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BEREC

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BEREC Guidelines to foster the consistent application of the conditions and criteria for assessing co-investments in new very high capacity network elements (Article 76 (1) and Annex IV EECC)

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1. INTRODUCTION

(1) BEREC is required under Article 76 (4) of Directive (EU) 2018/1972[1] (referred to as the European Electronic Communications Code – hereafter "EECC") to publish guidelines (hereafter "Guidelines") to foster the consistent application by National Regulatory Authorities (NRAs) of the conditions to be met when assessing co-investment offers as these are set out in paragraph 1 of Article 76 and Annex IV EECC[2].

(2) Article 76 addresses the regulatory treatment of new very high capacity network (VHCN) elements. According to this Article, undertakings designated as having significant market power (hereafter "SMP") in one or several relevant markets as defined in Article 67 EECC may offer commitments to open to co-investment the deployment of new VHCN that consists of optical fibre elements up to the end-user premises or base station. Co-investment may take the form of co-ownership or long-term risk sharing through co-financing or through purchase agreements giving rise to specific rights of a structural character by other providers of electronic communications networks and/or services (ECN/ECS). If the NRA concludes that the co-investment commitment offered complies with the conditions set out in paragraph 1 of Article 76 and its associated Annex IV, then it shall make the proposed commitments binding and not impose any additional obligations pursuant to Article 68 as regards the elements of the new VHCN that are subject to the commitments.

(3) The rationale for issuing the Guidelines is to contribute to the consistent application by NRAs of the conditions and criteria which co-investment offers must comply with when commitments associated with those offers are being assessed by the NRAs in the context of Article 76. Therefore, the envisaged Guidelines are to facilitate the consistent application of the minimum criteria for assessing the relevant co-investment project, as set out in Article 76, paragraph 1 and Annex IV.

(4) In developing the Guidelines, BEREC has considered the requirements of Article 76, as well as Annex IV and the relevant recitals in the EECC that pertain to co-investment, namely recitals (181), (198), (199), (200) and (201).

(5) Recitals (198-201) explain the relevance and benefits of co-investment agreements to facilitate the roll-out of VHCN and the regulatory treatment the EECC foresees in this regard. The criteria set out in Annex IV are also an integral part of the conditions (a) through (d) of Article 76 (1). Both 76 (1) and Annex IV have been therefore considered in the assessment of these conditions to produce the Guidelines.

(6) The present Guidelines are organised following the epigraphs in Article 76 (1), showing in grey boxes the relevant text in the EECC and providing clarifications guidance below each box. Literal text citation from the EECC is always in *italics*. Unless otherwise specified, all Articles and Annexes mentioned in the Guidelines are referring to the EECC.

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[1] Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (EECC) (Recast) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1972&from=EN

[2] According to Article 76 (4): "*BEREC, after consulting stakeholders and in close cooperation with the Commission, shall publish guidelines to foster the consistent application by national regulatory authorities of the conditions set out in paragraph 1, and the criteria set out in Annex IV*"

2. GUIDELINES ON ARTICLE 76 (1)

2.1. Guidelines on Article 76 Paragraph 1

Article 76, Paragraph 1

"*Undertakings which have been designated as having significant market power in one or several relevant markets in accordance with Article 67 may offer commitments, in accordance with the procedure set out in Article 79 and subject to the second subparagraph of this paragraph, to open the deployment of a new very high capacity network that consists of optical fibre elements up to the end-user premises or base station to co-investment, for example by offering co-ownership or long-term risk sharing through co-financing or through purchase agreements giving rise to specific rights of a structural character by other providers of electronic communications networks or services.*"

(7) According to the first paragraph of Article 76, operators that have been designated as having SMP may offer commitments to open the deployment of a "new very high capacity network that consists of optical fibre elements up to the end-user premises or base station" to co-investment.

(8) Article 76 deals with the co-investment offers of undertakings that have been designated – at the time the offer is made – as having SMP. Operators not holding SMP are thus not subject to this provision[3].

(9) The elements contained in this definition are discussed below. In particular, the present Guidelines address the following issues:

a) Which VHCN fall in the scope of Article 76;
b) What is a new VHCN for the purposes of Article 76;
c) Timing for making an offer to co-invest;
d) Type of investments which may be covered by Article 76; and,
e) Co-investment models which may be covered by Article 76.

