



ecta RESPONSE

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

**DRAFT BEREC GUIDELINES ON
GEOGRAPHICAL SURVEYS**

**VERIFICATION OF
INFORMATION**

BoR (20) 230

27 JANUARY 2021

1. Introduction

1. **ecta**, the **European Competitive Telecommunications Association**,¹ welcomes the opportunity to comment on the third set of draft Guidelines on Geographical Surveys of Network Deployments that BEREC has drawn up.
2. This third set is entitled '*Draft BEREC Guidelines on Geographic Surveys. Verification of Information*' – BoR (20) 230², and concerns verification of information gathered by National Regulatory Authorities (hereinafter 'NRAs') and Other Competent Authorities (hereinafter 'OCAs') in the context of the implementation of Article 22 of the European Electronic Communications Code³ (hereinafter 'EECC'). They are described hereinafter as 'verification guidelines'.
3. **ecta** has **three key observations** to share with BEREC with regard to the draft 'verification guidelines'. These are contained in Section 2 below. The subsequent sections of this **ecta** response contain brief but important comments on:
 - STEP 2: Questioning the envisaged use of end-user data to challenge operators' data.
 - STEP 3 and STEP 4: Addressing security risks, and concerns about imposing unduly burdensome obligations on mobile/fixed wireless access operators and on takers of wholesale access.
 - QoS-2 Measurements.
 - QoS-3 Measurements.
 - **Section 6 on Transparency and accountability. **ecta** congratulates BEREC for adding such a section, encourages BEREC to include a transparency and accountability section systematically in all future BEREC documents, and wholeheartedly welcomes the contents of Section 6.**
4. This **ecta** response should be read in conjunction with the comments **ecta** has provided to BEREC in the context of its previous consultations on the implementation of Article 22 of the EECC, i.e. BoR (19) 182 in November 2019 and BoR (20) 168 in November 2020.

2. Key Observations

5. The three key **ecta** observations presented below apply on a transversal basis, to the entirety of the document that BEREC has made available for public consultation.

Observation 1: Legal basis and need to avoid causing competitive disadvantage

6. **Verification of information by NRAs/OCAs is not addressed in Article 22 and in corresponding recitals of the EECC. There is therefore a question as to whether BEREC 'verification guidelines', if these were to be issued, would have a solid legal basis, and would be consistent with other provisions of the EECC.**

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

² BoR (20) 230, 11.12.2020.

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

7. This is very important, given that the draft being consulted upon would ultimately result in imposing complex additional information requirements on operators, potentially representing a **disproportionate burden on smaller operators**. Attention is also needed that publication of information does not result in **causing competitive distortion or disadvantage**.
8. ecta wishes to recall that the EECC contains provisions on **proportionality of regulation** (Article 3) and on **avoiding undue burden** resulting from information requests to addressees (Recitals 57 and 59), and that all authorities concerned should **avoid causing a competitive disadvantage to any undertaking** (recital 59). **It seems questionable that BEREC's draft 'verification guidelines' readily meet these requirements.**

Observation 2: Need for consultation with operators prior to publication by NRAs/OCAs

9. ecta **explicitly supports the proposals made by BEREC about involving operators in the verification process** in the paragraphs listed below (*our paraphrasis*):
 - Para 26: Opportunity for operators to check data discrepancies – which in many cases will prove sufficient to solve a problem, even if data has already been subject to initial 'verification' by the NRA/OCA.
 - Para 62: Authority to discuss with operators the conditions that the sample of measurements needs to satisfy to conclude that data is inaccurate.
 - Para 79: Involving mobile operators in the definition of technical parameters.
 - Para 91: Publishing the principles in advance on how data quality is assured (for operators to review).
 - Para 94: Reporting on the outcome of the NRAs/OCA's own quality assurance (for operators to review).
10. ecta suggests that BEREC could and should go further in providing guidance, and indeed considers that **prior to any publication of geographic survey information by NRAs/OCAs, affected operators should be consulted individually on draft material to be published**. This is necessary in order to ensure that no undue competitive disadvantage is inadvertently caused by publications of NRAs/OCAs.

