



## Liberty Global response to BEREC's draft guidelines on geographic surveys

Liberty Global welcomes the opportunity to comment on BEREC's draft Guidelines on Geographical surveys of network deployments. Liberty Global also responded to BEREC's call for input in July 2019.

Liberty Global supports BEREC's continued commitment to stakeholder engagement in relation to the Guidelines of geographical surveys, and has found the two stakeholder workshops on this topic to be useful. We urge BEREC to take sufficient time to review and discuss with stakeholders their input to the draft Guidelines to allow stakeholders to provide adequate input on their views. Liberty Global provided a position paper to BEREC regarding this topic in late September 2019 and is awaiting an opportunity to discuss our position with BEREC prior to the adoption of the final guidelines.

Under article 22 of the new European Electronic Communications Code (Code), relevant national authorities will be required to conduct geographical surveys of the reach of broadband-capable networks at least every 3 years. Under these provisions, BEREC is required to issue guidelines by 21 December 2019 to ensure consistent application of the surveys.

Liberty Global supports policies that encourage private investment in telecommunications infrastructure, particularly in very high capacity networks (VHCN) such as Hybrid Fibre Coax (HFC), and ensure the efficient and appropriate use of EU and state funds. We believe the information obtained through these surveys will allow national policy makers to make better-informed decisions when implementing policies to achieve the EU's broadband connectivity goals. In particular, we believe that they can enable national regulatory authorities to gain better insight into the current reach of broadband networks and complement existing State aid procedures. However, they must not be a substitute for existing State aid assessments and they must also be proportionate and objectively justified (as required under article 21 of the Code).

In relation to the draft Guidelines, we note that for older legacy networks, the proposed approach to require a high level of spatial resolution is likely to place a high burden on operators to undertake inventory mapping. We are pleased to see, however, that BEREC recognizes the high burden such obligations place on operators and that it creates additional confidentiality issues.<sup>1</sup> In this regard, Liberty Global supports BEREC's apparent intention to limit the burden on operators, by allowing temporarily higher levels of spatial resolution and recognizing that Member States may need to take additional steps to reduce the burden of compliance on operators (e.g. making geographical tools available). Nevertheless, Liberty Global still has several serious concerns regarding BEREC's proposed approach as it is neither appropriate, nor proportionate; specifically the adoption of a forecast period of 3 years or more. Moreover, the Guidelines do not provide sufficient certainty regarding the treatment of commercially confidential network coverage information.

### Forecasts

Future network deployment and upgrade plans are highly changeable and therefore inherently unreliable. There are a wide range of internal and external factors that can affect the incentives and ability to execute

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<sup>1</sup> Draft BEREC Guidelines on Geographical surveys of network deployments, BoR (19) 182, para. 8 and 117.



deployment plans in a particular area. These barriers may arise at various stages of the financial and operational work flow. In terms of internal factors, build plans may be affected by availability of capital, identification of better alternative opportunities, changes in demand or supply (such as availability of contractors, input costs). In terms of external factors, for example, it may be affected by difficulties in gaining the required civil planning/building permits, and changes in regulation. Given that new build plans are regularly subject to change, we consider that very little weight can be placed on any forecasts imposed under article 22 of the Code. We would not support a forecast for longer than 1 year as the information is likely to be very unreliable past this point. In addition, given the often ad-hoc nature of network investments, complete and up-to-date information will be hard to collect and report. We note that, for this reason, the Code specifically states that this information can only be required by Member States ‘to the extent that it is available and can be provided with reasonable effort’—reflecting the principles of appropriateness and proportionality. In the pre-planning and planning stage, operators generally only have high-level information, not precise locations, in relation to future deployment plans (e.g. in a particular region, or suburb). This information becomes more concrete as the plan progresses. On this basis, and in the event that Member States wish to implement forecasts for their national market, we note that the information is more likely to be available and reliable at an address level if the forecast is for a period of 3 months or less (though the precise period will, of course, vary by provider/country). Liberty Global therefore would propose that BEREC adopts a 3 month forecast period instead and recognise these forecasts are subject to change given the large number of variables that can affect the civil process when building VHCN at scale.