2.1.1. Which VHCN fall in the scope of Article 76

(10) The technical elements that are referred to in Article 76 limit the scope of the application of this provision to a specific category of VHCN compared to the definition of very high capacity networks as contained in Article 2(2) of the EECC[4]. In particular, Article 76 makes an explicit

[3] It will always be up to the SMP operator to decide whether to engage in the procedure contemplated under Article 76 of the EECC by voluntarily offering commitments under Article 79.

[4] According to Article 2(2) of the EECC, a very high capacity network *"means either an electronic communications network which consists wholly of optical fibre elements at least up to the distribution point at the serving location, or an electronic communications network which is capable of delivering, under usual peak-time conditions, similar network performance in terms of available downlink and uplink bandwidth, resilience, error-related parameters, and latency and its variation; network performance can be considered similar regardless of whether the end-user experience varies due to the inherently different characteristics of the medium by which the network ultimately connects with the network termination point"*.

technological choice, and specifies that only a VHCN that consists of optical fibre elements up to the end-user premises or base station will qualify for the specific regulatory treatment foreseen in the Article. Thus only particular types of VHCN are subject to Article 76 and to the present Guidelines.[5]

(11) As indicated in Recital (199) of the EECC, in exceptional circumstances the specific regulatory treatment afforded to co-investments may also apply to optical fibre elements that are deployed up to the immediate proximity (meaning just outside) of the end-user's premises, when the SMP operator demonstrates that it is technically impracticable to deploy optical fibre elements up to the premises. It is worth noting that the exception foreseen in Recital (199) refers to technical issues that make the deployment up to the end-user premises or base station impracticable, and thus in principle does not apply in cases where such choice has been made exclusively due to economic considerations.

2.1.2. What is a new VHCN for the purposes of Article 76

(12) Regarding what should be deemed a *"new"* VHCN, Recital (198) of the EECC refers to the benefits that co-investments may bring, in an economic environment that is characterized by *"current uncertainty"* regarding the rate of materialisation of demand for very high capacity broadband services, as well as general economies of scale and density.

(13) The purpose of Article 76 is thus to overcome such existing uncertainty, by affording a specific regulatory treatment to new VHCN that meet certain requirements, and that are deployed on the basis of co-investment agreements[6]. As noted in Recital (198), it is assumed that co-investments offer significant benefits in terms of pooling of costs and risks, enabling smaller-scale undertakings to invest on economically reasonable terms and thus promoting sustainable, long-term competition.

(14) The specific regulatory treatment foreseen in Article 76 should be exclusively granted to VHCN that are "new", not to the roll-out of VHCN that were publicly announced before the EECC entered into force in December 2018. In those cases, the SMP operator had already decided to undertake the investment, without considering the additional regulatory incentives that the EECC provides for. The situation may however be different in case substantial changes are made after December 2018 to an investment project that was publicly announced before that date. In such a scenario, the NRA may assess to what extent the changes are significant enough for the project to qualify as an investment in a new VHCN according to Article 76 and do not create windfall effects according to Guideline (15).

[5] BEREC has issued Guidelines on the criteria that a network is to fulfil in order to be considered a VHCN according to Article 82 of the EECC, see BoR (20) 165 of 1 October 2020. As noted, not every VHCN which meets these criteria will be relevant for the purposes of Article 76 of the EECC and its stricter definition.

[6] It should be noted that the concept of "new" under Article 76 of the EECC does not have the same meaning as the concept of "new" under Article 61(3) of the EECC (referring to existing infrastructure).

(15) The goal of Article 76 is thus to induce investments in new VHCN elements, not to create windfall effects[7] for investments that were publicly announced before the EECC entered into force.

2.1.3. Timing for making an offer to co-invest

(16) BEREC understands that Article 76 also covers co-investment offers in a new VHCN that might have been publicly announced after the EECC provisions entered into force (December 2018), but before the measures contained in the EECC are to be transposed into national law (21st December 2020).