Observation 3: Need to remove unsubstantiated allegations against operators

11. ecta observes that BEREC not only suggests that data provided by an operator may be of poor quality or misleading, but also considers such data by definition as *'inaccurate'*, needing to be verified and even challenged by third-parties, by point to the *'use of third parties to find out about inaccuracies of data'* (title section 4). BEREC further uses terms such as: *'partial or incorrect'* (para 5), *'irregularities'* (para 20), *'misreported data'* (para 24) and *'suspicious'* (para 54). BEREC provides no substantiation of these points, yet it is precisely these which are invoked by BEREC as the justification for issuing 'verification guidelines' (see especially para 5).
12. **If 'verification guidelines' were to be issued by BEREC, these should not contain unsubstantiated allegations about the veracity of operators' data reporting.**

3. Comments on STEP 2: Use of third parties to find out about inaccuracies in data

13. In Section 4 of the draft ‘verification guidelines’, BEREC indicates that *‘[...] information from third parties may enable the authority to suspect that some particular data may be inaccurate. For example, after data is publicly available through a Mapping Tool, citizens who are not able to get the published speed has the possibility to contact the Authority’* (para 23). BEREC adds that this *‘[...] may also discipline operators in ensuring that they deliver accurate data, as misreported data may upset end-users’* (para 24). BEREC goes so far as to suggest that *‘[...] direct end-user declarations [...] can help identify problematic data. It is good to integrate this possibility of third-party declarations in the broadband map itself[...]’* (para 28).
14. **ecta** infers from these statements that BEREC would like to encourage NRAs/OCAs to rely on end-users challenging operators’ data, and that BEREC considers that it might be a good idea to **de-facto encourage end-users to complain via mapping tools and possibly to include information/complaints generated by end-users in the mapping tools themselves**, and possibly even to display this user-generated information on the maps made publicly available.
15. **ecta respectfully disagrees very strongly with this set of suggestions, and asks BEREC to reconsider the statements made in paragraphs 26, 27, 28 and 30.** Such suggestions are not in line with the aim and the use of the mapping tools envisaged by the EECC for end-users. **ecta** would like to remind BEREC that end-users are entitled to have access to non-confidential data of the mapping under the condition that there are no other tools available on the market and exclusively for the purpose of *“determining the availability of connectivity in the different areas, in order to support their choice of operator or service provider”*⁴ and in no way in order to indicate problematic data or report on areas, operators and/or technologies where there may be problems.
16. In light of the point made in the preceding paragraph, **ecta** adds that end-users may not have the necessary (technical) knowledge to correctly assess the situation at a given geographic location, and, as BEREC itself recognises elsewhere (para 87 and 88), the end-user environment may be a cause of differences in measurement compared to operator-supplied data. Regarding fixed networks, in-home network parameters (cabling, network configuration, settings, hardware/terminals, Wi-Fi, multi-device usage, possible presence of malware, etc.) may affect availability, quality and reliability. For mobile networks, end-users will likely test connections indoors or in vehicles in some cases, whereas NRAs/OCAs collect data on outdoor coverage. End-users may also test connections behind obstacles they have themselves erected, etc. Also, there is a possibility that end-users may accidentally misreport the exact location/time. Finally, there is a risk that end-user access is misused to upload misinformation, cause mischief, that activists may

⁴ Article 22(6) of Directive (EU) 2018/1972, (2018) OJ L321/36.

overwhelm mapping tools in the context of individual or co-ordinated campaigns, and that hackers gain control over mapping tools and perhaps over underlying databases.

17. Based on what precedes, **ecta** advises strongly against the inclusion of STEP 2, i.e. against direct end-user input to mapping, and especially against any publication of end-user input on maps. Indeed, **BEREC should consider removing STEP 2 from the ‘verification guidelines’ altogether.**

4. Comments on STEP 3 (Verification) and STEP 4 (Decision regarding data accuracy)

18. BEREC suggests that NRAs/OCAs would verify information on the geographical location of active access nodes and loop lengths in fixed networks (para 34, 37 and 38) and of BTS for mobile/FWA networks (para 43, 50 and 52). Reference is also made to possible on-site inspections for verification purposes for both fixed and mobile networks (para 42 and 50).

19. Whilst BEREC does not seem to suggest that this information would be published by NRAs/OCAs, **ecta** hereby emphasises that this information is **highly sensitive from the perspective of network security and resiliency**. BEREC’s guidelines should therefore emphasise that **NRAs/OCAs should ensure strict confidentiality of this type of information, and should ensure protection of the systems/databases from unwarranted access** that could expose equipment locations to unauthorised third parties. A large number of users would be at risk of being affected if access nodes or BTS were increasingly targeted by vandals or by other malevolent actors as a result of them gaining access to maps or underlying mapping tools or underlying data. The recent actions of anti 5G group vandalism must push us to the utmost caution.

Note: This is without prejudice to regulatory obligations, notably imposed on operators declared as having Significant Market Power, to make available the necessary information to access seekers on the location of access points, network architecture and capabilities and so on, subject to non-disclosure agreements, and under the supervision of the NRA.

