



# **ecta RESPONSE**

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

**DRAFT BEREC GUIDELINES DETAILING  
QUALITY OF SERVICE PARAMETERS**

**BoR (19) 189**

**5 DECEMBER 2019**

## 1. Introduction

1. **ecta**, the **European competitive telecommunications association**,<sup>1</sup> welcomes the opportunity to comment on BEREC's draft of Guidelines detailing quality of service parameters,<sup>2</sup> as mandated by art. 104(2)(2) of the European Electronic Communications Code (hereinafter: 'EECC' or 'Code').
2. Quality of service is a key competitive parameter. Competitive advances in electronic communications markets over the last decade have also in mass markets increasingly been driven by qualitative improvements. In business markets, quality has always been the primary vector of competitive dynamism.
3. Transparency about qualitative advantages towards clients is essential to seizing the competitive edge that they grant. Accordingly, the European Electronic Communications Code rightly recognises,<sup>3</sup> as does BEREC,<sup>4</sup> that electronic communications providers are 'likely to make adequate and up-to-date information on their services publicly available for reasons of commercial advantage'. There is thus no contradiction between well-functioning markets and market participants' incentives to offer transparent information about the quality of their services.
4. Indeed, **ecta** members have repeatedly sought and established quality leadership and exploited that quality differential through targeted offerings based on transparent communication.
5. Furthermore, electronic communications providers generally monitor and assess the qualitative performance of the services they offer as part of their internal process management and surveillance and to supervise performance of service level agreements entered into.
6. Therefore, **ecta** considers it imperative to underline that art. 104 EECC imposes no obligation on national regulatory authorities (hereinafter 'NRAs') or other competent authorities (hereafter 'OCAs') to require publication of quality of service information by electronic communications providers. Instead, as the Code clarifies,<sup>5</sup> such requirements shall be imposed only where authorities can demonstrate that the information in question is not effectively available to the public.<sup>6</sup>
7. This limitation equally applies to requirements for information about quality of service dependency on external factors as well as about measures to ensure equivalent access for disabled end-users.<sup>7</sup>

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

<sup>2</sup> BoR (19) 189, 3.10.2019.

<sup>3</sup> Recital 271 EECC.

<sup>4</sup> BoR (19) 189, para. 14, at 4.

<sup>5</sup> Recital 270 EECC.

<sup>6</sup> Recital 271 EECC.

<sup>7</sup> Art. 104(1)(1) i.c.w. recital 271 EECC.

8. Accordingly, the key operational consideration on which the guidelines should focus in order to ensure proportionate and substantially appropriate application of the mandate of art. 104(1) EECC is how to ensure that competent authorities<sup>8</sup> are capable of demonstrating the objective need for such additional information.
9. **ecta** and its members note that, despite referring to this requirement on two occasions,<sup>9</sup> the draft offers no guidance, substantive or procedural, on the matter. Indeed, the draft guidelines even lack discussion of the vital difference between information being available and information not being *effectively* available, although this constitutes the single most important condition for informational obligations pursuant to art. 104(1) EECC to be legitimate and in conformity with the Code and its objectives.
10. Meanwhile special attention to this consideration appears critical when considering the substantive informational obligations to which electronic communications providers are already subject under arts 102 and 103 EECC, beyond their own incentive to communicate transparently about the quality of their services. This makes it all the more important, in **ecta's** view, that any additional obligations are thoroughly justified and precisely targeted to address real and material non-availability of information.
11. **ecta** also observes that BEREC's benchmarking, reported in Annex 3,<sup>10</sup> offers little illustration or other clarification in this regard: a majority of NRAs did not provide any indication of compliance issues regarding quality of service, which makes a lack of effective information availability even less likely in those cases.<sup>11</sup> This finding is all the more remarkable considering that the survey covered both internet access services (IAS) and interpersonal communications services (ICS),<sup>12</sup> despite the draft guidance remaining limited to the latter<sup>13</sup>.
12. Moreover, the fact that, in BEREC's own findings – published in parallel to,<sup>14</sup> but not considered systematically in this consultation – the majority of IAS complaints is based on observed discrepancies between declared and delivered QoS values<sup>15</sup> further underlines that there is no lack of *effective* relevant QoS information.

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<sup>8</sup> Without article, this refers to the combination of NRAs/OCAs throughout, unless otherwise specified. On the relation between NRAs and OCAs, see chapter 3 below.

<sup>9</sup> BoR (19) 189, para. 14, at 5 and para. 53, at 19.

<sup>10</sup> BoR (19) 189, at 28ff.

<sup>11</sup> BEREC's reporting (at 33) allows no assessment of the relative importance among the majority of responding countries of NRAs that lack competence to deal with QoS matters.

<sup>12</sup> BoR (19) 189, at 28.

<sup>13</sup> BoR (19) 189, para. 4, at 2.

<sup>14</sup> BoR (19) 177, 3.10.2019.

<sup>15</sup> BoR (19) 177, at 32.

13. This conclusion is also corroborated by the fact that less than one in four NRAs are reported<sup>16</sup> to have imposed requirements for the publication of additional transparency information under art. 4(1) of the Open Internet Regulation<sup>17</sup> (hereinafter: 'OIR').
14. Closer examination reveals even this figure to be misleading, since one NRA has not stipulated any binding requirements,<sup>18</sup> which brings the number of additional enactments to less than one in five countries. Of the remaining five authorities, two appear to have required – as far as is discernible from BEREC's reporting – but an extension on, or extended publication of, already available information,<sup>19</sup> while one has required publicity about an end-user right to an IPv4 address<sup>20</sup>. Description of the requirements imposed by another NRA remaining limited to 'provid[ing] more transparency when offering internet access services'<sup>21</sup> allows no appraisal of their substantive nature.
15. Even full consideration of BEREC's own most recent reporting thus shows but one NRA to have imposed requirements that are at least partially comparable to the informational obligations that art. 104(1) EECC permits.
16. While art. 104(1) EECC does not evidently contradict maintenance of this enactment, the current evidence clearly provides no support for the need for guidance on that provision to encourage or otherwise promote further enactments of this nature. A measured and thoroughly justified approach, on the other hand, comprising restraint and careful evaluation of market developments, appears critical at a time when aggregate compliance burdens for electronic communications providers from Code transposition and its preparation are already significant.
- 17. In view of what has been observed above, ecta and its members consider that the draft guidelines do not succeed in providing an appropriate foundation for the consistent application of art. 104 EECC insofar as it lacks any elaboration on the criterion of information not being effectively available.**
- 18. Without appropriate guidance, at least in the form of a common approach, on this key aspect, art. 104 may become a source of significant imbalance and fragmentation in the application of the Code. Were NRAs to exercise that mandate short of a shared understanding that doing so requires demonstrable issues not otherwise addressable, this empowerment could lead to further divergences in information standards for end-user market participation.**
- 19. ecta therefore calls on BEREC to ensure that this consideration is given due and prominent treatment as the essential balancing policy principle under the Code in revising the document.**

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<sup>16</sup> BoR (19) 177, at 29.

<sup>17</sup> Regulation (EU) 2015/2120, (2015) OJ L310/1.

<sup>18</sup> BoR (19) 177, at 29.

<sup>19</sup> BG, SI.

<sup>20</sup> FI.

<sup>21</sup> DE.

20. **ecta** emphasises that the below additional observations, while necessary to ensure adequate guidance quality, will remain ineffective if BEREC does not accept the need to ensure that any additional informational obligations must be driven by the demonstrable need for such information to be effectively available. Where the legislature itself was not convinced of the unconditional need for such obligations, BEREC's guidance clearly must recognise the conditionality of their imposition and spell out criteria by which that conditionality may be deemed to have been fulfilled.
21. Below, **ecta** addresses a number of concerns that relate to the guidance scope (chapter 2) and its institutional framework (chapter 3), before responding to BEREC's questions (chapter 4).

