network performance of existing infrastructure (coverage, no pure infrastructure data)'. To remove the ambiguity around this distinction, **ecta** calls on BEREC to introduce this wording upon the first mention of QoS-1 in the text²¹ and to streamline it throughout. The same logic applies *a fortiori* to forecasts.
25. Accordingly, **ecta** asks BEREC to clarify the scope of its guidance mandate (see also section 2.2.1. above) and, in accordance therewith, to limit the approach to the reach of broadband networks to an appropriate estimation of theoretical network performance by relevant geographic reference area.

2.1.3. The role of geographical surveys in State aid review

26. **ecta** agrees with BEREC as to the mention in art. 22(1)(2) EECC of geographical surveys in the context of the application of the State aid rules.²²
27. While the mandate of art. 22(7) EECC does call on BEREC to devise guidance to also assist other competent authorities in the consistent implementation of their obligations regarding geographical survey, **ecta** would emphasize that this mandate must be interpreted narrowly in accordance with its purpose and BEREC's general competences.
28. That mandate thus does not require BEREC to issue guidance on State aid review proper. Indeed, notifiable aid measures are assessed under art. 107(3)(c) TFEU by the European Commission, who has also adopted specific rules concerning regional aid as well as broadband deployment²³.

¹⁸ BoR (19) 182, paras 15, 19, 20, 28, 34, 38.

¹⁹ BoR (19) 182, paras 28, 35, 36, 52.

²⁰ BoR (19) 182, at 39,

²¹ BoR (19) 182, para. 12, at 6.

²² BoR (19) 182, para. 3, at 4.

²³ 2013/C 25/01 <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:025:0001:0026:EN:PDF>

29. BEREC should therefore judiciously avoid that the guidelines consulted upon become confounded with the State aid regime. To this end, [ecta](#) suggests that BEREC clearly express the scope of guidance in relation to State aid in a manner explicitly addressing authorities engaged in State aid proceedings and replace any citations and summaries of applicable State aid rules by references thereto.
30. In this vein, rather than stating that the main purpose of the EECC is not to promote compliance with State aid rules,²⁴ the guidelines should focus on explaining their relevance to State aid assessments. This notably entails, in [ecta](#)'s view, the need to clarify that precisely targeted requests for geographic information in a specific State aid compatibility assessment must always take precedence over surveys or forecasts made by NRAs in application of art. 22 of the Code. Another relevant element are the considerations concerning data aggregation in the context of State aid assessment.²⁵
31. Overall, [ecta](#) requests BEREC to narrowly delimit and concisely state the contribution that the guidelines can be expected to make to State aid practice, focussing on methodological aspects concerning geographical surveys. The guidelines should not convey the impression of offering guidance on substantive or procedural aspects of State aid law.

2.1.4. No prejudice to guidelines on the definition of very high capacity networks

32. Decisions on which networks will meet the definition of very high capacity network in art. 2(2) EECC will fundamentally structure the future of competition in electronic communications markets in the EU, especially as regards the implementation of the co-investment rules²⁶ and associated guidance,.
33. As BEREC is yet to issue specific guidance on the notion of very high capacity networks,²⁷ [ecta](#) considers it unfitting for the consultation document to suggest any determinations in that regard, such as when indicating that mobile networks might meet these criteria.²⁸
34. Accordingly, [ecta](#) asks BEREC to remove any suggestion to that effect²⁹ as well as to clarify³⁰ that no data collection will occur prior to the adoption of the VHCN guidelines, in order to avoid double administrative burdens in case the latter would give rise to reclassification.³¹

²⁴ BoR (19) 182, note 3, at 4.

²⁵ BoR (19) 182, para. 121, at 35.

²⁶ Art. 76 EECC.

²⁷ Art. 82 EECC.

²⁸ BoR (19) 182, para. 61, at 21.

²⁹ BoR (19) 182, paras 69, 72, 76 and tables.

³⁰ Especially at paras 44, 50, 70 and passim.