(17) In this regard, if the SMP operator decides to publish a co-investment offer in the period between December 2018 and December 2020, and is planning to subject the new VHCN open to co-investment to the procedure of Article 79, it will have to publicly provide a clear indication of its intention in the publication of the initial offer[8]. In order to prevent the asymmetry of information between the SMP operator and potential participants to the co-investment, any co-investment offer that has been made without an express indication of the SMP operator's intention to submit it to the specific regulatory treatment of Article 76 will not qualify for the commitment's procedure foreseen in the EECC. The same principles would apply *mutatis mutandis* to co-investment offers for the opening of a VHCN that are made after the 21st December 2020, in Member States where by that date the EECC has still not been effectively transposed into national legislation.

2.1.4. Type of Investments which may be covered by Article 76

(18) In BEREC's view, Article 76 does not cover investments in existing physical infrastructure[9], nor the mere construction of physical infrastructure on a stand-alone basis. This applies in particular to the upgrade or renovation of existing physical infrastructure, even when such upgrade or renovation is undertaken for the specific purposes of deploying a VHCN. This is because such upgrade or renovation would still pertain to infrastructure that already exists, and that was built before the entry into force of the EECC provisions.

(19) The conclusion is however likely to be different in the case of completely new physical infrastructure that is built for the specific purposes of deploying a new VHCN. In those instances, the building of the infrastructure for the purposes of hosting VHCN elements will normally be an essential component of the co-investment scheme designed by the SMP operator. NRAs should thus be able to assess whether the newly-built physical infrastructure is an integral part of the co-investment scheme, and therefore falls under the remit of Article 76.

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[7] With windfall effects, we refer to effects (in this case, profits or gains) that are sudden and/or unexpected, and as such were not anticipated when making the investment.

[8] See also in this regard the section in the Guidelines dealing with Article76 (1) (c) (publication in advance).

[9] As set in Directive 2014/61/EU on measures to reduce the cost of deploying high-speed electronic communications networks, physical infrastructure means *"any element of a network which is intended to host other elements of a network without becoming itself an active element of the network, such as pipes, masts, ducts, inspection chambers, manholes, cabinets, buildings or entries to buildings, antenna installations, towers and poles"*.

(20) Regarding the optical fibre elements, the question arises as to the level of investment at which this condition should be assessed. In this regard, an investment consisting of the deployment of an optical fibre from the ODF to the end-user premises (that is, an FTTH or FTTB deployment) is clearly an investment in "*the deployment of a new very high capacity network*" for the purposes of Article 76.

(21) By the same token, an investment pertaining exclusively to the terminating segment or the sub-loop of the network (in order to turn an existing network into an optical fibre-only network up to the end-user premises or the home) is also likely to qualify under Article 76 of the EECC, as it would be deemed to contribute to the transition towards a VHCN.

(22) When applying Article 76, NRAs have to take account of the scope of the project to avoid regulatory complexity. For instance, if the network is deployed from the ODF, all the optical fibre lines deployed from this ODF to the end-users may have to be submitted to the same regulatory regime.

2.1.5. Co-investment models which may be covered by Article 76

(23) The EECC further characterizes the co-investment agreements that may be subject to the provisions contained in Article 76. According to the EECC, SMP operators may offer commitments to open the deployment of VHCN to co-investment. Article 76 names co-ownership and long-term risk sharing as examples. The latter might take the form of co-financing or purchase agreements giving rise to specific rights of a structural character by other providers of electronic communications networks or services.

(24) The EECC does not identify any particular co-investment model but makes a more generic reference to – among other possible scenarios – a cooperative structure based on either co-ownership or long-term risk sharing.

(25) As to the latter, the EECC refers to the structural nature of purchase agreements by stating in Recital (198) that *"[…] purchase agreements which constitute co-investments entail the acquisition of specific rights to capacity of a structural character, involving a degree of co-determination and enabling co-investors to compete effectively and sustainably in the long term in downstream markets in which the undertaking designated as having significant market power is active. By contrast, commercial access agreements that are limited to the rental of capacity do not give rise to such rights and therefore should not be considered to be co-investments."*

(26) While acknowledging that the EECC only refers to structural rights in the context of purchase agreements, BEREC considers that the structural nature would constitute an important underlying consideration when assessing any co-investment agreement under Article 76.