## 2. Scope of the draft guidance: Limitation to interpersonal communications services

22. Art. 104(1) EECC permits for the definition of new informational obligations on electronic communications providers in respect of internet access and publicly available interpersonal communications services.
23. Early on,<sup>22</sup> and throughout,<sup>23</sup> the draft guidance, BEREC espouses the position that the document it is tasked to elaborate according to art. 104(2)(2) EECC will not define QoS parameters regarding Internet access services. It justifies this by reference to competing competences between the relevant expert working groups within BEREC.
24. Appreciative of BEREC's desire to minimise such conflicts of competence and avoid overlapping or incoherent guidance, **ecta** sees several problems with this approach.
25. Most obvious among these is that this approach does not allow for BEREC to fully and appropriately discharge the mandate entrusted to it by art. 104(2)(2) EECC. That mandate attaches to the information obligations under art. 104(1)(1) EECC in their entirety, so that there is no legal basis in the Code for excluding IAS considerations from the guidelines.
26. While, historically, the OIR precedes the Code and the latter integrates its definition of IAS as one type of electronic communications service in art. 2(6) EECC, it must not be forgotten that the OIR itself builds on the Code.<sup>24</sup> Characterisations of the relationship between the two instruments in the recitals of the latter<sup>25</sup> do not prejudge the legal construal thereof.
27. Notably as regards the publication of information regarding Internet access services, art. 104(1)(1) EECC provides not only additional obligations relative to arts 102 and 103 of the Code, but also relative to art. 4(1)(2) OIR, as BEREC recognises<sup>26</sup>.

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<sup>22</sup> BoR (19) 189, para. 4, at 2.

<sup>23</sup> BoR (19) 189, para. 22, at 6 and para.30, at 7.

<sup>24</sup> Art 2 OIR i.c.w. art. 125 EECC.

<sup>25</sup> Recital 36 EECC.

<sup>26</sup> BoR (19) 189, para. 52, at 19.

28. Conscious of the relationship between the two instruments, the Union legislature could not, however, have meant art. 104(1)(1) EECC to simply duplicate the publication of information already required under the OIR.
29. Quite the contrary, as has been emphasised above,<sup>27</sup> that provision seeks to facilitate requirements for the publication of information over and above the information already available, but not effectively so. From this vantage point, overlaps with the requirements of the OIR could only arise where publication under the latter was shown to demonstrably not achieve effective availability.
30. As far as Internet access services are concerned, art. 104(1)(1) EECC thus provides a limitation to the residual competence expressed by art. 4(3) OIR, according to which Member States shall not be prevented from ‘maintaining or introducing additional monitoring, information and transparency requirements, including those concerning the content, form and manner of the information to be published’, as long as they comply with the OIR and with the Code<sup>28</sup>.
31. Any other interpretation, [ecta](#) submits, would inevitably undermine the purpose of art. 104(1)(1) EECC, which is precisely to create a common framework for the conditions under which competent authorities may posit additional information obligations: if Member States could simply rely on the OIR to escape the requirements of that provision, its enactment would have been meaningless. This interpretation is also confirmed by historical construal of the relevant provisions that takes due account of the evolution of the EU law concerning internet access, as outlined above at paragraph 26.
32. Taken together, these arguments underscore that the guidance BEREC is required to issue in the context of art. 104(2)(2) EECC is materially distinct from the requirements of art. 5(3) OIR, not only because of the inclusion of publicly available interpersonal communications services, but also in respect of Internet access services. For this reason, [ecta](#) does not consider the current draft an appropriate response to what is required by the Code.
33. Secondly, and in addition to the above concerns over the material scope of the guidance to be provided in accordance with the legislative mandate, [ecta](#) considers the approach proposed by BEREC also problematic with regard to the addressees of the guidance.
34. In this regard, [ecta](#) is convinced that the difference in the authorities concerned by each set of rules is material: while the OIR vests powers solely and exclusively in NRAs, art. 104 EECC addresses competent authorities whether these are NRAs or OCAs.
35. Precisely because the scope and nature of the power shared by all competent authorities is more limited, yet should be immediately accessible to all, [ecta](#) considers it appropriate to provide an integrated guidance document.

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<sup>27</sup> Art 2 OIR i.c.w. art. 125 EECC.

<sup>28</sup> Art 4(3) OIR i.c.w. art. 125 EECC.

36. An integrated set of guidelines should thus incorporate elements specific to Internet access services as relevant for competent authorities when acting under art. 104(2)(1) in execution of the empowerment granted by art. 104(1)(1) EECC. Where necessary, this may still refer to the Net Neutrality Guidelines (NNGL)<sup>29</sup> subject to clarifying the differences in competences and purpose of that guidance instrument.
37. This points, thirdly, to a final set of concerns regarding the guidance value of the guidelines if these were to cover Internet access services, as suggested, exclusively by reference to the Net Neutrality Guidelines.
38. In addition to the above arguments concerning the substantive and personal scope of art. 104 EECC, **ecta** believes that this approach would raise significant doubts about the practicality of the resultant guidance, as:
- the draft itself fails to maintain strict separation;<sup>30</sup>
  - this approach hinders, rather than promotes a coherent construal of quality of information criteria across the different types of service categories, even if this is patently required by art. 104(1)(1) EECC;
  - the Net Neutrality Guidelines have not been conceived to be used in this way, limiting both their accessibility and usefulness in the context of art. 104 EECC, especially to other competent authorities and industry;
  - even where authorities might be willing to incur the search and transaction costs involved in parallel processing, the lack of alignment between the two bodies of text is likely to raise interpretive questions that neither set of guidelines is fit to address;
  - these complications are only going to increase compliance costs, contrary to what the legislature intended,<sup>31</sup> and do so notably for smaller operators who will face difficulty in assessing NNGL relevance in the context of art. 104 EECC.
39. Considering the above elements to provide a succinct, yet compelling statement of the likely limited usefulness of a set of guidelines built around a one-way referral approach, **ecta concludes that, in sum, the arguments set out in this chapter convincingly underpin the need for one set of integrated guidelines tailored to the requirements of art. 104 EECC and asks BEREC to revise the draft in light thereof.**

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<sup>29</sup> BoR (16) 127, August 2016. **ecta** notes that the Net Neutrality Guidelines are currently under review, according to the BEREC proposal set forth for consultation in BoR (19) 179, October 2019. Upon adoption, this will change the title of the guidance to Open Internet Guidelines. This document refers to the Net Neutrality Guidelines as currently applicable guidance.

<sup>30</sup> E.g. BoR (19) 189, paras 54, at 19 and 64ff, at 21.

<sup>31</sup> Recital 272 EECC.

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### 3. Competence attribution under art. 104 EECC

40. Art. 104(1)(1) EECC grants the facultative possibility to require electronic communications providers capable of exercising effective control over service quality to publish additional information to national regulatory authorities in coordination with other competent authorities. Art. 104(2)(1) specifies the actions to be taken consistent therewith.
41. Use of the wording ‘in coordination with’, in [ecta](#)’s view, unequivocally emphasises that this competence is primarily vested in NRAs who have, nevertheless, to coordinate their possible actions with other competent authorities.
42. In this sense, Art. 104(1)(1) EECC may be construed as an instance of the task for NRAs to contribute to the protection of end-user rights pursuant to art 5(1)(2)(d) EECC, in which the legislature has deemed interagency coordination to be relevant. This, of course, bears no prejudice to either type of agency being fully bound by the objectives of the Code in exercising their powers.
43. Of course, the exercise of this coordination must occur in view of national circumstances, reflecting the distribution of competences between NRAs and other competent authorities as published and notified by the Member State under art. 5(3) and (4) EECC.
44. Yet, art. 104 EECC does not create any obligation for Member States to specifically set up other competent authorities for the exercise of the discretionary competence recognised by that provision.
45. Despite this clearly established lead role of NRAs in exercising the competence recognised by art. 104 EECC, BEREC, in the draft guidelines, argues that this responsibility of guiding the application of that provision may, ‘where relevant’, be assigned to other competent authorities, who, in such case, shall act in coordination with NRAs.<sup>32</sup> This interpretation is derived from recital 271 of the EECC, which contains wording to this effect.
46. [ecta](#) is of the view that while recitals can have an important role in clarifying the provisions of EU legislative instruments, they cannot and must not interfere with critical issues of competence attribution.
47. This is evident, as a matter of law, already from the fact that art. 104 cannot reverse the assignment of competences in art. 5(1) EECC. This is further corroborated by the unmistakable obligation for Member States under art. 5(1)(5) EECC to promote stability in the competences of NRAs relative to the 2009 regulatory framework when transposing the Code.
48. Moreover, the BEREC Regulation<sup>33</sup> clarifies that where the views of other competent authorities are to be considered (at working group level), such consideration must not

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<sup>32</sup> BoR (19) 189, para. 14, at 4.