³¹ Cf. also the comment on BEREC's delivery calendar at note 15 above.

2.2. Data collection

2.2.1. Risk of disproportionate impact of information gathering on smaller operators

35. **ecta** is concerned that the undifferentiated, globally applicable approach to information gathering that BEREC presents in the consultation document³² will result in imposing undue administrative burdens on smaller operators.
36. While BEREC initially does recognise the legal requirement for information requests to be reasonable and proportionate,³³ **ecta** does not find any further consideration of this point later in the document that would provide some degree of relief for smaller operators.
37. Therefore, **ecta** calls on BEREC to reconsider the impact of each of its proposals particularly on smaller/challenger operators in terms of cost/benefit analysis, with an emphasis on costs for data collection and supply to the NRA/OCA. The existence of administrative burdens that weigh disproportionately on smaller/challenger operators may negatively affect competition, which would ultimately harm end-user interests (less choice, overall higher retail prices) in consumer, business-to-business (B2B) and business-to-business-to-consumer (B2B2C) markets.
38. To address these concerns, **ecta** proposes that BEREC revise paragraph 36 to introduce a clear hierarchical order of data gathering by NRAs/OCAs, as follows:
- a) NRAs'/OCAs' own knowledge/information;
 - b) Publicly available sources of information;
 - c) Any third parties holding or able to generate the information;
 - d) The operator(s) designated as having significant market power (hereinafter 'SMP') in the relevant broadband markets;
 - e) Other operators, reporting on the broadband coverage they self-provide and/or provide to companies taking wholesale network access; and
 - f) Only as a last resort and if proven strictly necessary, wholesale access takers whose network/service reach is determined by the SMP operator or other network operators they take wholesale access from. **ecta** further stresses that it generally cannot be for the wholesale access taker to validate the geographical reach of its underlying wholesale access provider; the request should be first and foremost be addressed to the latter, and **ecta** would invite BEREC to make this point explicit in the guidelines.
39. **ecta** invites BEREC to adopt such prioritised data gathering not only to avoid excessive and undue administrative burdens, but also to evade unnecessary data duplication and associated inefficiencies for competent authorities (e.g. for storage, management and maintenance).

³² BoR (19) 182, para. 24, at 12 and para. 91, at 29.

³³ BoR (19) 182, para. 8, at 5.

2.2.2. No justification for gathering of address level data and geocoding for fixed broadband networks

40. Art. 22(1)(7) EECC provides that ‘information collected in the geographical survey shall be at an appropriate level of local detail and shall include sufficient information on the quality of service and parameters thereof and shall be treated in accordance with Article 20(3).’
41. For fixed broadband networks, **ecta** notes that BEREC is proposing to require address-level data gathering and geocoding, either immediately³⁴, or after a temporary period using another solution.³⁵
42. **ecta** is concerned that the draft guidelines contain no justification for this proposal, which constitutes a very far-reaching interpretation of the Code, for which there is no manifest support in the legislation itself.
43. BEREC also does not provide any impact assessment in terms of the administrative burdens imposed on operators, or cost/benefit analysis in terms of how this level of data gathering may be necessary for competent authorities to help achieve the objectives of the Code. Such an analysis would appear appropriate, however, notably for jurisdictions like Italy in which currently no databases gathering data at address *or* grid level exist, and their implementation would involve significant costs and risk delaying ongoing deployments, contrary to the objectives of the Code.
44. Having expressed its point of view on regulatory/administrative burdens above, **ecta** invites BEREC to address these concerns in its revision of the guidance document, notably by ensuring clear demonstration of the proportionality of the proposed approach.

2.2.3. Financial support for data collection/conversion and option of administrative relief

45. If despite the above arguments, major administrative burdens were nevertheless indiscriminately imposed on all operators in application of art. 22 EECC, **ecta** asks that BEREC explicitly refer to the possibility for NRAs/OCAs to financially support data collection, and, where applicable, data conversion into a different GIS system, so as to minimise adverse impact on ongoing business processes.
46. Moreover, in such a case **ecta** would also ask BEREC to include in the guidelines mention of an option for phasing-in requirements differentiated according to operator size / capacity.