(27) The structural nature of the agreement is compatible with various business models for co-investment. In view of this, BEREC considers that at least the following co-investment models, as well as possible combinations of these may be able to qualify as co-investments under Article 76: a) joint-venture, b) reciprocal access and c) one-way access. These are described as follows:

a) Under a **joint-venture model**, the SMP operator would offer co-ownership of the co-invested deployment to other providers of electronic communications networks and/or services. The SMP operator and the other co-investor(s) may organise ownership through the creation of a new entity/company (co-investment vehicle), which would be responsible for rolling out the VHCN.

b) Under a **reciprocal access model**, the SMP operator and the co-investor(s) would reach a long-term risk sharing agreement whereby they would be responsible for deploying and operating their respective own VHCN in geographically separate areas. Each co-investor has access to all other VHCN.

c) Under a **one-way access model**, the SMP operator and the co-investor(s) would reach a long-term risk sharing agreement whereby the former would build up the VHCN and grant access to this network to the other co-investor(s)[10].

(28) This list is not exhaustive and the providers of electronic communications networks and/or services might conclude other types of co-investment agreements that may also fall under Article 76. For instance, they could combine features of the abovementioned co-investment models.

(29) The structural nature of the co-investment agreements under the joint-venture and reciprocal access models will in general be relatively straightforward. This is particularly the case of the reciprocal access model where each party owns its own network and grants access to other co-investors, in exchange for an equivalent treatment.

(30) Regarding joint-ventures, the implementation and the details of any given joint-venture may differ from one agreement to another. These potential differences, however, would not change the structural nature of this type of agreements as such. In particular, regardless of the concrete details of the ownership arrangements, a common characteristic in the joint-venture model will normally be that the co-investors own a relative stake of the new company and thus are entitled to participate in the decision-making process concerning new investments, upgrades of the network, entry of a new partner, etc.

(31) Finally, determining the structural nature of the one-way access model requires a case-by-case analysis. Such agreements could be implemented via long-term co-financing schemes that foresee minimum buying commitments and volume discounts or take the form of purchase agreements through Indefeasible Rights of Use (hereafter "IRUs").

(32) The one-way access model based on purchase agreements provides the IRUs' holders with some of the characteristics that are associated with ownership such as the right to exclusive use over long-term periods, although it may grant the holders with a limited degree of co-determination and/or the right to make decisions on new investments, upgrades, etc.

[10] In this regard it is worth recalling that the EECC states that long term risk sharing can be either in the form of co-financing or purchase agreements. For the latter, it is made clear that the agreement needs to entail the acquisition of specific rights to capacity of a structural character in order for the offer to constitute a co-investment. Furthermore, mere rental of capacity does not constitute a co-investment.

Alongside the ownership structure, other factors such as the governance rules provided for in the agreement may in this regard become relevant[11].

(33) In that context, providing the co-investors with sufficient capacity to take relevant strategic decisions as to, for instance (and depending on the specific type of agreement and business model), the roll-out, maintenance of the VHCN, the service provision and the adaptation/evolution of the agreement may in many cases be an important element to take into consideration in the assessment of the agreement, as highlighted in Recital (198).

2.2. Guidelines on Article 76 Paragraph 1 Point A)

Article 76, Paragraph 1

"*When the national regulatory authority assesses those commitments, it shall determine, in particular, whether the offer to co-invest complies with all of the following conditions*":

Point a)

"it is open at any moment during the lifetime of the network to any provider of electronic communications networks or services"

2.2.1. Open offer

(34) BEREC understands that the requirement for an open offer, in the context of Article 76 (1), refers to the terms offered to potential co-investors to enter the agreement.

(35) First and foremost, the offer has to be open during the lifetime of the network. That means that there needs to be a possibility for potential and different types of electronic communications providers to join the co-investment at any moment during the lifetime of the network, i.e. with no cut-off date set by the SMP operator for the co-investment.

(36) Thus, in order to assess whether an offer is open during the lifetime of a network, an NRA should check that no cut-off date during the lifetime is set by the SMP operator, in terms of validity of the offer.

(37) Furthermore, the offer shall not be exclusive to particular ECN/ECS and/or services providers or types of ECN/ECS providers.[12] This means that the SMP operator must credibly commit to give potential entrants effective access to the offer to co-invest and thus also to the network in question under clear conditions, on a fair, non-discriminatory and transparent basis. These conditions are addressed in more detail in the following sections.

