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MEMORANDUM

To: Body of European Regulators for Electronic Communications

Date: 21 November 2019

Our Ref: Plato.0025

Subject: **Joint response to consultation BEREC geographical survey guidelines**

INTRODUCTION

T-Mobile/Tele2, KPN, Vodafone/Ziggo and CAIW in the Netherlands ("the operators") wish to thank BEREC for the opportunity to respond to the consultation of the draft BEREC Guidelines on Geographical Surveys of network deployments dated October 3rd, 2019.

Part 1 and 2 of the document contain general and specific remarks and comments. Part 3 contains responses to the questions raised in the draft Guidelines document ("the draft Guidelines").

1. GENERAL REMARKS AND COMMENTS

- 1.1 *Administrative burden* – Despite BEREC's position in § 8 that the Guidelines "should provide a level of harmonisation (...) and also should take into account the potentially significant costs that that any new or modified data requirements may place on data providers and authorities", the draft Guidelines show that delivering data for a geographical survey is potentially a huge burden for operators. In order to pursue these principles, the Guidelines should contain considerations as to what measures should be taken by NRAs/OCAs to reduce costs for operators. The principle of proportionality should be at the heart of the draft Guidelines and the future NRA guidelines. NRAs/OCAs should only request strictly necessary data for the purpose of analysis, decision making and publication and should be based on a publicly available cost-benefit analysis within the context of the scope of article 22 of the Code, i.e. defining designated areas where no undertaking or public authority has deployed or is planning to deploy a VHCN or significantly upgrade it, network to ≥ 100 Mbps.
- 1.2 *Consistent application* - The starting point for the draft Guidelines is the European Electronic Communications Code ("the Code"), particularly article 22. In accordance with article 22 (7) of the Code, in order to contribute to the consistent application of geographical surveys and forecasts, BEREC shall, after consulting stakeholders and in close cooperation with the Commission and relevant national

authorities, issue guidelines to assist national regulatory and/or other competent authorities on the consistent implementation of their obligations under this Article.

- 1.3 In its present form, the draft Guidelines are no more than an **analytical framework providing general guidance** for the NRA/OCA to make their own choices. In general, there is a tension between the freedom for the NRA/OCA to set its own rules and the principle of consistent application. For instance, NRAs/OCAs may choose QoS-1, QoS-2 or QoS-3 parameters pursuant to the European Broadband Mapping Project for measuring network performance. This will result in vastly different regulatory compliance requirements for the industry and different outcomes per member state. For different network topologies, based on the draft Guidelines, NRAs/OCAs may come to different conclusions in terms of the current geographical reach of broadband networks.
- 1.4 *Forecasting information* – § 85 BEREC explicitly states that the collection of forecast data is not mandatory under Article 22. We would like to argue that the NRA/OCA should only request this information if there are areas in the Member State that do not meet the applicable standard of ‘broadband availability’ and there is a market failure that make the application of state aid procedures or the procedure for the identification of designated areas necessary.
- 1.5 In § 87 BEREC rightly sets out that operator's roll out plan may change over time as a result in changes in the investment strategy or unforeseen events and that longer terms forecasts are more uncertain in nature than short term forecasts. We think BEREC should take one step further by acknowledging that forecasting data are unreliable by nature, regardless the forecasting period. Market circumstances may lead operators to change their plan and constantly and accordingly.
- 1.6 Nevertheless, operators have an incentive to provide accurate information. After all, if an operator has future network deployments plans, he may have an interest in reporting this to prevent state aid to third parties or the designation of specific areas to avoid the risk of being overbuilt with public funding, as is rightly set out in § 97 of the draft Guidelines.
- 1.7 As said, forecast information cannot be linked to actual network deployment in the future. Deployment plans are subject to change for various reasons (business case parameters, competition in the market), regardless the forecasting period. Moreover, for public investment purposes the State Aid Broadband Guidelines (2013/C 25/01) contain stand-alone provisions for forecasting that are distinct from the purpose of geographical surveys on the basis of article 22 of the Code. The State Aid Broadband Guidelines focus on absence of market delivery in terms of broadband coverage and allow local authorities to request investment commitments from market parties within a 3-year period or for a longer period foreseen for the supported investment before deferring public investment.¹ For forecasts in the

¹ EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks (2013/C 25/01), § 65

context of state aid no penalties apply. BEREC should acknowledge that forecasting information is unreliable by nature by requiring NRAs/OCAs not to draw strict conclusions on actual network deployment based on forecasts.