2.3. Aggregation and publication of survey data: Assumptions and competitive impact

47. **ecta** has had difficulty making sense of BEREC’s proposals for data aggregation as expressed at paragraphs 124 and 125, notably as to whether the implication here should be that in the context of grid-based data collection only the broadband reach of the

³⁴ BoR (19) 182, para. 28f, at 13; cf. also para. 40, at 16.

³⁵ BoR (19) 182, para. 31f, at 14; cf. also para. 40, at 16.

operator with the highest coverage rate would be published for a given location (by technology).

48. **ecta** is further unclear as to the relevance of overlap between different access technologies provided by the same operator in this context.³⁶ Moreover, **ecta** is not fully convinced that the criterion of population density will always be evaluated in the same manner by operators, notably when there are important differences in socio-economic characteristics and consumption patterns that may lead to different prioritisation towards geographical fringe customers.
49. As stated in section 2.2 above, imposing data collection/GIS conversion on smaller/challenger operators constitutes a major administrative burden/cost for those entities.
50. **ecta** is concerned that if it would then be decided not to publish smaller/challenger operators' coverage (by technology), their data collection would only constitute a cost, and yield no benefit in terms of end-users being able to discover the smaller/challenger operators' presence at the location of interest.
51. Accordingly, **ecta** asks BEREC to consider and introduce the issue into its revision of the consultation document.

2.4. Clarity regarding forecast optionality, forecast use, reduction of forecast burdens and recognition of competitive impact

52. With regard to forecasts, **ecta** notes first that these constitute an optional, not a mandatory element of geographical surveys according to art. 22(1)(3) EECC.
53. BEREC recognises this explicitly by formulating what it calls 'recommendations' on information to be requested when implementing forecast surveys.³⁷
54. To underline the special role of forecasts, **ecta** asks BEREC to more clearly bring out the difference between them by explicitly separating its document into a guidelines part (on geographic surveys) and a recommendations part (on forecasts).
55. In terms of implementation, **ecta** considers that the guidelines should include an explicit requirement for competent authorities to align data gathering for geographical surveys and for forecasts to the largest possible extent in order to avoid imposing additional administrative burdens on operators. Depending on the authorities involved, this constitutes one of the most important instances of the need for cooperation between NRAs and OCAs (see paragraph 3 above). **ecta** would welcome this point being explicitly introduced in the final document.

³⁶ BoR (19) 182, note 46, at 36.

³⁷ BoR (19) 182, para. 85f, at 27.

56. **ecta** would further stress that forecasts are not be required where they are not necessary. For example, the 100 Mbps downstream threshold is already met for a very large proportion of the EU through a variety of technologies.³⁸ In these situations, nationwide forecasts as a default make no sense, illustrating that NRAs/OCAs need to specifically justify the geographical areas for which they require forecasts.
57. Functionally, **ecta** re-emphasises³⁹ that State aid cases require a more specific assessment, which stands separate from generic forecasting, including their own specific data gathering. The same applies for market definition and analysis, which require not merely counting the number of networks in a geography, but a full assessment of their actual and prospective impact on competition, and a market test where co-investment or a commitments procedure is concerned.
58. These points are essential for **ecta**: inappropriate geographic segmentation, focused on the mere presence of infrastructures (e.g. within municipal boundaries), without taking into account that they do not actually overlap, do not actually compete, or assumptions on future extensions of their physical build-out, are too prospective and too unreliable for conducting a market analysis aimed at establishing whether there is effective competition or not, or whether there are short-term prospects for effective competition. In line with its introductory remarks (see paragraph 6), **ecta** asks BEREC to include these limiting considerations on the uses of forecasts into the guidelines.
59. Similarly, **ecta** considers forecasting future broadband network reach at address level and geocoding thereof as plainly unrealistic, certainly for the first year, for any type of operator, from the largest SMP operators to smaller/challenger operators. This would impose unrealistic obligations on operators.⁴⁰ **ecta** asks BEREC to remove from paragraph 95 the reference to ‘with the same resolution as for broadband reach’ and any reference to address level in paragraph 96 when it comes to forecasting.
60. **ecta** also believes that forecasting network reach beyond three years is also plainly unrealistic, and therefore asks BEREC to remove the reference to forecast periods ‘at least of 3 years’ from paragraph 94.⁴¹ Three years needs to be the absolute maximum, and is a real challenge in its own right. **ecta** notes in this context that where a smaller/challenger operator has made a business decision, and secured investment to cover a particular geographic area, but where the SMP operator would decide to overbuild it, or would call for a co-investment in another geographic area, the smaller/challenger operator may have to re-evaluate its business case. This may include switching its investment to the co-investment area, especially if it is more economical to co-invest, or if its business as wholesale access taker in a far larger geographic area is fundamentally jeopardised.