[11] The governance rules also contribute to the way co-investment projects are managed. In particular, they determine how decisions are made with respect to the development and operation of the network and provides the mechanism for monitoring and enforcing compliance with the terms of the agreement (for example, via service level agreements – "SLAs").

[12] The requirement for openness is not fulfilled if the co-investors are not able to compete effectively and sustainably in the long term in downstream markets in which the undertaking designated as having significant market power is active. This aspect is closely linked to Article 76 (1) (b) (i) and should particularly be examined when assessing the fairness, reasonableness and non-discrimination of the co-investment offer's terms.

(38) The offer should also have sufficiently clear and precise terms and conditions, and it should be possible for investors to join the co-investment agreement under clear and specific rules.

(39) Generally, two different access situations should be distinguished when assessing the openness of the co-investment offer: 1) access by entering the co-investment agreement at the beginning of the offer; and 2) access by entering the co-investment agreement at a later stage (access of late entrants to the co-investment agreement).

(40) It is important that the offer fulfils the aforementioned requirements in both access situations.

(41) In the second case, however, depending on the type of co-investment agreement, the implementation of safeguards to ensure the offer's openness might differ when it comes to undertakings willing to join the co-investment at a later stage. Thus, any existing limitations of openness need to be considered in the context of joint-venture models, reciprocal access models, one-way access models and mixed-form models specifically. Here below, the requirements for the openness and limitations that might possibly exist are presented for the different co-investment types.

2.2.1.1. Joint-venture models

(42) As a plausible scenario, two or more undertakings enter into arrangements for creating a joint-venture. In order to become part of the joint-venture and participate in the co-investment, undertakings acquire a stake in the joint-venture[13].

(43) At a later stage, however, joining the joint-venture or increasing the respective stake a co-investor already owns can potentially be complex[14]. Because of the extensive negotiations that are needed between potential co-investors before the conclusion of a joint-venture contract, it might be reasonable for the co-investment offer to include specific cut-off dates after which a late entry into the joint-venture itself does not need to be guaranteed at the same condition or with the same model. However, in such a case, it is necessary to put in place an additional mechanism to ensure the effective openness of the co-investment offer, e.g. by combining the joint-venture model with a one-way access model.

2.2.1.2. Reciprocal access models

(44) In a reciprocal access model, each co-investor deploys an independent network in an exclusive area and grants all other co-investors access to its network.

(45) Similarly to joint-venture models, the possibility to join the reciprocal access co-investment model at later stages might be complex, e.g. because no area (that the already participating co-investors are interested in) may be left where a potential late co-investor can deploy its independent network. Therefore, the terms of the co-investment offer might include specific cut-off dates after which a late entry into the reciprocal access model itself does not

[13] In general, a stake can be acquired by bringing capital into the joint venture or in some cases by (also) bringing in other assets (e.g. civil infrastructure already deployed in some areas of the planned network).

[14] This does not apply to the same extent to the acquisition of a stake from co-investors that are willing to sell parts of or their whole share.

need to be guaranteed. However, as stated in the context of joint-venture models, it would be necessary to put a different mechanism in place to ensure the effective openness of the co-investment offer, e.g. by combining the reciprocal access model with a one-way access model.

2.2.1.3. One-way access models

(46) Compared to joint-venture and reciprocal access models, one-way access models – in which only one a single operator[15] deploys the network infrastructure and offers all co-investors access to its network – are in general more flexible regarding the potential for late entry of additional co-investors and regarding the potential to increase the participation of an existing co-investor. Therefore, there should be no need to limit the requirements regarding the openness of the offer.

2.2.1.4. Mixed-form models

(47) As previously stated, co-investment vehicles might also be designed as a mix of the above-mentioned types of co-investments. As an example, in joint-venture and reciprocal access models, guaranteeing that the offer to co-invest is open at any moment during the lifetime of the network might only be possible by offering additional one-way access to potential late co-investors.

2.2.2. Lifetime of the network

(48) BEREC notes that, as each network is unique (in terms of geographic scope and coverage, in terms of usage of parts/components and in terms of offered services), it is impossible to provide precise parameters that apply universally to the span of time of a network.