Member States are currently already required under the European Commission’s State Aid Guidelines to undertake mapping and analysis of existing coverage information — now further enabled under article 22 of the Code — as well as a formal public consultation.<sup>2</sup> During consultation, parties can advise of their intention to invest, or express interest in investing, in the near future (i.e. within 3 years), in areas affected by State Aid measures. Such declarations may be made subject to roll-out commitments to ensure their delivery.<sup>3</sup> The Guidelines state that “A detailed mapping exercise and a thorough consultation ensure not only a high degree of transparency but serve also as an essential tool for defining the existence of ‘white’, ‘grey’ and ‘black’ areas”.<sup>4</sup> This State Aid assessment procedure is well established, trusted and proven to provide the safeguards and assurance necessary for both providers and the relevant competent authorities. It is therefore vital that it remains a key pillar of the State Aid regime. Liberty Global sees little utility in collecting unreliable and incomplete forecast information when an existing process exists for obtaining this information on a more targeted basis for State Aid purposes.

### Confidentiality

Whilst we understand the Commission and relevant authorities’ desire to have transparency over the reach of broadband networks in Europe, complete transparency in the market would have significant negative effects. Network coverage information, and particularly planned deployments, is highly commercially sensitive and its

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<sup>2</sup> European Commission Communication ‘EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks’ (2013/C25/01) (**State Aid Guidelines**), p.17.

<sup>3</sup> State Aid Guidelines, p.14.

<sup>4</sup> State Aid Guidelines, p.17 (paragraph 78(b)).



disclosure is likely to have serious and damaging implications for operators. In particular, disclosing such information would result in significant legal and investment uncertainty for private operators such as Liberty Global. It would be extremely difficult to regain this trust. Liberty Global also sees a significant risk of market distortion and gaming by competing providers. We therefore consider it of utmost importance that this information is considered as — and kept — confidential by the relevant authorities collecting the information.

Whilst we recognize that some information may need to be published to achieve the objectives under article 22 of the Code (particularly the provision of broadband availability tools for end-users), regard should always be had to the level of information needed to achieve the objectives and to the interests of the operator in maintaining confidentiality, and the effects on competition. Commercially sensitive information should never be published. Where there is a need to publish information, it should be anonymized and/or aggregated at national or regional level.

Commercially sensitive information should not be accessible to operators, nor should they be able to ‘reverse engineer’ anything that is published to determine the footprint or build plan of a competing provider. To the extent that an authority envisages the making available of information to enable consumers to check availability or coverage at a particular premises, such facilities must be limited to an ability to confirm availability on a premises-by-premises basis and should not, for example, provide public access to a bulk coverage database. In relation to forecast information, the more detailed and granular the new build planning information, the more sensitive it is. If competitors become aware — on a systematic basis — of a provider’s roll-out/new build plans, this could lead to loss of first-mover advantage, distortion of competition and reduce the profitability of, and incentives for, investment. This information should therefore not be made publicly available (or at least only in a highly aggregated and anonymous manner). On the contrary, the consequence of the current BEREC proposal is that it creates a requirement to maintain a high resolution inventory with a common data structure, with potential for this to be shared with competing private enterprises, who would then be able to use a range of analytical techniques to infer patterns from anonymized data; hence promoting outcomes potentially sub-optimal for market development.

Finally, operators should always be consulted if an authority is considering publishing data arising from the geographic surveys, regardless of the level of detail and format envisaged.



## **About Liberty Global**

Liberty Global is one of the world's leading converged video, broadband and communications companies, with operations in six European countries under the consumer brands Virgin Media, Telenet and UPC. We invest in the infrastructure and digital platforms that empower our customers to make the most of the digital revolution.

Our substantial scale and commitment to innovation enable us to develop market-leading products delivered through next generation networks that connect 11 million customers subscribing to 25 million TV, broadband internet and telephony services. We also serve 6 million mobile subscribers and offer WiFi service through millions of access points across our footprint.

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 investments in ITV, All3Media, ITI Neovision, LionsGate, the Formula E racing series and several regional sports networks.