³⁸ E.g. DOCSIS, many VDSL2 non-vectored deployments (e.g. 35b), VDSL2 vectored deployments, g.fast, FTTB/H, FWA, and others.

³⁹ Cf. para. XXX above.

⁴⁰ BoR (19) 182, para. 95f, at 30.

⁴¹ BoR (19) 182, para. 94, at 30.

61. The points that **ecta** has raised above underline the need for competent authorities to appreciate how smaller/challenger operators' investment decisions may be conditioned by external factors beyond their control. These may prompt deviations from forecasts that are not voluntary, but rather a necessity, driven by the decisions of SMP operators that choose to overbuild or employ co-investment schemes as strategic means to avert long-term infrastructure competition.
62. Given their critical nature, **ecta** asks BEREC to urgently expand on these competitive aspects of forecasts both in terms of administrability for smaller/challenger operators, the justification for departures from previous forecasts and the need in aggregate not to substitute forecasts for appropriate market definition and analysis as well as separate State aid review.

2.3. Forecast confidentiality

63. **ecta** cannot emphasise enough the seriousness of the threat that strategic overbuild and announcements thereof by SMP operators represents to challenger operators.
64. If the art. 22 process and/or BEREC guidelines were to divulge smaller/challenger operators' build-out plans to SMP operators, this would be highly likely to stifle investment in new networks. Confidentiality is therefore of paramount importance, as the Code rightly emphasises when stressing that '[i]n gathering any ... information, all authorities concerned should respect the principle of confidentiality, and should avoid causing a competitive disadvantage to any undertaking.'⁴²
65. **ecta** therefore emphasizes, in view of the discernible gist of certain guidance elements,⁴³ that the risk of information leakage to SMP operators who have a strong incentive to strategically (announce) overbuild in order to strangle emerging infrastructure competition, is far greater, from the challenger operator perspective, than the risk of State aid being granted for overbuilding a commercial roll-out (also because State aid is subject to specific stakeholder consultation).
66. More specifically, **ecta** considers especially the wording of paragraph 97 problematic insofar as it neither recognises the above concerns, nor clearly provides for any guidance on how to focus verification efforts to address them.
67. Accordingly, **ecta** encourages BEREC as part of its general approach to assuring the confidentiality of forecast information to explicitly consider strategic overbuild incentives for SMP operators and how these can be addressed by targeted verification. This should also include consideration of the blocking effects on competitors' ability to realise their projected build-outs when SMP operators engage in aggressive price wars to capture necessary resources (e.g. civil engineering capacity).

⁴² Recital 62 EECC.

⁴³ BoR (19) 182, paras 24, 91, 97 and 114.