<sup>33</sup> Regulation (EU) 2018/1971, (2018) OJ L321/1.



compromise BEREC's independence,<sup>34</sup> including NRAs as its constituent members.<sup>35</sup> This reaffirms that the legislative framework clearly aims to safeguard NRAs' autonomy in pursuit of their statutory tasks and not to subjugate them to other authorities' decisions.

49. Also specifically with regard to the preparation of the present draft guidelines, the BEREC Regulation stipulates that the views of other competent authorities shall be considered,<sup>36</sup> without this implying any reversal of competences in acting pursuant to art. 104 EECC. Indeed, it would be in manifest contradiction of EU law on the matter if the authorities to be consulted at the level of guidance preparation were subsequently to determine how the competences concerned by that guidance should be exercised.
50. Incidentally, **ecta** observes that the draft guidelines make no reference to the involvement of other competent authorities in their preparation. Also from this perspective, any explicit endorsement for such authorities to lead the exercise of competences under art. 104 EECC would appear misplaced.
51. **ecta** is concerned that these draft guidelines, too,<sup>37</sup> place little emphasis on the institutional underpinning for the operational functioning of the substantive rules on which guidance is provided.
52. Considering both the clear mandate for Member States to preserve institutional stability and the explicit and extended assignment of tasks to national regulatory authorities under the Code, in combination with the significantly increased number of rules and potentially associated compliance obligations, it is key for providers, and their associations, to be able to confidently identify relevant institutional interlocutors.
53. This is of particular relevance to smaller operators whose primary investment is in the delivery of competitive provisioning to end-users' benefit, and applies *a fortiori* where legislation foresees new, yet vaguely circumscribed coordination arrangements. The impact of institutional complexity on compliance costs, which this provision is to reduce,<sup>38</sup> also deserves special consideration in this context.
54. **ecta** therefore invites BEREC to clarify the guidelines to the effect that
- **art. 104 EECC unambiguously invests primary competence to act under that provision in NRAs, in views of their knowledge of the special characteristics of electronic communications markets and their day-to-day functioning<sup>39</sup>;**

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<sup>34</sup> Recital 25 i.c.w. art. 8 BEREC-R.

<sup>35</sup> Art. 7(1)(2) BEREC-R.

<sup>36</sup> Art. 13(3)(4) BEREC-R.

<sup>37</sup> **ecta** has previously articulated its concerns about institutional aspects in responses regarding guidelines to be elaborated under the Code, most recently in its response to the BEREC consultation on geographical surveys.

<sup>38</sup> Recital 272 EECC.

<sup>39</sup> Art. 104 EECC i.c.w. arts 5(1)(2) EECC and 7(1)(2) BEREC-R.

- where other competent authorities are being associated to such actions, the coordination between them and NRAs must be led by the latter – in no case does art. 104 allow for full devolution of decision-making competences to such other competent authorities;
- regulatory relations and communications with market participants, including compliance matters, remain with the ambit of national regulatory authorities;
- coordinated action must be procedurally predictable to the same standard as NRA decision-making, minimise providers' transaction and compliance costs, and avoid any situations of, or akin to, double jeopardy with regard to subject matter of art. 104 EECC;
- under art. 104 EECC, national regulatory authorities should serve as the sole direct interlocutor for electronic communications providers and ascertain efficient discharge of any coordination without prejudice to providers' procedural rights.

55. In practical terms, **ecta** and its members expect NRAs to mediate exchanges with OCAs engage with these other authorities on the sector's behalf, ensuring notably appreciation of its competitive make-up and the implications this has, inter alia, for the degree of control that can be exercised by different types of service providers.

## 4. Responses to BEREC questions

### 4.1. Horizontal considerations

#### 4.1.1. *The role of end-user equipment and of the network termination point*

56. As an preliminary remark to the below responses to BEREC's questions, **ecta** underlines that quality of service in its understanding must consistently be determined at network level to ensure that determinations are as objective and non-discriminatory as possible.
57. It must be acknowledged that the influence of terminal equipment choices lies outside the providers' realm of control and that any impact deriving from such choices, as has been demonstrated by NRAs' own investigations, for example, into speech quality of voice communications with different mobile handsets, have to be attributed to equipment manufacturers and to customers choosing to use their equipment.
58. Accordingly, providers' responsibility for the quality of Internet access services and interpersonal communications services should only be assessed against parameters that exclude factors related to terminal equipment. This position is both consistent with ETSI specifications<sup>40</sup> and with BEREC's own conceptual analysis of the relation between the rules for terminal equipment and electronic communications networks<sup>41</sup>.

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<sup>40</sup> ETSI ES 202 057-1 V2.1.1 (2013-01), at 7, 16; prior version, as cited in Annex X, ETSI ES 202 057-1 V1.3.1 (2008-07), at 5.

<sup>41</sup> BoR (19) 181, 3.10.2019, at 4.

59. The network termination point thus naturally marks the only point for which electronic communications providers should be required to provide additional QoS information that demonstrably is not otherwise effectively available. As [ecta](#) has explained in its position on the identification on the network termination point, the latter's location varies as a result of topological considerations.
- 60. In conclusion, [ecta](#) emphasizes that competent authorities should, upon proving an objective lack of effective information availability, focus on specifying quality of service parameters in line with the foregoing considerations as well as on promoting end-user awareness thereof. [ecta](#) believes it decisive for end-users to understand the influence they have on quality of service through their equipment choices as well as the role of the network termination point as the limit to quality of service parameters.**

#### *4.1.2. The role of standards*

61. As is clear from the structure and the content of art. 104 and Annex X of the Code, standards are essential to the specification of meaningful quality of service parameters for key dimensions of the functioning of Internet access services and interpersonal communications services.
62. Without prejudice to the more detailed discussion below, [ecta](#) at this stage wishes to emphasize the market-driven nature of standardisation processes. This implies that standards choices should be appropriately linked to market technological development, and rule-making and guidance reflect advances therein, as appropriate.
63. Notably in the field of quality of service parameters, [ecta](#) believes that the implications of updates and changes to relevant standards for compliance costs, especially those faced by smaller competitive operators that may not be directly involved in standardisation activities, should be taken into consideration.
64. At the same time, standards' continued relevance must continuously be re-evaluated as the category of number-independent interpersonal communications services illustrates.
65. As the draft guidelines do not seem to address this aspect explicitly, [ecta](#) encourages BEREC to introduce general considerations along the above lines as well as to ensure the applicability of Annex X standards to new forms of electronic communications services as well, to the extent they come within scope of art. 104 EECC and insofar the technical considerations remain applicable.
66. At the same time, [ecta](#) considers that the number of standards should be kept as small as possible when specifying quality of service parameters pursuant to that provision in order to ensure accessibility and keep compliance manageable. As a general principle, this should mean that concurrent citation of multiple standards should be avoided, also in interest of reducing compliance costs.
67. [ecta](#) encourages BEREC to include in the guidelines, and maintain, a list of references to the standards on whose basis the guidance is set forth. Where possible, these references should link directly to the online versions of the relevant standards.

68. In this regard, **ecta** welcomes BEREC's proposal to conduct a review of the guidelines on a regular basis.<sup>42</sup> These reviews would be the right moment to update the standards references.

#### 4.1.3. *The role of differences among end-users*

69. Final among these horizontal remarks, **ecta** wishes to highlight the possible need to adapt quality of service parameters according to the group of end-users to which they relate.