## 2.1 Definitions

### Maximum available speed and Normally available speed

These definitions should mirror the definitions in the Open Internet Guidelines, which is best achieved by referring directly to the Guidelines themselves in (both of) the definitions. We also note with regard to the inclusion of the words ‘in the address/grid’ in the Normally available speed definition that it is impossible to calculate the maximum and normally available speed at the exact address location and that these will be approximated values for the area or neighbourhood (e.g. for cable networks, beyond the optical access node). HFC, in particular, is a shared medium and available speeds will change over time. Finally, it is not clear what is meant by the last sentence in each definition—namely ‘*The parameters should describe the capability of the network*’. In particular, which parameters (other than speed) are being referred to and what capabilities need to be described. We would urge BEREC to delete this additional sentence and to stick to the existing definitions.

**Response to Question 1:** Liberty Global does not consider that there is any reason to specify the speed values based on a lower layer protocol than the transport layer protocol payload. On the contrary, we consider that — as far as possible — the calculation of these values should be consistent with, and there should be no divergence from, the Open Internet Regulation.<sup>5</sup>

In previous position papers and consultation responses regarding the implementation of the Open Internet Regulation, Liberty Global held that technology neutrality is one of the Regulation’s key principles. Regulators and policy-makers must ensure that their choices do not favour, nor discriminate against the use of particular technologies. Additionally, Liberty Global has held consistently that the task of developing methodologies for the measurement of internet speeds is one that should be mandated to the European Standards Development Organizations (SDOs), such as ETSI. Liberty Global would therefore reject any attempt BEREC to define different protocols in these Guidelines. Instead, in the event that BEREC wishes to adopt a different definition to the Open Internet Regulation, it should work with the European Commission on a standardisation request, which the Commission is empowered to issue under the Standardization Regulation, to ask the SDOs to develop a standard which meets BERECs needs.

## 2.2. Data sources

Liberty Global supports the collection of survey information from all network operators, regardless of size or technology. However, we consider that this section would benefit from national regulatory authorities and/or other competent authorities (hereafter, relevant authorities) also being included as a data source, as in many cases information will already be held by these authorities. In order to reduce the burden on operators, information should be obtained as much as possible from public or government sources.

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<sup>5</sup> Regulation (EU) 2015/2120 laying down measures concerning open internet access, OJ L 310/01 [2015]; BEREC, Guidelines on the Implementation by National Regulators of European Net Neutrality Rules, BoR (16) 127.



### 2.3 Geographical spatial resolution of data

As noted previously, Liberty Global supports an approach which focusses on existing practices and tools to deliver a consistent level of information across Europe, rather than requiring operators to invest in new tools — the costs of which would be significant — to achieve a harmonized data set.

Today, national regulators use their own methodologies and tools for collecting geographical network information that providers under their jurisdiction have implemented. However, methodologies and tools for collecting geographical network information vary considerably across Member States as experienced by Liberty Global's operating companies, including the level of detail/resolution. This would also be inconsistent with the plain reading of the Code. Recital 61 specifically states that 'the size of the territorial unit will also vary between Member States, depending on the regulatory needs in the specific national circumstances, and on the availability of local data'. Moreover, imposition of fully harmonized, detailed and rigid information requirements (e.g. using a particular GIS system) will be highly costly. Moreover, it is unlikely in reality to yield consistent data sets, due to current differences in the quality of data collection. Whilst BEREC has been tasked with providing guidelines to contribute to the consistent application of geographical surveys and forecasts under the Code, such guidelines must meet general regulatory principles of appropriateness and proportionality. Such a single approach would place unreasonable and disproportionate efforts and costs upon operators that are not appropriate, nor necessary to meet national regulatory policy needs. The added value that such surveys would have for citizens, if any, would not outweigh what it would require from operators.

In the event that BEREC continues with its current approach to collect address (for fixed) and 100x100m grid (for mobile) level data, we support BEREC's apparent intention to adopt a flexible approach to limit the burden on operators. Specifically, we support BEREC's proposed approach to allow relevant authorities to temporarily apply higher levels of spatial resolution to allow Member States and operators sufficient time to transition. We also support measures which could be implemented at Member State level to reduce the burden on operators (such as, but not limited to, making geographical tools available to operators).