(49) There are different approaches to the concept of "lifetime of the network": for example, there is a difference between technical and commercial lifetime of the network. BEREC considers that, for the purposes of Article 76, the lifetime of the network can only be understood with reference to the expected life of the commercial co-investment scheme, as set in the co-investment agreement, during which the network is fully operative, rather than the technical operating lifetime of any of the network components (that is likely longer than the commercial lifetime).

(50) BEREC considers that the expected commercial lifetime of the co-investment scheme should be included in the proposal made by the SMP operator as part of the submission for regulatory exemptions under Article 76. This expected commercial lifetime would then inform decisions on the exemption and the NRA assessment of the suitability of the offer in terms of factors such as the openness of the co-investment scheme.

(51) The lifetime of the network can, therefore, not be shorter than the period established for the binding co-investment commitments approved by the NRA, according to Article 79 (3), 2nd subparagraph.

[15] In the context of Article 76 this operator has SMP.

2.3. Guidelines on Article 76 Paragraph 1 Point B)

Point b)

"*it would allow other co-investors which are providers of electronic communications networks or services to compete effectively and sustainably in the long term in downstream markets in which the undertaking designated as having significant market power is active, on terms which include: […]*"

(52) The conditions mentioned in Article 76 (1) (b) are solely related to *"other co-investors"* and do not concern access seekers not participating in the co-investment[16]. NRAs may assess the co-investment offer at a preliminary stage when no provider of electronic communications networks and/or services has entered into the co-investment agreement yet. In this context, the reference to "other co-investors" has to be understood as a reference to *potential* co-investors. Some of these potential co-investors can typically be identified while the market test is run, through the public consultation in accordance with Article 79 (2), whereas others may also enter the market at a later stage (i.e. after the market test was run) and join the co-investment scheme as further detailed in Section 2.3.2.

2.3.1. Guidelines on Article 76 Paragraph 1 Point B) (I)

Point b) (i): "*fair, reasonable and non-discriminatory terms allowing access to the full capacity of the network to the extent that it is subject to co-investment*;"

(53) This sub-condition is – together with sub-conditions (b) (ii) through (iv) – one of the key aspects in ensuring that co-investors can *"compete effectively and sustainably in the long term in downstream markets in which the undertaking designated as having significant market power is active"*. Implementing fair, reasonable and non-discriminatory terms is essential to safeguard the interests of the other co-investors after NRAs decide not to impose further obligations on the SMP operator according to Articles 76 and 79.

2.3.1.1. "Fair, reasonable and non-discriminatory terms"

(54) The terms of the co-investment offer have to be fair, reasonable and non-discriminatory. According to Annex IV (c), these terms include amongst others:

- Terms regarding the financial consideration required for the acquisition of specific rights (in the following called "financial terms");
- Terms regarding the protection awarded to the co-investors by those rights both during the building phase and during the exploitation/operational and any expansion phases;
- Terms regarding the conditions for joining and potentially terminating the co-investment agreement.

[16] Access seekers benefit from other guarantees and conditions, which are detailed in point (d).

(55) Adhering to fair, reasonable and non-discriminatory terms[17] ensures that other co-investors can compete effectively and sustainably in the long term, especially with the SMP operator. This implies that all co-investors, including the SMP operator, should have similar commercialization chances and investment risks within the co-investment offer given their respective investment share/commitment and relative to the time they join. In particular, these depend on the quality level of access granted. Therefore, in case the co-investors themselves exercise command over (some of) the new network elements, all co-investors should grant each other *reciprocal rights* on fair and reasonable terms and conditions to access the co-invested infrastructure. Furthermore, a co-investment vehicle must provide for access to all co-investors on an equivalence of inputs basis as well as the conditions of fairness and reasonableness according to Annex IV (c).

(56) Variations of the terms offered can be justified, and in some cases are even necessary, for a co-investment offer or one of / more of its terms to be deemed fair, reasonable and non-discriminatory, but should always be based on the same objective, transparent, non-discriminatory and predictable criteria.[18] Most importantly, it could be justified to differentiate the terms of the co-investment offer depending on the level of risk or the share of the total risk carried by different potential co-investors. That means that co-investors committing for different types or levels of participation or deciding to co-invest at different points in time could justifiably be offered different terms.