70. Art. 104 EECC recognises in this respect the special needs of end-users with disabilities, and **ecta** comments on BEREC's proposals in this regard in section 4.3 below.

71. To reduce unnecessary burdens, **ecta** emphasizes that certain user groups, such as business users, may both have special expertise in standards and differentiated quality of service needs, so that general quality of service parameters may be of less relevance to them.

72. **ecta** encourages BEREC to introduce this consideration into the guidance in order to make sure that informational obligations under art. 104 EECC remain strictly proportionate in scope in terms of their publication requirements where a demonstrable need for ensuring the effective availability of information has been established.

#### 4.2. Question 1: Information quality of QoS parameters and measurement methods

##### **Consultation Question 1**

1. According to Article 104 of the EECC information required from providers on the quality of their services should be comparable, reliable, user-friendly and up-to-date. Do you believe the parameters and measurement methods in Table 2 are suitable for this purpose? If not, please explain why and the possible changes that could be made to improve the information.

#### 4.2.1. *Introductory considerations*

73. In section 4, BEREC presents two tables with quality of service parameters. Table 1 presents a selective consolidation and extension of Annex X EECC, while Table 2 suggests a number of additional quality of service parameters.

74. **ecta** notes that national regulatory authorities, in specifying quality of service parameters and measurement methods, shall, according to art. 104(2)(1) EECC, use the parameters, definitions and measurement methods of Annex X, where appropriate.

75. In this light, and in view of BEREC's mandate to adopt guidelines detailing relevant quality of service parameters, **ecta** observes that the draft guidance fails to provide for clarification of the circumstances in which it will be appropriate to rely on Annex X standards.

76. While paragraph 42 makes reference to factors to be considered when determining when a parameter may be appropriate, **ecta** finds these to be rather wide and to provide little concrete guidance. If, however, the **appropriateness test of the second sentence of**

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<sup>42</sup> BoR (19) 189, para. 72, at 22.

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**art. 104(2)(1) EECC** is to effectively shape decision-making, including barring inappropriate uses, more detailed discussion appears necessary.

77. **ecta** finds discussion of this question of significant importance to the proportionality of quality of service information provisioning as well as to its cost-effectiveness, and thus to the objective of reducing providers' compliance costs.
78. Unfortunately, BEREC's benchmarking exercise reported in Annex 3 provides, as far as visible, but for three examples of NRA use of standards towards quality of service ends, and thus provides no convincing basis for establishing when reliance on the Code's quality of service parameters will be appropriate and when it will not. Moreover, among these three examples, one, which is not an Annex X-endorsed standard,<sup>43</sup> only refers to measurement methodology, whilst the other two focus exclusively on call waiting times for customer support,<sup>44</sup> and thus an ancillary aspect of the quality of electronic communications services.
79. Overall, the draft guidelines thus currently offer little orientation for NRAs on how to decide about the appropriateness of using a given parameter from Annex X. **ecta** encourages BEREC to adopt a goal-oriented approach in this respect by examining how well different parameters are able to address an effective lack of information to the public relative to other available means, including existing provider practices and their adaptability to changing requirements.
- 80. ecta thus invites BEREC to revisit section 4 of the draft guidelines with a view to ensuring that appropriateness is interpreted consistently with the requirement of establishing a lack of effective availability of information to the public that parameters may be selected to address, while remaining mindful the objective of enhancing comparability and reducing compliance costs. Such consideration should also take account of the use of Annex X required by section I.1.i of Part B of Annex VIII.**

#### *4.2.2. Lack of guidance on Internet access services*

81. As detailed further in chapter 2 above, **ecta** considers, for a variety of reasons, that the draft guidelines should be revised to provide guidance on Internet access services as well as interpersonal communications services.
82. Non-inclusion in the guidelines of the third table relating to Internet access services in Annex X would appear to be in manifest disagreement with the contents of the scope of art. 104(2) EECC and with fostering consistent application thereof and of Annex X.
83. **ecta** also considers that by not providing guidance on this dimension, the draft guidelines also let the opportunity unseized to clarify the relation between transparency measures under art. 4(1) OIR and informational requirements pursuant to art. 104(1) EECC. This

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<sup>43</sup> BoR (19) 189, at 31.

<sup>44</sup> Even though one of these indicators is derived from an Annex X-endorsed standard, it is not a relevant quality of service parameter under Annex X; BoR (19) 189, at 32.

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being a question genuinely relating to art. 104 EEC, **ecta** considers the Net Neutrality Guidelines not to be the right place to address this.

84. **Based on the above considerations, **ecta** here repeats its call for a set of integrated guidelines tailored to the requirements of art. 104 EEC and asks BEREC to revise the draft in light thereof (see already paragraph 39 above). This should include an adjustment to Table 1 and accompanying footnote 22.**

#### 4.2.3. *Guidance on interpersonal communications services*

##### 4.2.3.1. Table 1

85. **ecta** explicitly welcomes the idea underlying Table 1 of including details on definitions and measurement methods from relevant ETSI standards documents into the guidelines.
86. Likewise, **ecta** generally endorses BEREC's proposal to close the gaps left by the legislature in respect of specifying definitions and measurement methods for call signalling delays and failure probability.
87. As set out above, **ecta** considers, however, that Table 1 requires extension to cover Annex X in its entirety.
88. Furthermore, **ecta** considers the manner in which the idea of providing substantive information through the guidelines has been implemented, not to achieve the desired effect, for the following reasons.
89. First, standards documents are referenced without indication of versioning information or indication of whether the information provided is reflective of all versions of the standard in question. This means that guidance users will have to review the source documents to determine applicability, which is likely to increase implementation and compliance costs.
- 90. **ecta** therefore asks BEREC to specify the relevant versions of standards being cited.**
91. Secondly, review of the relevant standards documents shows that even definitional sections are only quoted in part,<sup>45</sup> without these limitations being made clear.
92. Where remaining definitional elements may give rise to different interpretations that may impact on their regulatory assessment, derived information requirements and the application of measurement methods, this should be clear from the guidelines.
93. Moreover, **ecta** notes references in respect of definitions to be insufficiently precise when they refer to all information relating to a parameter in the sense of the Code rather than to the specific definitional part of the standard.<sup>46</sup>

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<sup>45</sup> Cf., e.g., definition of 'Supply time for initial connection' at 10 with 'Supply time for fixed network access' in ETSI ES 202 057-1 V1.3.1 (2008-07), at 16.

<sup>46</sup> Op.cit., the definition in the preceding footnote refers to clause 5.1 rather than to the definition in clause 5.1.1.

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94. **In this regard, ecta asks BEREC to clarify its approach to definitional practice and ensure precise referencing throughout to ensure ease of use, avoid ambiguities and minimise interpretive discrepancies likely to increase compliance costs.**
95. Thirdly, it appears that Table 1 contains manifestly incorrect information. The definition of ‘supply time for initial connection’ illustrates this when stating that it is ‘Applicable to both fixed and mobile services’,<sup>47</sup> even though the relevant standards clause holds that ‘The QoS parameter is applicable to fixed direct services only.’<sup>48</sup>
96. The value of the guidelines as a guidance document derives from their correctness and trustworthiness as a point of reference. It is therefore essential for them to be free from factual error.
97. **Accordingly, ecta asks BEREC to review the contents of Table 1, in the context of its revision, and correct all information that does not reflect the underlying standards documents.**
98. Fourthly, the table, which is intended to present an expanded, more information-rich version of Annex X, includes on four occasions references to multiple standards for the same parameter.<sup>49</sup>
99. In addition to not being within the scope of Annex X, ecta notes that these standards often lack full accompanying information, use unexplained acronyms and generally are difficult accessible.
100. There are also instances in which two standards are cited in parallel without clear distinction,<sup>50</sup> examples of unexplained mixtures between different standards families<sup>51</sup> and lack of correspondence between the standards in the parameter definition and in the related specification of the associated measurement method<sup>52</sup>.
101. ecta considers this presentation to be unclear and confusing to readers, and thus standing in the way of the document achieving the objective of providing useful guidance on the points in question.
102. **ecta here requests BEREC to clearly separate definitions and measurement methods for quality of service parameters that have been specified in Annex X from other standards, to clarify the scope of application of the latter and to explain, where they overlap with the specifications in Annex X, what the relation between them is. To the extent that such alternative specifications allow for less onerous measurement**

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<sup>47</sup> BoR (19) 189, at 10.