2.4. Conclusion

- 68. Based on the points made above, ecta considers that the draft BEREC Guidelines on geographical surveys of network deployments are not ready for adoption before several important material modifications are made.**
- 69. In light of the manifest need for adaptations that this chapter has shown, ecta urges BEREC, also in view of the fact that QoS-2 and QoS-3 are not covered by the mandate of art. 22(7) EECC, to submit a fundamentally revised version of the current text, responding to the issues and concerns identified above, for renewed consultation.**

3. Responses to BEREC questions

70. The ecta responses to BEREC's questions are comparatively short, given that they concern very specific technical points, rather than the major policy and regulatory issues which are in fact at stake in the elaboration of these guidelines.
71. ecta therefore expects BEREC to place these responses in the context of the key points in chapter 2 as well as a series of more detailed points in chapter 4, which ecta considers to affect the competitive dynamics and end-user interests that are key to the EU legislative framework.

Question 1: In BEREC's current Public Consultation on the implementation of the Open Internet Regulation (paragraph 140), BEREC is requiring that the speed values required by Article 4(1)(d) of the Regulation EU 2015/2020 should be specified on the transport layer protocol payload, and not based on a lower layer protocol. Is there any reason why this layer should not be used in providing information about speeds in the context of a Geographical Survey of Broadband reach?

72. ecta appreciates BEREC's objective of ensuring a maximum degree of consistency between different guidance instruments by proposing to adopt the same approach to speed value reporting in the context of its Open Internet Guidelines and the present guidance.
73. ecta understands that in adopting this approach, BEREC principally seeks to eliminate speed specifications based on IP packet payload measurements.
74. Unfortunately, BEREC appears not to have provided any explicit material justification for deleting this alternative in the context of the consultation on the Open Internet Guidelines.⁴⁴
75. ecta would therefore welcome BEREC's clarification on the considerations having motivated removal of layer 3 measurements from the suite of possible options. At this stage, ecta does not object to the proposed approach, but reserves its position on the matter. In any case, ecta urges BEREC to clarify specificities of TCP measurement (especially TCP's slow start), so that the reported values will effectively be both appropriate and reasonably comparable.

⁴⁴ BoR (19) 179, paras. 140 to 142.

76. More generally, **ecta** considers the question of alignment between the different sets of guidelines as principally hypothetical in nature, as the mandate under art. 22(7) EEC does not extend to the conduct of actual measurements (see section 2.1.2 above).

Question 2: BEREC has considered several methods to calculate speed information according to the relevant fixed network. The development of these methods often requires information on the position of network infrastructure (for example, collecting the distance to the street cabinet or the switching centre). Do you consider information on location of infrastructures strictly required for the purpose of art 22? If so, what is the minimum information level related to network infrastructure that the Geographic Survey should collect and why?

77. **ecta** considers that this question needs to be assessed in a differentiated manner according to the technologies involved.

78. As a general observation, and in line with BEREC's own recognition of the need to limit the potentially significant costs arising as a result of new information requirements,⁴⁵ **ecta** considers that the renewed collection of information already available from other sources must be avoided. This means that, in principle, infrastructure-related information should be sourced from the Single Information Point operated in the context of the Cost Reduction Directive.

79. However, **ecta** is not convinced that information on the precise location of infrastructures is indeed strictly required in all cases.

80. For technologies in which distance-based attenuation is of limited relevance, no such information appears necessary for reach calculation and should therefore be abstained from in accordance with a standard of strict necessity.

81. On the other hand, where line length can be expected to materially impact achievable bandwidth, especially for access takers and the end-users they serve, the collection of such information will be appropriate. Competent authorities should ensure that the information provided by SMP operators regarding their copper networks is also available to access takers, especially where these are required to publish coverage maps of their own.

82. Overall, **ecta** thus endorses an appropriately differentiated approach along the above lines.

83. Therefore, and in line with a data minimisation approach and the need to ensure that existing data sources are used as efficaciously as possible (see paragraph 3 of this response), **ecta** invites BEREC to streamline its assessment in the first sentence of paragraph 13 of the consultation document of data on physical infrastructures being out of scope of the throughout the guidelines, while ensuring the effectiveness of such an appropriately differentiated approach.