### 2.4 Elements of characterization of network connectivity or services

Under paragraph 7 of article 22(1) of the Code, geographical surveys should include sufficient information on the quality of service and parameters thereof. In this regard, Liberty Global recognizes that it is necessary for national authorities to have general quality of service information in order to more easily identify gaps between the proposed forecast plans (for VHCN or networks capable of 100Mbps) and existing networks, and then to be able to designate these areas as provided for under article 22(2). However, we consider that the amount of information being requested is disproportionate.

BEREC currently proposes for relevant authorities to collect information at the address/grid level on the type of technology, the maximum and normally available upload and download speeds, and whether a network is considered VHCN at the relevant address. We urge BEREC to consider the huge burden placed on operators to collect and provide this quality of service information — particularly at address level; as well as their ability to do so. BEREC, the Commission, and relevant authorities should not ask for more information than is strictly necessary to achieve the regulatory objectives — respecting the principles of appropriateness and proportionality. In this context, Liberty Global considers it would be sufficient for operators to identify the type



of technology (as per the technology codes outlined in Table 1 of the draft Guidelines) and whether their network at a particular point is capable of at least 100Mbps — since this is the lower bound for an area to cease to be eligible as a designated area under article 22(2) of the Code. This information would enable relevant authorities to designate areas, and would also provide sufficient information for regulatory purposes such as identifying areas that may benefit from State Aid and the allocation of funds under national broadband plans, and to verify the availability of services within the universal service obligations.

We note that it is important to avoid the granting of State Aid for projects that target areas where cable is present (as has been confirmed by the Commission in the *Bavaria* case<sup>6</sup>). Hybrid Fibre Coax (HFC) networks provide the speeds needed to stay well ahead of consumer demand. Liberty Global operates far-reaching, scalable, Gigabit-capable networks that rely on optical fibre at their core. In fact, we are already offering 1 Gbps services in numerous cities across Europe. Moreover, HFC networks are expected to be able to deliver 5 Gbps speeds within the next 5-10 years, which will ramp up to 10 Gbps and beyond as demand for high-speed services grow. Moreover, innovations in HFC technology — particularly due to DOCSIS standard upgrades — have resulted in more capacity, lower latency and greater security. For Liberty Global to continue to realise these network improvements over time, however, it is necessary to undertake significant investments. Conversely, state subsidies have a distortive effect on competition and disincentivize private investment. We would further caution against implementing Guidelines that favour certain technologies.

**Response to Question 2:** Liberty Global does not think the position of network infrastructure is covered by the Code as, again, it only pertains to the ‘reach’ of the network. This indicates that the provisions relate to the outer bounds of the network, representing the final consumer handover and therefore the access network. We do not consider that the Code supports an interpretation that would enable Member States to require operators to provide information about their networks beyond this (e.g. to associated facilities). We note that this has already been recognized by BEREC in page 13 where BEREC states ‘*data on physical infrastructure (such as ducts, conduits, masts, manholes and so on) ... do not fall within the scope of these Guidelines*’ (page 6). Such information is highly commercially sensitive but also sensitive from a network security perspective. Moreover, we don’t believe it is necessary or relevant. Distance is only potentially relevant for DSL technologies; and, even then, can only be used as an approximate tool for measuring performance. For HFC and FTTP networks, it has little relevance to overall performance. In this context, we consider that such a requirement would place an unreasonable and disproportionate burden on operators given its limited utility (particularly in relation to non-DSL networks).

**Response to Question 3:** Whilst Liberty Global would prefer that BEREC allows Member States to maintain their existing approach to collecting geographic network information, we generally support harmonization of any new information requirements to avoid further fragmentation. We consider that information on the grid code/polygon ID, technology availability and whether the network is either capable of 100Mbps download speeds (as outlined above) would be sufficient for the regulatory objectives.

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<sup>6</sup> European Commission, State Aid SA.48418 (2018/N) – Germany: Bavarian gigabit pilot project, C(2018) 8617, Brussels, 18.12.2018.