(57) As a general rule, potential pricing differences between co-investors should be based on the level of risk that is linked to the investment, in a way that there are no incentives for an efficient ECN/ECS provider to postpone the decision to enter into the co-investment agreement to a later stage for the sole reason of better terms and conditions.[19]

(58) Other differentials on pricing may also be justified in certain circumstances. For example, the offer to co-invest should provide undertakings of different sizes and financial

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[17] Fair, reasonable and non-discriminatory terms (FRAND terms) are usually seen as a regulatory market-based solution in cases where a company owns/holds an asset/product and other companies need to access/use this asset/product to be able to compete in a given market. These terms should therefore represent a balance of interests between the company that owns/holds an asset/product (in this case the SMP operator) and those companies that need to access/use this asset/product (the other co-investors). Frequent applications of the FRAND principle – outside the regulation of network industries – can be found in patent and competition law.

[18] "*Non-discriminatory terms in this context do not entail that all potential co-investors shall be offered exactly the same terms, including financial terms, but that all variations of the terms offered shall be justified on the basis of the same objective, transparent, non-discriminatory and predictable criteria […].",* (Annex IV (c), first bullet point).

[19] *"The determination of the financial consideration to be provided by each co-investor needs to reflect the fact that early investors accept greater risks and engage capital sooner."*, Annex IV (c), second bullet point. *"A premium increasing over time shall be considered to be justified for commitments made at later stages and for new co-investors entering the co-investment after the commencement of the project, to reflect diminishing risks and to counteract any incentive to withhold capital in the earlier stages."*, Annex IV (c), third bullet point. It should be noted that the relationship between the timing of entering into the co-investment agreement and the corresponding risk associated with this decision is not always linear. Thus, later investment decisions do not always imply lower levels of risk of the co-investment as a very high degree of market saturation can significantly lower the commercialisation chances of potential co-investors.

capacity with an opportunity to become infrastructure co-investors.[20] This condition ensures that smaller undertakings or undertakings with less financial capacity are not discriminated against, nor excluded from participating in the co-investment. However, and with due regard to the principle of non-discrimination, the SMP operator may include certain *reasonable* conditions regarding the ability of smaller undertakings to fulfil their commitments.[21] Of particular relevance in the context of different undertakings' financial capacity could be potential terms regarding the level of a minimum share for initial commitment.[22]

(59) The co-investment offer could potentially also include terms that allow for changes and adaptations to the offer's conditions. Such changes could become necessary due to general competitive conditions which the co-investors cannot influence or anticipate in advance. However, these changes would need to be based on the same conditions that the co-investment offer has to comply with, namely fairness, reasonableness and non-discrimination. If the SMP operator and/or other co-investors see the need for such changes, they should notify these proposed changes in advance so that NRAs, alongside interested parties, in particular third parties which are directly affected, are in a position to appropriately assess whether the proposed changes are in line with the conditions of this Article before they are implemented and, if necessary, raise potential concerns related to these planned changes.

(60) In general, co-investment agreements should be designed to last over the commercial lifetime of the network as the general intention of co-investment agreements is to pool and share costs and risks of investments in very high capacity networks in the long term. In exceptional cases, however, specific circumstances (as for example bankruptcy of one of the co-investors) can make it necessary to terminate the co-investment agreement under fair, reasonable and non-discriminatory conditions. The conditions for such a termination of the co-investment agreement might also reflect the necessity to share given investment and failure risks. In this respect, all co-investors potentially bear a burden relative to their investment share even in case of a termination of the co-investment.

(61) Of particular importance for the ability of other co-investors to compete effectively and sustainably in the long term are the co-investment offer's terms and conditions regarding:

- pricing for access to the co-investment;
- its corresponding pricing structure;

[20] *"Where an undertaking designated as having significant market power makes an offer for co-investment on fair, reasonable and non-discriminatory terms in very high capacity networks that consist of optical fibre elements up to the end-user premises or the base station, providing an opportunity to undertakings of different sizes and financial capacity to become infrastructure co-investors […]."*, Recital 199.