⁴⁵ BoR (19) 182, para. 8, at 5.

Question 3: As explained above, BEREC considers that the characterization of the mobile network is reliant mainly on technology (subsection 2.4.2.1), and that NRAs/OCAs may collect performance information, such as QoS-1 speed information (subsection 2.4.2.2.) as they see fit for their own needs. That is, each MS may decide on the performance information suitable for its own national circumstances.

However, BEREC would like to hear views on the following issues:

A) Does such optionality compromise the purposes of Article 22, or should BEREC consider making some performance information non-optional? If so, why, and which information should be mandatory?

B) Which kind of performance information may be better to inform end users? (Note that in all circumstances NRAs/OCAs should consider that BoR (18) 237 has already recommended that *“In order to improve the information on mobile coverage given to the public, NRAs may want to consider specifying at least four levels of mobile coverage. Generally, the levels of mobile coverage could be chosen to reflect the different probabilities of successful service reception which equates to service availability”*. As an example, a service could be characterized by the following graded approach: capability to the end user to: 1) browse traditional web pages and consult emails, 2) to view enriched web content and to stream standard quality video, 3) to stream high definition videos.)

84. As regards point A, **ecta** considers that Art. 22 EECC is not compromised by optionality, and that regulatory/administrative burdens on operators should not be increased without explicit justification and cost-benefit analysis.

85. As regards point B, **ecta** considers that no additional performance information to end-users can be readily justified at this point.

86. **ecta** would stress that a graded approach as suggested by BEREC will be extremely difficult to implement, as the number of parameters that can affect service quality is vast and the stated accuracy of surveys and forecasts regarding a particular level will therefore tend to be prone to error. Gradations are therefore likely to convey a false sense of accuracy, yet to require qualifications that will make them impractical to both implement and use. **ecta** is also concerned that increasing levels of technical complexity to provide additional performance information will render theoretical modelling prohibitively difficult.

87. Furthermore, the examples given by BEREC seem to specify limited use cases, which may not shape actual end-user behaviour beyond the short term. Especially in view of the move to high definition as the standard production technology in audiovisual programmes, the distinction between the second and third suggested grade of network performance seems of limited utility.

88. In the short to medium term, **ecta** thinks that BEREC should focus on fostering a regulatory environment that supports the competitive provision of a wide range of services for consumers, B2B customers, and B2B2C and Internet of Things use cases.

89. To this end, BEREC and its members, in cooperation with other competent authorities, should strive to ensure that the geographical surveys are implemented effectively and efficiently and focus on making administrative practices as nimble and efficient as possible to facilitate roll out, while promoting effective competition.

Question 4: Should BEREC seek to harmonize the assumptions made by operators and NRAs throughout Europe? Should BEREC encourage NRAs/OCAs to seek this harmonization at a national level? Which assumptions should be considered to be harmonized and how? (For example, should BEREC consider data service speed coverage calculations without cell load, considering that the network is available for at least one user at a specific location at a specific time? Or should BEREC consider network load and, if so, based on which parameters?)

90. **ecta** is not favourable to ‘harmonisation by harmonised assumptions’ and believes that BEREC should not encourage NRAs/OCAs to seek such harmonisation, notably because this could lead to a lowest common denominator approach.
91. Historically, competition has been the key driver of innovation in both network and service provisioning. This has produced radically different results between EU Member States. These outcomes, ranging from more or less the highest mobile data performance in the world to disappointing results in the very same domain, are not linked to objective geographic or population factors, much less to standardised measurement assumptions.
92. Results in network coverage and performance, and in services that build on them derive from competitive dynamics, i.e. how market players have responded and respond to market circumstances. Unless originating a wholly new approach, harmonisation in a highly technical domain such as geographical surveys is likely to cement a given national approach with significant adjustment costs for other jurisdictions and their operators.
93. **ecta** therefore suggests that BEREC generally focus on facilitating first application of the guidelines and continuously review their technical implementation so as to enable mutual learning among competent authorities and identify possible best practices.
94. As regards the specific question raised, **ecta** believes that BEREC should conceive of an approach that clearly takes into account the network topology and the transmission medium used in evaluating achievable performance. For shared media, reporting for a case of only one user does not seem appropriate in the interest of promoting EECC objectives. Competent authorities should decide on the precise manner in which this should be implemented at national level.