<sup>48</sup> ETSI ES 202 057-1 V1.3.1 (2008-07), clause 5.1.2, at 17.

<sup>49</sup> See ‘Call set-up time’, ‘voice connection quality’, ‘dropped call ratio’, ‘unsuccessful call ratio’

<sup>50</sup> See the definition the of voice connection quality, at 11.

<sup>51</sup> See measurement method for voice connection quality, at 11.

<sup>52</sup> Cf. definition and specification of measurement method for voice connection quality, at 11.



**approaches, this would appear to constitute a relevant element in the context of appropriateness considerations as outlined above (see paragraphs 73 to 80).**

#### 4.2.3.2. Table 2

103. **ecta** notes that BEREC in Table 2 details a set of quality of service parameters not set out in Annex X of the EECC.<sup>53</sup>
104. At face value, **ecta** is unclear as to the basis for the inclusion of these additional elements under art. 104 EECC.
105. When the accompanying paragraph suggests these parameters to be similar to those contained in Table 3 due to not having been set out in Annex X, **ecta** finds this argument unconvincing. While art. 104(2)(2) EECC explicitly includes ‘parameters relevant for end-users with disabilities’ within BEREC’s mandate for action under that provision, to which Table 3 may be seen to respond, the same cannot be said of the parameters in Table 2.
106. More important still is the consideration that BEREC does not provide any reasoning to suggest that any of these quality of service parameters would be required in terms of a demonstrable need for information not effectively available to the public.
107. It is particularly puzzling for **ecta** to note that, despite the self-imposed restraint on the scope of its draft, BEREC here suggests that customer service parameters for interpersonal communications services based on telephony should be equally applicable to Internet access services.<sup>54</sup>
108. Moreover, **ecta** observes that some of the suggested specifications appear problematic, such as when the number of customer requests for technical and commercial support are considered to constitute appropriate measurement methods for the frequency of customer complaints.<sup>55</sup>
- 109. Overall, ecta is unconvinced of the need for the proposed additional quality of service parameters in Table 2, and therefore urges BEREC to remove it in the course of finalisation.**
- 110. ecta believes this to provide substantive demonstration of the need to ensure that the guidelines must be careful to thoroughly justify inclusion of any additional quality of service parameters, not only as responding to a clearly discernible and demonstrable need, but also in terms of the balance between their effectiveness and cost impact. Should BEREC consider there to be informational concerns regarding these quality of service aspects, ecta would invite targeted investigation thereof and potential reconsideration for the need for guidance in the context of a future review of the guidelines.**<sup>56</sup>

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<sup>53</sup> BoR (19) 189, at 13; see also para. 43.

<sup>54</sup> BoR (19) 189, para. 43, at 13.

<sup>55</sup> BoR (19) 189, at 14.

<sup>56</sup> BoR (19) 189, para. 72, at 22.



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#### 4.2.4. Informational quality of quality of service parameters

111. As to the question whether the quality of service parameters set out in Table 2 comply with the criteria of art. 104(1)(1) EECC, **ecta** has the following observations.
112. First, **ecta** is unclear both to the non-inclusion of Table 1 within the remit of the question and to the exclusion of the criterion of comprehensiveness.
113. **ecta** also finds it problematic for BEREC to present this question without having elaborated upon its understanding of the information quality criteria in art. 104(1)(1) EECC, which it sets out only in the context of Question 3. **ecta** refers to its response in that context for details on its views regarding BEREC's proposed interpretation of those criteria.
114. Generally speaking, **ecta** considers ETSI standards by definition comparable and reliable, providing that their implementation is consistent and limitations are clearly acknowledged. **ecta** finds it unfortunate that BEREC's draft guidelines do not include such consideration where such is clearly set out in the standards documentation itself.<sup>57</sup>
115. As regards their ability to provide up-to-date information, **ecta** has already remarked upon the limitations deriving from a lack of versioning information (see paragraph 89f), and calls upon BEREC to address this as well as the various other issues observed with regard to the accuracy, accessibility and guidance value of the presentation of quality of service parameters.
116. **ecta** would add to this that to the extent that the criterion of 'up-to-date' refers to providing the most accurate reflection of underlying technological reality, this may not be achievable where the standard specification has evolved in a setting that did not yet include more recent technology to which the standard may subsequently be assimilated. Even when standards are elaborated with the aim of being applicable in a technology-neutral manner,<sup>58</sup> guidance such as the present guidelines should confirm this to be the case, notably in view of the difference between traditional telephony and IP transmission.
117. Finally, **ecta** wishes to underline that the informational quality to a certain extent depends on end-users themselves. As ETSI has correctly pointed out, 'It is important that the reader is aware of the scope of the parameters and with that of the correct application of the QoS statistics, otherwise there is a high risk that the measurement results are misinterpreted.'<sup>59</sup>
118. In this context, **ecta** is concerned that the assumption for readers 'interested in comparable QoS statistics and QoS parameters of different nature' to also be 'willing and capable to understand technical and operational background information on telecommunication services',<sup>60</sup> even if it were still applicable, to not uniformly apply to all end-users.
119. Therefore, **ecta** calls on BEREC to ensure that it and its members, as well as competent authorities with whom they act in coordination, accompany the present guidance with

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<sup>57</sup> E.g., ETSI ES 202 057-1 V1.3.1 (2008-07), clause 4.8, at 13.

<sup>58</sup> E.g., ETSI ES 202 057-1 V1.3.1 (2008-07), clause 1, at 7.

<sup>59</sup> ETSI ES 202 057-1 V1.3.1 (2008-07), clause 4.9, at 13.

<sup>60</sup> Ibid.

appropriate outreach activities to foster end-user appreciation of any mandated quality of service parameters, where these fulfil the requirements of art. 104 EECC.

#### 4.3. Question 2: Information quality of QoS parameters and measurement methods for disabled end-users

##### **Consultation Question 2**

2. According to Article 104 of the EECC information required from providers on the quality of their services and on the measures taken to ensure equivalence in access for end-users with disabilities should be comparable, reliable, user-friendly and up-to-date. Do you believe the parameters and measurement methods in Table 3 are suitable for this purpose? If not, please explain why and the possible changes that could be made to improve the information.

##### *4.3.1. Introductory remarks*

120. ecta welcomes specific attention to the issues of quality of service and equivalent access for end-users with disabilities in the context of art. 104 EECC.
121. The drafting of the provision, here as elsewhere, raises difficult interpretative questions, which neither the consultation question, nor section 5 of the draft guidelines addresses. As these questions have immediate relevance to the appropriate scope of the guidance, ecta wishes to highlight a number of their implications.
122. In ecta's understanding, the draft guidelines focus predominantly on possible measures to ensure equivalent access for disabled end-users and their quality, rather than on the quality of service of the interpersonal communications services (or the Internet access services) that these users receive and the associated need for information provisioning where it is demonstrated that information is not effectively available.
123. The measures set out in Table 3, as far as they fall within the domain of electronic communications providers, concern access services or associated facilities. Considering the significant degree of ambiguity in the Code, ecta is not, as a matter of principle, opposed to some form of guidance on such services.
124. At the same time, ecta believes that the quality of those services should be clearly distinguished from the general quality of service specifications in the context of Internet access services and interpersonal communications services, including the elements set out in Tables 1 and 2, as discussed in section 4.2 above.
125. Moreover, the guidance should take pain to clarify – also in view of recent discussions on the contract summary template under art. 102(3) EECC – what may legitimately be expected from information requirements for disabled end-users that fall within the scope of art. 104 EECC.