20. With regard to **on-site inspections**, **ecta** raises the question as to whether inspections (to be conducted with or without operators, as is indicated in para 42) are justifiably part of the geographical surveys envisaged by Article 22 of the EECC. In fact, there is no such indication in Article 22, which only provides that the aim of the geographical survey is to gather information in order to enable national authorities to conduct a survey on the reach and performance of broadband networks. A **cost-benefit analysis is justified** in this regard, also bearing in mind that, in most cases, it is the operators that are financing the activities of the NRAs/OCAs.
21. **ecta** also wishes to highlight that competitive providers of electronic communications operate under far greater resource constraints than historical incumbents. **Where information (e.g. location of active access nodes, their coverage radii, loop lengths, etc.) is already available from wholesale access providers** (in particular the operators

designated as holding Significant Market Power) or from public sources (e.g. the location of radio transmitters⁵), information **should not be requested a second time from operators**, as this would impose a disproportionate burden on them, and some of them would in any case have to request the information from their wholesale access suppliers.

Note: Over the past decade, several NRAs have promoted active access/VULA (in some cases to the detriment of passive access/unbundling). This has resulted in several cases in a reduced ability for access takers to determine their own service parameters incl. downstream and upstream speed and other QoS elements. Asking these access takers now, in the context of geographic survey verification, for information about loop lengths and QoS they no longer control themselves, is not justified.

22. In sum, **ecta** considers that if ‘verification guidelines’ were to be issued by BEREC, these should not trigger disproportionate new information requirements for verification purposes (over and above the geographical survey information already required from operators) imposing undue burdens on challenger operators, especially where information is already available from other sources.

5. Comments on QoS-2 Measurements – drive tests

23. **ecta** welcomes BEREC’s recognition (para 59 and 60) that QoS-2 measurements (e.g. drive tests to measure mobile network coverage/performance) are costly to implement, and thus that the scope of measurement should be clearly pre-defined, and that **operators’ own drive test results could be used. Operators’ data should not only be relied upon for verification purposes, but could also serve as the primary information gathering method, to avoid multiplying costs.**
24. With regard to the proposals made by BEREC in terms of the sample of measurements needed in order to conclude that certain operator-provided data would be inaccurate (para 62), **ecta requests that the text is changed** from *‘In general, it would be advisable for the Authority to discuss with operators[...]*’ to **more binding guidance, i.e. NRAs/OCAs should be firmly guided to discuss the methodology and especially the sample sizes, with operators, prior to conducting verifications.**
25. There are also instances where **BEREC appears to go too far** in the context of QoS-2 Measurements. For example, BEREC states: *‘Additionally, the Authority must verify the operator’s information on whether a pixel is covered or not by a VHCN or a certain mobile broadband speed class’* (para 67 – our emphasis on the word ‘must’). **Given that Article 22 of the EECC does not address verification (see also Key Observation 1 above), ecta does not believe that BEREC is readily able to require NRAs/OCAs using language such as ‘the Authority must’.**

⁵ In some Member States there is an authority (not necessarily the NRA, e.g. ANFR in France and Agentschap Telecom in The Netherlands) to which all major radio transmitters are to be notified, including their exact geographic location, antenna height, power output, technology employed etc. These authorities may already make (some of) that information publicly available or they can be asked to share it with NRAs/OCAs. Such information should therefore not be requested a second time from operators.

6. Comments on QoS-3 Measurements – crowdsourcing

26. **ecta** is sceptical on the use of QoS-3 measurements in order to evaluate the accuracy and correspondence - in terms of quality of experience and speed - of the data provided by operators for the mapping exercise and the ones available through the use of crowdsourcing tools (para 56). The reason is that it is not clear how such measurements could possibly be used in order to assess the accuracy of data that are purely theoretical. As specified by BEREC in its Core Guidelines (para 66), the QoS1 speed indicators that are to be provided by operators “*should be reflective of the speed achievable rather than the speed actually experienced by end-users*”. Moreover, **ecta** would like to stress that BEREC also acknowledges, in paragraphs 82, 84, 86, 87 and 88, the necessity to use with extreme caution the QoS3 measurements, in particular crowdsourcing (e.g. using measurement tools to be downloaded and run by end-users). The results of such tests could be misleading considering, as correctly underlined by BEREC, that they could be influenced by several factors (para 87). Taking into account the challenges that the use of the said measurements entail, **ecta** is of the view that BEREC should stress more that QoS3 measurements are to be considered only as potential indicators of connectivity problems but in no event a measurement of the accuracy of the data provided by the operator.
27. Paragraphs 82, 84, 86, 87 and 88 being particularly relevant in terms of caution, should definitely be maintained in case BEREC intends to publish ‘verification guidelines’. BEREC would also be well-advised to **provide guidance to NRAs/OCAs to include these points of caution prominently with every publication of geographic survey results**.
28. As regards the development of an API to be included in ISP set-top boxes (para 90), **ecta** asks BEREC to take account of the fact that whilst this exists in one Member State, it may not be justified to transpose this to other Member States, as this could result in imposing extremely disproportionate burdens on smaller operators, especially in Member States that have many small ISPs. **ecta** suggests that this would better be removed from the envisaged BEREC ‘verification guidelines’.