4. Specific further **ecta** remarks

95. Section 2.1. of the BEREC consultation contains a list of definitions. Many of these amount to BEREC taking fundamental policy positions, with little or no justification being provided. **ecta** encourages BEREC to review this section, and to re-consult on the genuine policy issues that are objectively at stake. In particular, with reference to paragraph 22 (the definition of ‘premises passed’), BEREC proposes a 4-week period for fixed (network) operators to be able to ‘technically connect’ an end-user, as a criterion in the context of a geographic survey for fixed networks. The fact that this key policy issue is in BEREC’s section on definitions, and is not explicitly consulted upon, is a matter of serious concern. **ecta** considers that such an important decision point should not be included in the

definitions and should not be presented as an established BEREC decision. It should be subject to explicit stakeholder consultation. That being stated, **ecta** broadly agrees that a timeframe to ‘technically connect’ any entity (e.g. an end-user, but also a wholesale access taker), and objective mitigating factors (footnote 10), for making a connection request is a highly relevant element for achieving reliable geographical surveys.

96. Paragraphs 25/32: In paragraph 25, BEREC refers to ‘highly digitalized industries’, and in paragraph 32 and Table 8, BEREC refers to ‘highly digitalized businesses’. **ecta** is concerned that publicising data on businesses of that type entails risks of revealing sensitive/confidential information, which may not be desirable with regard to the promotion of competition and preserving security.
97. Paragraphs 47/77 (and also 28, 29, 33): **ecta** wishes to explicitly flag to BEREC that placing an obligation on smaller/challenger operators to convert their internal GIS data to an NRA/OCA GIS system, and/or require geocoding data in novel ways, may represent high regulatory/administrative burdens, and could entail high costs.
98. Paragraphs 70/71: **ecta** welcomes that BEREC proposes not to extend detailed surveying to mobile indoor coverage. Indoor coverage is objectively difficult to assess, and is notably affected by increasing thermal insulation of buildings (which is part of EU climate policy). More generally, it is clear that surveying indoor coverage reliably would place very high regulatory/administrative burdens on operators.
99. Paragraph 89: **ecta** is deeply unconvinced that NRAs/OCAs providing forecasts to end-users on future higher broadband speeds is wise. The effect may be to hold back end-user purchasing decisions, discourage switching to better deals provided by smaller/challenger operators, in the (uncertain) expectation that waiting for better service might be forthcoming from the operator that end-users contracted with (most often the retail arm of the SMP operator or another large operator). End-users’ interests may not be served by waiting for what the NRA/OCA forecasts indicate may be ‘coming soon’.
100. Paragraph 93: **ecta** agrees with the second sentence. Forecasting requirements should not be generic (de facto nationwide), and should only be applied if and when there is a clear justification to designate areas for policy/public intervention (the State aid regime being separate and subject to separate public consultation in any case).
101. Paragraphs 99/100: **ecta** clearly indicated above that Art. 22 of the Code specifies that forecasting is optional, and **ecta** noted above that BEREC is rightly providing recommendations rather than formal Guidelines where it comes to forecasting. On that basis, **ecta** requests the removal of the reference to “guidance” in paragraph 99, and the deletion of the entirety of paragraph 100, which suggests ex-ante verification of all operators’ forecasts. There is a real risk of NRAs/OCAs unduly shifting their focus to micro-management of smaller/challenger operators’ business plans, whereas NRAs’ fundamental mandate implies a focus on ensuring that SMP is effectively addressed and to take regulatory measures towards achieving effective competition.