##### *4.3.2. The role of equipment and distribution of responsibilities between Member States and providers*

126. In this respect, ecta considers that the guidelines should stress that where equivalence measures are further or indeed primarily conditional on, or influenced in their effectiveness by, special terminal equipment or equipment features catering to the needs of the end-user, this dependency should be flagged. In this respect, ecta observes that most of the

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parameters in Table 3 appear to be equipment-related and thus outside the provider domain.

127. If that equipment is such as to affect signal transmission (e.g., by forced signal conversion), it should be considered whether it would qualify an external factor in accordance with art. 104(1)(1) EECC, and, if so, how information about such equipment can be made available to all electronic communications providers in need thereof in non-discriminatory fashion.

128. More generally, [ecta](#) considers it critical for the guidelines to give prominent exposure to the fact that Member States, pursuant to art. 85(4) EECC, are under an obligation to ensure:

- appropriate support to consumers with disabilities, and
- related terminal equipment and specific equipment and services enhancing equivalent access being available and affordable.

**129. To this end, [ecta](#) specifically calls on BEREC to ensure rectification of the reference in paragraph 45 of the consultation document and for a clearer exposition of its context (see section 4.3.3. below).**

130. Such balanced exposition is important to ensure that all parties, and most important the end-users concerned, are aware of the various sources of support and of measures to enhance equivalence of access to interpersonal communications services and to Internet access services.

#### *4.3.3. Appropriate guidance contextualization*

131. Article 85(4) EECC regarding the affordability of universal service clarifies that measures to enhance equivalent access have a special status among Member States' responsibilities to enable all citizens to benefit from a safety net that enables full participation in today's society, notably through adequate broadband connectivity.<sup>61</sup>

132. To the extent that the provision of equivalent access is required only of universal service providers, any special informational requirements should be explicitly limited to those providers, so as to minimise compliance costs for others.

133. In general, national regulatory authorities, whether acting alone or in coordination with competent authorities, should take care to require publication of information concerning equivalence measures in full consideration of the operational impact of such requirements on providers, notably smaller and medium-sized operators.

134. Considering that the market for purpose-tailored solutions for disabled end-users is limited, especially where obligations have been imposed in the context of universal service, [ecta](#) believes that such requirements should be limited to providers having announced their intention to provide such services.

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<sup>61</sup> Cf. also recital 213 EECC.

135. In any case, proportionality in the administration of informational obligations under art. 104 EEC requires, in **ecta**'s view, that such informational requirements should not be imposed on providers unable to meet them.

#### 4.3.4. Specification of quality of service parameters

136. As regards the specification of quality of service parameters, the remarks set out in discussing Table 1 (see paragraphs 85 to 102) apply *mutatis mutandis*.

137. In view of the special role that equipment-related considerations play in this context, as set out above (see paragraphs 126 to 129), BEREC should take particular care in finalising the guidelines to clarify the extent to which electronic communications providers may be concerned by these specifications and how the relevant measurements are to be conducted.

#### 4.3.5. Informational quality of quality of service parameters

138. As regards the information quality of quality of service parameters, the same comments as in response to Question 1 apply (see paragraphs 111 to 119).

### 4.4. Question 3: Publication modalities

#### **Consultation Question 3**

**3. Do you agree with the Guidelines outlined above covering Publication of Information? Please provide comments if any.**

#### 4.4.1. Introductory remarks

139. As explained in chapter 1 of this contribution, **ecta** considers that the imposition of new publication requirements must occur only subject to an objective necessity test being fulfilled that establishes the demonstrable need for the information made subject to such requirements.

140. **ecta** notes that BEREC with the guidance set out in this section appears to exceed the scope of its mandate pursuant to art. 104(2)(2) EEC, which includes '*the content and format of publication of the information*' (our emphasis), but not the content and format of the information itself.

141. In this sense, **ecta** considers that the qualitative criteria that information should fulfil under art. 104(1)(1) EEC are beyond the scope of this guidance.

142. Accordingly, **ecta** considers that these criteria should initially be construed in accordance with national circumstances, while building, as far as possible, on available standardised quality of service parameters. A future review of the guidelines<sup>62</sup> could assess national application with a view to establishing a pan-European interpretation of those criteria on the basis of national practice.

143. **ecta** offers the following observations in a constructive spirit to ensure that any guidance that might nevertheless be maintained is as useful as possible to both interpersonal

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<sup>62</sup> BoR (19) 189, para. 72, at 22.

communications services and Internet access services, and in this sense is aligned with existing BEREC guidance on corresponding aspects of the OIR, in order to ensure comparability, where useful, and reduction in compliance costs.

#### 4.4.2. Criteria for information quality

##### 4.4.2.1. Comprehensive

144. **ecta** has doubts about all of the elements of the proposed definition of comprehensive information as being ‘complete/statistically representative as well as understood by members of the intended audience.’<sup>63</sup>
145. First, It is unclear what relevance ‘statistical representativeness’ has in relation to the provider providing the information.
146. Furthermore, **ecta** does not consider intelligibility to form part of comprehensiveness and therefore proposes to exclude it from the notion of ‘comprehensive’. As far as relevant, this aspect should be discussed jointly with the criterion ‘user-friendly’ (see below).
147. **ecta** proposes to interpret the term ‘comprehensive’ as either ‘far-reaching’, ‘broadly covering’ or ‘covering all essential elements’. Depending on appropriate clarity as to the meaning of statistical representativeness (see paragraph 145 above), this could be linked to a prohibition of publishing manifestly unrepresentative elements of information.
148. As no provider can ensure that information will be understood by all potential addressees, such a standard, as suggested by BEREC,<sup>64</sup> is inappropriate in the context of requirements for information to be communicated to the public, as is the case under art. 104(1)(1) EECCE, and should therefore be deleted.
149. **ecta** proposes to replace this test by ‘intelligible’ or ‘easily understandable’, with due qualification of the limits arising from the requirement for information to simultaneously meet a series of additional criteria, as discussed below.

##### 4.4.2.2. User-friendly

150. As regards the notion of user-friendly information, **ecta** believes that this concept should, as far as possible, be aligned with the notion ‘clear and comprehensible’ under art. 4(1) OIR, as interpreted by the Net Neutrality Guidelines,<sup>65</sup> excluding those defining elements of the latter, which are listed explicitly in art. 104(1)(1) EECCE (‘comparable’ and ‘up-to-date’), that is to say:
  - Easily accessible and identifiable for what it is;
  - Accurate;
  - Meaningful to end-users, i.e. relevant, unambiguous and presented in a useful manner;

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<sup>63</sup> BoR (19) 189, para. 56, at 19.

<sup>64</sup> BoR (19) 189, para. 56, at 19.

<sup>65</sup> BoR (16) 127, para. 130 at 31.

- Not creating an incorrect perception of the service provided to the end-user;

151. The above criteria, **ecta** considers, already cover the suggested requirements for information ‘not to be phrased in abstract or ambivalent terms’ and to be ‘preferably using clean and plain language [...]’<sup>66</sup>, and would therefore suggest their deletion.

152. **ecta** does not support, in any case, the use of the term ‘definitive’,<sup>67</sup> which is likely to mislead end-users, notably where providers cannot fully control quality of service performance, and therefore only can provide estimates, as BEREC recognises.<sup>68</sup> What the term may usefully be intended to capture can, in **ecta**’s view, be adequately covered by the requirement of accuracy (see below).

153. Moreover, **ecta** observes an inherent contradiction between the suggested requirements to ‘promote the use of relevant standards’<sup>69</sup> and to ‘avoid unduly technical terminology’<sup>70</sup> insofar as standards themselves necessarily presuppose technical terminology, which users must, as pointed out by ETSI, be willing to understand (see paragraph 118 above).

154. To address this point, **ecta** suggests adding the following element to the above list both in the current guidance, and in the future Open Internet Guidelines: ‘Utilising standardised expressions that build, where appropriate, on relevant standards’. Accompanying guidance could clarify that recourse to standards-based expressions should preserve meaningfulness to users, acknowledging possible limits to intelligibility in line with paragraph 148f, and be assessed conjointly with the requirement for information to be reliable (see below).

155. Finally, **ecta** considers that the requirement that user-friendly information ‘should not include too detailed information’ is unclear and therefore does not promote consistent application. Accordingly, it should be deleted.