- 1.8 Forecasting may take place on the basis of reporting coverage obligations attached to the rights of use for radio spectrum or market analysis and may hold a forecasting period on the basis of other relevant legislation. Any forecasting period should be in line herewith.
- 1.9 The operators question whether grid performance information will contribute to the objectives of the geographical surveys and the Code. VHCNs are rolled out in wider areas and not on grid level. Therefore forecast information should be requested at LAU level instead of 1,000m x 1,000m, irrespective of the 3-5 years period of the forecasted deployment as described in § 95 of the draft Guidelines.
- 1.10 The operators are cautious as to the consequences of not deploying networks in accordance with a prior forecast. Any change of plan should not provide a disincentive for investors in view of penalties for providing misleading information (article 29 of the Code). Reassurance from BEREC in this respect is most appreciated.
- 1.11 We note that there is a discrepancy between the draft guidelines and the Code, which states in recital 62 that “the relevant forecasts should concern periods of up to three years”. In our view, by suggesting “at least” three years BEREC is going beyond the scope of the EECC.
- 1.12 *Confidentiality and data aggregation* - The data provided by operators is business confidential and sensitive in terms of publication. Therefore, an appropriate level of aggregation of data for publication is essential to safeguard the business interests of operators in terms of their competitive position in the market. In terms of publication of data as set out in § 108 and onwards, the draft Guidelines leave room to NRAs/OCAs to set different levels of aggregation, depending on the purpose of publication of data. No distinction is made between different levels of detail of data for different purposes. For instance, for the application of state aid rules or to designate an area with clear territorial boundaries where no undertaking or public authority has deployed or is planning to deploy a VHCN, it is not necessary to request data at address level or at 100x100 grid resolution. This level of detail may be proportionate only to comply with article 22(6) of the Code, if the relevant information is not available on the market, subject to the availability of license coverage requirements and related reporting mechanisms by the operator.
- 1.13 In general, the legitimate interests of business secrets of operators, especially when it comes to network deployment, are a proper justification for taking a **unified approach to the level of aggregated data for publication**. The BEREC Guidelines should safeguard that operators are informed about the level of aggregation of data, prior to publication. In principle, there should be one a **single level of aggregation in view of confidentiality towards all third users of**

information for the purpose or function of the geographical survey as set out in article 22 and § 3 of the draft Guidelines and taking into account potential anti-competitive effects to information that can be re-engineered to individual operators. Operators should also be informed in advance about data requests of third parties.

- 1.14 *Network speed vis-à-vis performance* – Furthermore, BEREC seems not to recognise that in general there is no link between network deployment and network performance. For instance, network upgrades are more essential for the actual speed performance than network deployment statistics.² Therefore network deployment data should be assessed by NRA/OCAs with great care.
- 1.15 Finally, pursuant to the scope of the draft Guidelines, **there is no need for operators to deliver data when the network in the designated area is already capable of delivering speeds of ≥ 100 Mbps.**³ This was mentioned explicitly by BEREC during the workshop on the draft Guidelines at October 22nd, 2019 in Brussels. The operators request BEREC to mention this explicitly in the final Guidelines.

2. FURTHER DETAILED REMARKS AND COMMENTS

- 2.1 § 28 sets out that there is substantive agreement between the member states that for mobile networks, the level of resolution should be (at least) a 100m x 100m grid (or equivalent polygon): "Note that for mobile networks this refers to the calculation used for the production of results, not to the resolution that operators may use in order to perform their coverage and performance calculations." By contrast, § 36 states: "It is important to note that the NRA/OCA may choose to: a) generate its own coverage and performance information using its knowledge of existing infrastructure; b) obtain this information from operators; and c) if necessary, use a third party to generate the information." Inherently, § 36 considers coverage and performance information to be enough to characterise the reach of the network. Options a) to c) will also result in different outcomes in terms of the current geographical reach of broadband networks and to draw consistent conclusions on the basis thereof.
- 2.2 For mobile networks, setting the level of geographical spatial resolution of data to a 100m x 100m grid may conflict with coverage usage requirements pursuant to existing and future frequency licenses of MNOs, if applicable. Furthermore, grid information may not be a proper tool for data aggregation purposes, since MNOs have different cells with different technical characteristics.

² In the Netherlands, the operators are upgrading existing networks to ≥ 100 Mbps speeds on a large scale, next to further network deployment.

³ EU Strategic objective for 2025: All European households, rural or urban, will have access to Internet connectivity offering a downlink of at least 100 Mbps, upgradable to Gigabit speeds:
<https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-587-EN-F1-1.PDF>

- 2.3 Spectrum license coverage requirements ensure availability of speed and network performance based on calculations pursuant to ITU, ETSI, CEPT standards and recommendations. This should also suffice in the context of geographical surveys. Therefore, delivering grid performance information should not be mandatory.

We suggest BEREC to encourage NRAs/OCAs to harmonize coverage and network performance information based on QoS-1 information and spectrum license coverage requirements pursuant to ITU, ETSI, CEPT standards and recommendations. The optionality for an NRA/OCA to choose for QoS-2 and QoS-3 speed information compromises the general principle of consistent application of Article 22 (7) and should be abolished.

For mobile networks, a 100m x 100m grid spatial data resolution should only be required when no license coverage requirements and other reporting mechanisms are available.

- 2.4 According to § 14, the Guidelines will be issued in two phases. In phase two, for which the BEREC approval is foreseen in December 2020, guidelines will be issued regarding QoS-2 and QoS-3 information and the procedures for the forecast deployment of VHCNs. It is unclear whether phase 2 will be subject to a separate consultation. The present document only deals with QoS-1 information. We would appreciate clarity from BEREC on this matter. Furthermore, as long as the guidelines regarding QoS-2 and QoS-3 information are not known, Member States should not apply QoS-2 and QoS-3 to characterize broadband reach, as mentioned in footnote 6 of the draft Guidelines.