102. Paragraph 102: **ecta** considers that this paragraph needs to be modified to include a more explicit expression of the risks associated with SMP operators' incentives to engage in announcements and forecasts, e.g. abusive intent to take the wind out of the sails of emerging infrastructure competitors. More generally, **ecta** notes that the concept of 'large deviations' is insufficiently defined. In any case, prior to any regulatory action, the reasons for 'large deviations' should always be fully examined, notably to avoid unduly penalising smaller/challenger operators that may have been compelled (notably the SMP operators' actions, including co-investment schemes) to change their investment plans (this point is discussed in chapter 2 above).
103. Paragraph 114: **ecta** has serious issues with this paragraph. **ecta** insists that: (i) clear principles on the confidential treatment of forecasts need to be established well ahead of any forecasts being made, not to mention published; (ii) these principles need to indicate, ahead of time, how – in substance and in procedural terms – confidentiality will be ensured or potentially overridden, (iii) there must be a clear system for recourse/appeal available to operators, prior to any unilateral publication by an NRA/OCA. Case-by-case assessment can only occur once the clear principles are published. Both the principles and any case-by-case assessment need to be open to appeal at the NRA/OCA, as well as judicial review, prior to any information deemed confidential could leak, notably to the SMP operator, where that operator has an incentive to engage in strategic overbuild to nip an emerging competitor in the bud.
104. Paragraph 115/118: **ecta** endorses BEREC's proposal on what could qualify as business secrets and encourages BEREC to be more explicit on this point in its revised text, i.e. not to put it in the conditional.
105. Paragraph 132 (bullet 2 and bullet 4): **ecta** is on record with BEREC⁴⁶ in warning against defining geographic markets on a municipality basis. **ecta** has serious doubts that market definitions adopted by some NRAs on this basis have resulted in the promotion of competition and citizens' interests (e.g. by assuming the presence of two non-overlapping cable networks in the same municipality as an indicator of competition, and by assuming FttH fill-in once 20% of the population of a municipality is covered by the SMP operators' network).
106. Annex 3: **ecta** considers that more clarity would be useful here, notably on whether the data needs to be reported separately for download and upload speeds. In this context, **ecta** notes that broadband packages are typically commercialised (and commercially tiered) by means of the specific combination of download and upload speeds, e.g. a 100/10 offer is typically cheaper than a 100/100 offer, and a 300/30 offer is typically cheaper than a 300/300 offer. This needs to be adequately reflected. Reporting download and upload speeds in separate columns may not adequately capture commercial reality.

⁴⁶ **ecta** response on geographic markets, February 2014.

107. Finally, [ecta](#) requests BEREC to proceed to implement the following changes in revising the text (some of these points have been covered above, but are repeated here for clarity):

- a) References to *“from operators”/“operator data”/“operators’ data”/“network operators will need to”/“to be provided by operators”*, where the objectives can be achieved without having recourse to data gathering from smaller/challenger operators;
- b) Paragraph 29: remove *“at least”* (annual is already very challenging);
- c) Paragraph 96: Table 3 – references to *“or address”* and text below the table (providing address-level data is burdensome and not objectively justified);
- d) Paragraph 100 (ex-ante verification is burdensome and not objectively justified);
- e) Paragraph 126 (requiring even smaller geographic units is burdensome and not objectively justified);
- f) Paragraph 132 (deletion in its entirety is recommended, and especially the last bullet point on geocoded information);
- g) Annex 4: Multiple references to *“households”* (redundant information); references to *“highly digitalized businesses”* (sensitive information for competition); page 44 – GIS form bullet, reference to *“or lower”*; page 45 – reference to *“VHCN”*.

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In case of questions or requests for clarification regarding this contribution, BEREC and NRAs are welcome to contact Mr Oliver Füg, Director of Competition & Regulation at [ecta](#).