Liberty Global considers that the graded speed levels for consumers envisaged in Question 3(B) are wholly unsuitable for purpose. The end-user experience in each of these circumstances is dependent on many variables outside the sphere of network performance (such as the technical capabilities of the handset, or techniques applied by Content Distribution Networks used to serve traffic). Moreover, the levels rely on terminology that is inherently subjective and changing over time. For example, the term ‘traditional web page’ is so inherently vague that gathering data on that basis will inevitably lead to unusable data sets.

**Response to Question 4:** Whilst Liberty Global, as a pan-European operator, general supports harmonization at EU level (rather than national level), we consider the proposed approach to compare performance estimations across Europe — outlined in paragraph 79 — to be too theoretical and therefore of limited utility, and potentially misleading or deceptive. In that context, we prefer the approach outlined in paragraph 78 and which uses the information collected as per our response to Question 3 above (i.e. technology and whether capable of 100Mbps download).

## 2.6 Forecast specificities

### 2.6.1 Forecasts of broadband reach

Liberty Global refers to its previous remarks relating to forecasts on pages 1-2 above.

#### *(b) Areas where information is to be collected*

We support BEREC’s proposal for forecast information to only be requested when an authority intends to designate an area of interest. In our view, this approach strikes the right balance in terms of enabling relevant authorities to collect information required to designate areas of interest (i.e. guided by the specific regulatory objective) whilst reducing the burden on operators and the risk of disclosure of commercially sensitive information.

We consider that forecasts and the designation of areas should be conducted in a similar manner to the public consultation procedure under the State Aid Guidelines to avoid fragmentation.

#### *(d) Forecast period*

In relation to the forecast period however, we note that BEREC states in paragraph 94 that the period should be ‘at least’ 3 years. As noted previously, Liberty Global does not support a forecast for longer than 1 year as the information is likely to be very unreliable past this point. In addition, the Code recitals specifically state that ‘forecasts should concern periods of up to three years’ (consistent with the current State Aid guidelines). To adopt a 3+ year forecast would run counter to the text and spirit of the Code provisions.





### *(e) Resolution of the data collection*

In the pre-planning and planning stage, operators generally only have high-level information, not precise locations, in relation to future deployment plans (e.g. in a particular region, or suburb). This information becomes more concrete as the plan progresses (e.g. depending on the operator/country, this could range from 3 months to 1 year). In the event that Member States wish to implement forecasts for their national market, the information is more likely to be available and reliable at the address/grid level for all Member States and operators if the forecast is for a period of 3 months or less. Liberty Global therefore considers that the address/grid level resolution should be limited to 3 months.

#### 2.6.2 Verification

Under article 22(1), relevant authorities must decide ‘the extent to which it is appropriate to rely on all or part of the information gathered in the context of such forecast’ when undertaking their tasks. Liberty Global reminds BEREC that the ability to rely on the forecast information provided by operators will ultimately depend on the relevant time period for the forecast (see our comments above).

In terms of ex ante verification, Liberty Global is concerned that, depending on the approach taken by relevant authorities, the information listed under paragraph 100 — and which can potentially be requested from operators — is extensive and likely to place even greater burden on industry; particularly if they decide to collect forecast information on a nation-wide basis (rather than the more focused approach proposed by BEREC). Under the State Aid Guidelines, the European Commission recognizes that commitments may be required by state actors in cases where an “‘expression of interest’ by a private investor could lead to a delay in the delivery of broadband services in the target area if subsequently such investment does not take place while at the same time public intervention has been stalled”.<sup>7</sup> The circumstances are very different in relation to future forecasts provided under article 22 if these are provided on a national basis and not in response to a formal consultation or proposal by a relevant authority to designate a particular area.

Additionally, under paragraph 102 of the draft Guidelines, BEREC also proposes that — in the case of large deviations from their forecast — operators may be asked to provide reasonable justification, including whether there was an *incentive* to deliberately provide a wrong forecast. However, we consider that the threshold for requiring operators to justify deviations should be much higher and based on a clear pattern of conduct that demonstrates an *intention* to deliberately provide an incorrect forecast. As industry has repeatedly stressed, forecast information — whilst provided to the best of the providers’ knowledge — is subject to change on a regular basis. In this context, it follows that there are likely to be regular, and potentially large, deviations from forecasts. This is particularly the case for longer-range forecasts, such as is being proposed by BEREC.