156. Where a concern about too detailed technical information is linked to the use of standards, **ecta** believes this can be clarified in that context, using a formulation like ‘not *unnecessarily* include detailed *technical* information’. It should be clear that necessity in this context is a function of the requirement to inform the end-user about the quality of the service.

#### 4.4.2.3. Comparable

157. **ecta** is unconvinced about the usefulness of discussing comparability without reference to the role of standards.

158. As stated above at paragraph 114, **ecta** considers that standards-based information generally fulfils the criterion of being comparable.

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<sup>66</sup> BoR (19) 189, para. 56, at 19 (3<sup>rd</sup>+ 2<sup>nd</sup> bullet).

<sup>67</sup> BoR (19) 189, para. 56, at 19 (2<sup>nd</sup> bullet).

<sup>68</sup> BoR (19) 189, para. 38, at 9.

<sup>69</sup> BoR (19) 189, para. 56, at 19 (1<sup>st</sup> bullet).

<sup>70</sup> BoR (19) 189, para. 56, at 19 (4<sup>th</sup> bullet).

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159. Accordingly, the text in paragraph 57 of the draft guidelines<sup>71</sup> should therefore apply only where standards-based information is not being used, subject to the above remarks on the use of standards under the criterion of user-friendliness.

#### 4.4.2.4. Reliable

160. For the following reasons, **ecta** does not agree with BEREC's proposed interpretation of what it means for information to be 'reliable'.

161. **ecta** considers the element of correctness to be appropriately covered by the criterion of accuracy, discussed above in the context of the desirable alignment between the understandings of 'clear and comprehensible' and 'user-friendly'. **ecta** also observes that information may well be reliable without therefore necessarily being correct.

162. Similar considerations apply relative to the element of non-misleading information, also discussed in the aforementioned context above.

163. Additionally, while **ecta** does acknowledge that certification mechanisms may further attest to the reliable nature of information being provided, **ecta** does not consider use of the word 'reliable' in art. 104(1)(1) EECC to provide any basis for either a requirement or a preference for the use of certification mechanisms as BEREC expresses in paragraph 58. Quite the contrary, art. 104(2)(1) EECC clarifies that certification mechanisms are but an additional possibility.

164. **ecta** therefore asks BEREC to remove any reference to preferential use of certification mechanisms, including the imprecise conditioning expression 'if such mechanisms were introduced in a *given* Member State',<sup>72</sup> which is liable to require further interpretive effort.

165. In **ecta**'s view, reliable information is information that is dependable because it is not subject to unforeseeable and unjustified alteration of underlying reporting conventions. While this is to some extent tied to the use of standards, it is more generally linked to the use of standardised, recognisable language, as discussed at paragraph 154. **ecta** suggests BEREC to build on this interpretation in clarifying the criterion of information being reliable according to art. 104(1)(1) EECC.

#### 4.4.2.5. Up-to-date

166. Finally, as regards the up-to-date nature of information to be provided, **ecta** considers the proposed guidance to be insufficiently clear and lack alignment with the purpose of the provision.

167. Art. 104(1)(1) EECC may provide a basis for national regulatory authorities, on their own or in coordination with other competent authorities, to require providers to furnish information about the quality of their services. The nature of the publicity requirement, that is, of information to be made available to the public, in **ecta**'s view excludes the provision of individualised information provisioning about end-users' 'current situation'.

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<sup>71</sup> BoR (19) 189, para. 57, at 19.

<sup>72</sup> BoR (19) 189, para. 59, at 20.



168. Similarly, the provision does not grant authority for the definition or imposition of requirements for the cyclical updating of information provided, as BEREC suggests.<sup>73</sup> **ecta** cautions that any such requirement, being out of touch with business decision-making about adjustment of product portfolios, is likely to only drive compliance costs without any material benefit for end-users.
169. In much the same vein, **ecta** also specifically contests the assertion that the requirement for information pursuant to art. 104(1)(1) EECC to be ‘up-to-date’ provides any basis for obliging providers to ‘publish information showing the most recent update of data at a minimum frequency on an annual basis’.<sup>74</sup>
170. Not only does the provision of current information about the quality of service have no discernible link to the date of publication of that information insofar as there has been no change to service characteristics, but the distinct indication of when the last update was performed constitutes an additional publication requirement that has no discernible link to art. 104 EECC and appears disproportionate to its objective of ensuring the effective availability of QoS-related information.<sup>75</sup>
171. In fact, **ecta** is concerned that insertion of the proposed guidance may have the unintended consequence of animating certain types of providers to suggest quality of service being a function of update frequency, thereby exposing end-users to confusing and substantially irrelevant information.
172. In sum, **ecta** is convinced that the common language understanding of ‘up-to-date’ as ‘current at the time of publication’ is wholly adequate to ensure that end-users will receive quality of service information reflective of network performance at such time. As **ecta** has previously emphasised, and as BEREC itself has recognised, too,<sup>76</sup> providers have all commercial incentive to not supply outdated information that will either negatively affect their ability to compete or expose them to customer complaints.
173. Accordingly, **ecta** invites BEREC to build on this understanding if it plans to maintain guidance on the criteria, having given full consideration to the concerns set out at paragraph 140f above.

#### 4.4.3. *Publication modalities*

174. The principal purpose of art 104(1)(1) EECC, as has been elaborated in chapter 1 of this response, is to ensure the availability of information through publication where it has been demonstrated that it otherwise would not be effectively available to the public.

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<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> Incidentally, **ecta** observes that the blanket reference to ‘data’ in the suggested guidance element appears to constitute a misspecification, in addition to lacking adequate specificity.

<sup>76</sup> BoR (19) 189, para. 14, at 4.



175. Paragraphs 60 to 63 of the draft guidelines deal specifically with aspects relating to the ways and means of ensuring publication. Below, [ecta](#) sets out its comments on the proposed guidance in this regard.
176. [ecta](#) prefaces its comments by noting that in this domain, which is of particularly far-reaching practical relevance, the draft at the same time appears to be particularly lacking in terms of justification of its proposals, including notably in terms of their contribution to achieving the objective of that provision, but also in drafting clarity. Without this concern being addressed at a general level, together with the specific observations that follow, [ecta](#) considers this part of the guidance as unfit for publication.
177. BEREC introduces its considerations relating to publication modalities by establishing as a premise that information should be ‘accessible for the broadest possible group of end-users.’<sup>77</sup>
178. [ecta](#) is not fully convinced by this premise. As BEREC itself notes further on,<sup>78</sup> according to the relevant customer group, it may indeed be relevant to assess the effective availability of information at the level of different retail customers. As the assessment may vary by group, a broadest possible default may be inappropriate. Considering the substantial cost implications that overprovisioning requirements may have, especially for smaller operators, the guidance should appropriately clarify this aspect.
179. As regards the various technical options for publication set out in that paragraph, [ecta](#) at this stage only has the following remarks on the European Accessibility Act and on the Web Accessibility Directive.
180. With regard to the European Accessibility Act, BEREC should clarify why it references the general accessibility requirements of Section III of Annex I of the European Accessibility Act rather than the service-specific requirements for electronic communications services in Section IV(a), also in view of its approach in Table 3, as discussed in the context of Question 2 above.
181. As regards the reference to the Web Accessibility Directive,<sup>79</sup> [ecta](#) observes that
- That directive generally is not binding on electronic communications providers;
  - Yet, that directive includes a disproportionate burden test, which, where it is met, allows concerned public sector bodies to not implement accessibility requirements under that directive.
182. [ecta](#) urges BEREC to recognise both the appropriateness of a disproportionate burden test and to introduce a corresponding differentiation along the criteria of size, resources and nature in respect of providers that national regulatory authorities (and other competent authorities with whom they coordinate their activities) should take utmost account of.

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<sup>77</sup> BoR (19) 189, para. 60, at 20.

<sup>78</sup> BoR (19) 189, para. 62, at 20.

<sup>79</sup> [ecta](#) observes that the numerical reference given should be corrected to ‘2016/2102’.