7. Comments on Section 6: Transparency and accountability

29. **ecta congratulates BEREC’s for including a transparency and accountability section in this consultation document. ecta encourages BEREC to do this systematically in all its future documents. Transparency and accountability requirements should explicitly apply to NRAs, OCAs, as well as to BEREC itself.** ⁶

⁶ Whilst BEREC’s Work Programme for 2021 puts forward public consultations in many cases, which is most welcome, there are key dossiers for which BEREC does not intend to consult stakeholders appropriately, notably the instances in which BEREC will be called upon to issue an Opinion on a draft European Commission Recommendation. **ecta** will continue calling upon the European Commission and on BEREC to consult on the exact wording of draft EC Recommendations, and on the draft text of related BEREC Opinions. This is a matter of elementary transparency and good administrative practice, which must apply to draft decisions which profoundly affect the profit or loss, investments, and indeed the viability of businesses affected by regulation (or by the absence of regulation).

30. **ecta wholeheartedly supports the contents of Section 6** (paragraphs 91-95) and the affirmation of the same at a high level at the beginning of the consultation document (para 11). Indeed, **ecta** considers that if ‘verification guidelines’ were to be issued by BEREC, they should clearly state that NRA/OCAs should publish the method/s of verification and how data quality is assured to help make their proceedings plausible to market participants (para 91), an explanation of types of data being verified and – if applicable – which third party sources are used (para 92). **ecta** obviously also supports public reporting and accountability on the outcome of quality assurance (para 94). This could usefully include an assessment of whether verification actually yields useful results (thus continuing to assess costs and benefits of verification, and indeed of geographic surveys more broadly).
31. As is indicated in Key Observation 2 above, **ecta** suggests going further, and indeed considers that **prior to any publication of geographic survey information by NRAs/OCAs, affected operators should be consulted individually on draft material to be published.** This is necessary in order to ensure that no undue competitive disadvantage is inadvertently caused by publication by NRAs/OCAs. **If ‘verification guidelines’ were to be issued by BEREC, these should contain the principle of consultation of operators prior to any publication.**

8. Closing remarks

32. Whilst the BEREC draft ‘verification guidelines’ are addressed to NRAs/OCAs rather than to operators, it is clear that, if BEREC would adopt these, they would in practice lead to significant additional informational burdens, disproportionately affecting smaller operators, both fixed and mobile. **ecta therefore asks BEREC to systematically be mindful of the limited resources of challenger operators before imposing additional information provision/verification burdens on them.**
33. **ecta also asks BEREC to systematically be mindful of potential competitive distortions caused by the publication of geographic survey information.** **ecta** has commented extensively on this in its responses to previous BEREC consultations on the implementation of Article 22 of the EECC. These concerns apply as well in the context of verification of information.
34. It should also be noted that operators are rolling-out 5G and are in some cases being forced to make significant changes to their network infrastructure (including changing part of their equipment / multiplying their equipment suppliers) to meet new network security requirements. This may make it more difficult for operators to provide comparative data, and data may change from one period to the next, if/as/when new access and new core network equipment is activated (which will occur in a geographically phased manner in many cases). The transition to 5G will inevitably be a dynamic process, involving changes in network coverage and performance over time (as and when new spectrum bands are brought into use – e.g. mmWave bands).

35. Finally, given the extensive cross-referencing in the draft ‘verification guidelines’ to the ‘Core Guidelines’, as well as to the mandate of Article 22 of the EECC, **ecta** suggests that **all BEREC guidance relating to Article 22 should be consolidated in a single document, in which each individual item of guidance is systematically and explicitly connected with the corresponding underlying legal provision in the EECC, and subject to transparency and accountability requirements.** As is indicated above, **ecta** is unconvinced that BEREC’s draft ‘verification guidelines’ have a solid legal basis with regard to the EECC, and **ecta** is concerned that some of BEREC’s proposals raise questions in terms of proportionality and entail risks of causing undue disadvantage to some undertakings.

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In case of questions or requests for clarification regarding this contribution, BEREC and NRAs are welcome to contact Mr Luc Hindryckx, Director General of **ecta**, at lhindryckx@ectaportal.com