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<sup>7</sup> State Aid Guidelines, p.14.



DG Connect has indicated that one of its key goals for obtaining the forecast data is to avoid situations of ‘cherry-picking’; whereby operators invest in a built up area in a manner that threatens the viability of a small publicly-funded project. Liberty Global would however strongly oppose any attempts by the Commission, BEREC or national authorities to bind operators to forecasts provided under article 22 of the Code. Such commitments are not envisaged by the Code and any concerns held by authorities regarding the provision of misleading information is already addressed under article 29 of the Code (namely, through penalties). To do so would create significant risk for providers that provide forecast information on good faith, and create unnecessary constraints on operators. Such an approach would also give rise to the risk that this tool is used to protect publicly-funded projects from infrastructure-competition and to further crowd out public investment.

### 2.7 Publication, confidentiality and aggregation

Liberty Global refers to its previous remarks relating to confidentiality on pages 2-3 above and notes that the treatment of highly commercially sensitive and confidential information relating to Liberty Global’s precise network coverage and roll-out/new build plans is extremely important and we have significant concerns regarding the disclosure of this information.

Liberty Global broadly supports the broad approach being proposed by BEREC; in particular that deployment forecasts and detailed information regarding the position and type of different network elements are to be considered business secrets. We would further stress that ‘network elements’ should be further clarified to ensure that precise, address level information on the reach of networks are also considered business secrets. We nevertheless have two concerns with the guidelines as they currently stand.

Firstly, we are concerned that claims over the confidentiality of such information can be decided by relevant authorities on a *case-by-case basis* (paragraph 114 of the draft Guidelines). In our view, it should not be a matter of discretion for relevant authorities to decide on the confidential or commercial sensitive nature of this information. It should be based on objective and clear criteria (which the operator itself applies), and which bears in mind the rights of operators to protect their business interests. As previously mentioned, certainty regarding the confidential treatment of network coverage and roll-out/new build plans is of utmost importance to operators.

In terms of objective and clear criteria, Liberty Global supports the definition of (commercial) business secret and other confidential information adopted by the European Commission in respect of competition matters (see e.g. Guidance on confidentiality claims during Commission antitrust procedures). That is, i) it should be known only to a limited number of persons; ii) its disclosure must be liable to cause serious harm to the person/undertaking who has provided it or to third parties; and iii) the interests liable to be harmed by the disclosure must be objectively worthy of protection. In these matters, when a party is requested to provide information to the Commission, they self-assess whether the information contains commercial secrets or confidential information. Connecting the confidentiality rules in the Guidelines to standing practice will support legal certainty that is key to the electronic communications sector, and beyond.

Secondly, we are concerned that BEREC’s proposed approach is *non-binding* and that there is insufficient certainty that relevant authorities will adopt the approach being proposed by BEREC. This consequently gives



rise to increased concern for Liberty Global regarding the level of information being proposed to be collected under these Guidelines. Without certainty over the confidential treatment of this information, we would strongly oppose the collection of such detailed information on operator's network coverage and roll-out/new build plans. These two issues are related and cannot be considered in absence of the other.

We also consider that BEREC's guidance on this topic could be stronger. In particular, the Guidelines should specifically state that commercially sensitive information should never be published by relevant authorities and that, where there is a need to publish information, it should be anonymized and/or aggregated at national or regional level in order to market distortion and gaming by competing providers. For example, in section 2.7.3 BEREC states that relevant authorities require 'solid motivation' in order to provide access to geocoded information (at addresses/grid level). In our view, this information should not be provided to the public at all. It is also not clear in the guidelines what it considers to be solid motivation. Liberty Global considers that the Guidelines need to be very clear on this point to provide assurance to operators regarding the circumstances in which such detailed network information could be disclosed. BEREC should also state that operators are to be consulted if an authority is considering publishing data arising from the geographic surveys, regardless of the level of detail and format envisaged.