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183. Furthermore, [ecta](#) also asks BEREC to clarify that the requirements that NRAs might deem appropriate under art. 104 EECC can in no case oblige providers to create dedicated websites or mobile applications to comply with those obligations, contrary to what paragraph 60 might suggest.
184. As regards the possible alternatives of direct and indirect publication of information mandated under art. 104(1)(1) EECC, [ecta](#) calls on BEREC to underline that, by default, direct communication channels under the providers' control should be privileged.
185. Where publication via channels controlled by third parties is required, NRAs should guarantee that this does not incur any additional cost or difficulty for providers. Where NRAs choose to (re)publish information themselves, or where third parties do so without the provider's request, providers must disinvested of all responsibility for the information published.
186. When BEREC further recognises, as mentioned above,<sup>80</sup> that NRAs might invite providers to published information with regard to different levels of aggregation or different end-user groups, [ecta](#) believes that greater clarity is required as to the basis for such requests. BEREC refers to such publication contributing to the achievement 'of objectives' without clarifying what these might be.
187. [ecta](#) would notably caution that art. 104(1) EECC does not give NRAs licence to request the publication, or indeed production, of information simply for comparability purposes.
188. While comparability should be a natural consequence where the imposition of additional informational requirements has been justified in respect of a specific provider, relative to all other providers similarly obligated, art. 104(1)(1) EECC does not serve to promote comparability *in abstracto*, without demonstrated need for the information in question: for if the quality of service-related information is already available, this availability will facilitate comparison.
189. Therefore, BEREC should, in [ecta](#)'s view, take care in specifying the preconditions for such informational duties and notably unpack and clarify the formulation 'depending on the level of availability of information to the public, QoS parameter or service',<sup>81</sup> which in its current form is not sufficiently intelligible to provide guidance value.
190. Finally, BEREC closes its remarks on publication modalities with the self-standing paragraph, 'To that end, and to enhance overall publication, some consideration of QoE (quality of indicators) indicators shall be included wherever possible.'
191. [ecta](#) considers that this paragraph unfit for inclusion in the guidelines, as it remains unclear what purpose is initially being referred to. Moreover, the expression 'to enhance overall publication' is not only unclear in terms of its meaning, but also lacks any basis in article 104 EECC.

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<sup>80</sup> BoR (19) 189, para. 62, at 20.

<sup>81</sup> BoR (19) 189, para. 62, at 20.

192. Additionally, the paragraph suggests mandating publication of QoE indicators, when these are both clearly outside the scope of this provision, as BEREC itself recognises,<sup>82</sup> and the wording suggesting an obligation is inappropriate in a guidance document, especially where the basis for such interpretation is missing.

#### 4.4.4. Conclusion

193. **Overall, ecta considers the facts that its above comments reveal a significant number of interpretative concerns and, at the same time, substantially exceed the size of the proposed guidance, to illustrate a need for that guidance either to be abolished or to be thoroughly revised prior to issuance.**

194. **Should BEREC, notwithstanding the introductory concerns set out at paragraph 140f above, consider maintaining guidance on the criteria of art. 104(1)(1) EECC, ecta invites BEREC to build on the suggestions it has provided above.**

#### 4.5. Question 4: Quality certification mechanisms

##### **Consultation Question 4**

**4. Do you agree with the Guidelines on Quality Certification mechanisms?  
Please provide comments if any.**

195. BEREC closes its guidance on aspects required by art. 104(2)(2) EECC with consideration of quality certification mechanisms (QCMs) in paragraphs 64 to 71.

196. *ecta* notes that this section not only relies extensively on considerations relating to Internet access services, which BEREC had initially declared outside the scope of the guidance,<sup>83</sup> but that its undifferentiated treatment of monitoring mechanisms in the sense of art. 4(4) OIR and certification mechanisms in the sense of art. 104(2) EECC renders the relation between the two instruments less rather than more clear.

197. Furthermore, the section is drafted as if ‘competent entities’ could act independently of NRAs with regard to QCMs, which is neither compatible with the wording, nor with the systematic relationship between NRAs and OCAs and the distribution of competences among them, as explained in chapter 3.

198. On this basis, **ecta cannot endorse the contents of this section and calls on BEREC to delete it, unless it were to be comprehensively and thoroughly revised prior to publication, taking account of the following comments.**

199. The starting point and principal emphasis of any guidance on QCMs should in *ecta*’s view be that no requirement for the use of QCMs derives from art. 104(2) EECC, but that certification (see paragraph 163f above).

<sup>82</sup> BoR (19) 189, para. 21, at 5.

<sup>83</sup> BoR (19) 189, para. 4, at 2.

200. While agreeing that the Code, and specifically art. 104 EECC, does not make any provision for who may be the provider of certification services,<sup>84</sup> ecta finds the considerations set out in paragraphs 68 to 70 unconvincing.
201. BEREC here variously presents views on the requirements for providers of quality certification mechanisms,<sup>85</sup> the certification of quality monitoring mechanisms,<sup>86</sup> and the duration of the certification period and conditions for certification withdrawal,<sup>87</sup> without shedding any light on the purpose and functioning of quality certification mechanisms in the context of art. 104 EECC itself.
202. ecta also does not agree to the posited function of quality certification mechanisms that BEREC then goes on to set forth in paragraph 71 when holding that ‘certification shall ensure that the quality monitoring fulfils requirements’.
203. This interpretation appears to be grounded in a claim previously set out in paragraph 66 to the effect that it follows from art. 4(4) OIR that ‘if the NRA provides a monitoring mechanism for IAS implemented for this purposes, it should be considered as certified monitoring mechanism.’
204. ecta understands that this assertion, which does not follow from the provision itself, is a modified citation from BEREC’s Net Neutrality Guidelines.
205. However, a review of the paragraph in question,<sup>88</sup>

*The relevant facts proving a significant discrepancy may be established by any monitoring mechanism certified by the NRA, whether operated by the NRA or by a third party. The Regulation does not require Member States or an NRA to establish or certify a monitoring mechanism. The Regulation does not define how the certification must be done. If the NRA provides a monitoring mechanism implemented for this purpose [i.e. for the purpose of establishing discrepancies, OF] it should be considered as a certified monitoring mechanism according to Article 4(4).*

illustrates that certification in this context spells self-certification of monitoring mechanisms provided by NRAs. For while art. 4(4) OIR itself only refers to ‘monitoring mechanism certified by the national regulatory authority’, the above paragraph declares that monitoring mechanisms provided by NRAs should be considered as having been certified by them.

206. The function of NRAs as certification bodies for monitoring mechanisms – which this guidance undercuts by allowing NRAs to also furnish the mechanism that they are supposed to certify – has, however, no place in art. 104(2) EECC.

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<sup>84</sup> BoR (19) 189, para. 67, at 21.

<sup>85</sup> BoR (19) 189, para. 68, at 21.

<sup>86</sup> BoR (19) 189, para. 69, at 21.

<sup>87</sup> BoR (19) 189, para. 70, at 21.

<sup>88</sup> BoR (16) 127, para. 157.

207. While certification under art. 4(4) OIR serves as a means of establishing non-conformity, quality certification under art. 104(2) EECC precisely serves to establish conformity (of the published information with the applicable requirements). This reading is not only consonant with the plain difference in wording between ‘certification’ and ‘monitoring’ that BEREC ignores, but also with the difference in context between the promotion of publicity and enforcement.

**208. Therefore, ecta considers that, if maintained, this section of the guidelines should not only insist on the independence of QCM providers from providers of electronic communications,<sup>89</sup> but also from national regulatory authorities themselves, in addition to clarifying the purpose of QCMs as set out in the preceding paragraph. Moreover, it should provide indications as to the criteria with which the specification of possible QCMs by NRAs would have to comply.**

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In case of questions or requests for clarification regarding this contribution, BEREC and its members are welcome to contact Mr Oliver Füg, Director of Competition & Regulation at [ecta](#), at [ofueg@ectaportal.com](mailto:ofueg@ectaportal.com).

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<sup>89</sup> BoR (19) 189, para. 68, at 21.