The draft BEREC guidelines only deal with QoS-1 information. Will phase 2 and the procedures to invite undertakings and public authorities to roll out VHCNs over the duration of the relevant forecast period be consulted separately?

- 2.5 Furthermore, the BEREC guidelines on very high capacity networks scheduled for publication in Q2 2020 may have an impact on the data to be delivered for geographical surveys and the scope of the Guidelines. Operators may need to reassess the information to be delivered when the scope of VHCN is available. Our understanding is that an individual operator needs to make its own judgement as to whether its network is a VHCN, since the draft Guidelines encompass broadband networks only.

We suggest BEREC to clarify the relation between the VHCN Guidelines and the Guidelines on geographical surveys and the scope of the VHCN definition.

- 2.6 *Definition of Address passed vis-à-vis homes passed* - In § 22, "Address passed" is defined as: "An address is passed when at least one premise at the given address is passed." Although this seems clear, § 16 states that "(...) a series of information points and key characteristics stand out as being considered important for many

functions and in many Member States. These are, for fixed broadband, the concept of homes passed (...)."

We recommend that the BEREC guidelines make clear whether there is a difference between "homes passed" and "address passed" and if not, to adapt the language accordingly.

- 2.7 § 22 sets out that a premise may only be counted as passed if the house will be connected on the basis of normal connection fees without any additional or exceptional cost within 4 weeks from the date of the request. The draft Guidelines do not make a distinction between households and businesses. The dynamics of connecting households and business are vastly different and should be acknowledged in the Guidelines. Next thereto, we suggest not to refer to "normal connection fees" or "exceptional costs" in the definition of address passed, since it will not be possible to objectively define "normal" and "exceptional".
- 2.8 In accordance with article 22(6) of the Code, if the " information is not available on the market, competent authorities shall make data from the geographical surveys which are not subject to commercial confidentiality directly accessible to allow for its reuse. They shall also, where such tools are not available on the market, make available information tools enabling end-users to determine the availability of connectivity in different areas, with a level of detail which is useful to support their choice of operator or service provider.
- 2.9 In the Netherlands as well as in many other Member States, relevant information is already widely available on the market. Also independent market players offer comparison tools for end-users which more information than network performance. As a result, the BEREC guidelines should instruct NRAs/OCAs not to request information with the proposed level of detail if the information is already available in the market. The data may still be collected for the other purposes or functions of article 22 as set out in § 3.

Performance information for end-users should only be requested by NRAs/OCAs if the relevant information is not available on the market, pursuant to article 22 (6) EECC.

3. QUESTIONS

- 3.1 *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 2015/202011 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?*
- 3.2 The distinction of "transport layer protocol" vis-a-vis "lower layer protocol" is unclear; the operators suggest BEREC to refer to the OSI model. Protocol references should apply in accordance with OSI definitions. Reference to the transport layer protocol is new in the revised guidelines on the Open Internet Regulation (OIR) which also refers to lower layer protocol. In any case, the speed values in the Geographical Survey Guidelines and OIR Guidelines should be consistent.
- 3.3 *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?*
- 3.4 Pursuant to the scope of the draft Guidelines, no data need to be delivered when the network in the designated area is already capable of delivering speeds of ≥ 100 Mbps. This was mentioned explicitly by BEREC during the workshop on the draft Guidelines at October 22nd, 2019 in Brussels. The operators request BEREC to set this out explicitly in the final Guidelines.
- 3.5 Information on location of infrastructures should not be strictly required:
- As mentioned before and as acknowledged by BEREC during the workshop on October 22rd, there is no need for information on location of fiber infrastructures since they qualify as VHCN. The main cable networks in the Netherlands that are capable of delivering broadband speeds of ≥ 100 Mbps on the basis of Docsis 3.0 and 3.1, now or in the near future, and can be considered to be VHCNs as well.
 - Information on location of infrastructures for non-VHCNs is not necessary either for the purpose of the Guidelines. The perception of speed on copper can already be deduced from the technology used (i.e. ADSL, VDSL, VDSL2).
- 3.6 It is unclear to us why BEREC in § 58 is considering alternate methods to calculate the QoS-1 information according to the relevant fixed network provided by market

parties. Are there reasons to doubt the reliability of the collected speed information on the basis of Regulation 2015/2120?

3.7 *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.

A) Optionality compromises the purposes of Article 22. QoS-1 speed information should be non-optional. We suggest BEREC to encourage NRAs/OCAs to harmonize coverage and network performance information based on QoS-1 information. The optionality for an NRA/OCA to choose for QoS-2 and QoS-3 speed information compromises the purpose of consistent application of Article 22 (7) and should be abolished.

For mobile networks, a 100m x 100m grid spatial data resolution should only be required when no license coverage requirements and related reporting mechanisms are available.

3.8 *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?)*

BEREC should seek to harmonise coverage and speed information based on QoS-1 information and spectrum license coverage requirements as set out above, in accordance with ITU, ETSI, CEPT standards and recommendations.