[21] *"The undertaking designated as having significant market power may include in the offer reasonable conditions regarding the financial capacity of any undertaking, so that for instance potential co-investors need to demonstrate their ability to deliver phased payments on the basis of which the deployment is planned, the acceptance of a strategic plan on the basis of which medium-term deployment plans are prepared, and so on."*, Annex IV (a).

[22] The aspect of undertakings of different sizes and financial capacity is also linked to condition (a) of Article 76 (1), which states that the co-investment offer has to be open to any provider of electronic communications networks or services and also to sub-condition (b) (ii) of this provision, which states that the co-investment offer should give flexibility in terms of the value and the timing of the participation. For more detail on the discussion of minimum levels, see (2.3.2).

- o granted rights regarding network access (in particular, type and quality of wholesale access) for co-investors.

(62) However, these terms, alongside other relevant terms of the co-investment offer, might differ in form and relative importance depending on the specific type of co-investment that the SMP operator offers for others to take part in.[23] In the following paragraphs (63) to (83), some of the terms of a co-investment offer are considered more closely in the context of the different co-investment types on the basis of possible shapes each of these co-investment types could present itself. However, the scenarios that are described for the different types are only illustrative examples. As such, they do not exclude the possibility that co-investment models are set up differently and nevertheless potentially fulfil the conditions for Article 76 in general or the principle of fair, reasonable and non-discriminatory terms more specifically.

2.3.1.1.1. Joint-venture models

(63) As a co-investment vehicle, a joint venture should grant all co-investors access to the network on an equivalence of inputs (EoI) basis.[24] Thus, with their participation, all co-investors have access to the joint venture's infrastructure and can supply users on the basis of the same (or similar) wholesale conditions. For this reason and due to the fact that the joint venture's profits (e.g. generated by wholesale revenue) are usually distributed to the co-investors according to their respective stakes, the risk that the SMP operator can discriminate against other co-investors based on the level of the access conditions included in the offer is rather low.

(64) As all co-investors are directly involved in the joint venture by holding shares and thus in most cases also participate in the decision-making process, such agreements generally have a relatively high degree of in-built structural character. Therefore, rights awarded to other co-investors will usually be the same or will be very similar to the corresponding rights the SMP operator holds in relation to the joint venture.[25] This bargaining power that co-investors enjoy due to the certain degree of ownership further reduces the scope for unfair, unreasonable or discriminatory conditions implemented by the SMP operator.

(65) In case co-investors enter the co-investment at the same time and bear the same level of risk, they should enjoy the same terms. However, co-investors in a joint venture may commit for different levels of participation or may decide to co-invest at different points in time. To this effect, if the terms differ between co-investors, NRAs should evaluate the rationale for these differences which could be justifiable.

(66) As discussed in section 2.2.1.1 it might be reasonable for the co-investment offer not to guarantee a late entry into the joint-venture after a certain time. Thus, any such condition in the offer may well be fair, reasonable and non-discriminatory. However, in such a case, an additional mechanism has to be put in place which ensures the effective openness of the co-

[23] See (2.1.5) for more detail on the general typology of different co-investment types.
[24] See Annex IV (c), fifth bullet point.
[25] However, the extent to which co-investors can make use of these rights might be limited by the respective shares of the joint-venture that they hold.

investment offer as a whole, e.g. by additionally granting access to the co-investment based on the one-way access model.

2.3.1.1.2. Reciprocal access models

(67) As already set out, co-investors, to a certain degree, own (parts of) the network. As all co-investors are supposed to offer each other reciprocal access on reasonable terms and conditions, such agreements imply a high degree of structural character. Rights awarded to co-investors will be the same or will be similar to the rights of the SMP operator.[26] Accordingly, the degree of co-determination (e.g. regarding wholesale products, their pricing and their characteristics) should be relatively high.

(68) Regarding reciprocal access models, two cases can be distinguished: either, the level of risk that each co-investor bears differs, or – less likely – the level of risk that each co-investor bears is identical. In both cases, when assessing whether the terms of the offer are fair, reasonable and non-discriminatory, NRAs should evaluate if the rationale for possible differences in access conditions is based on economic grounds.

(69) In the first case, the level of risk co-investors bear differs, e.g. because some co-investors face higher deployment costs per household in less densely populated areas, they are connecting more households, or they face greater uncertainty when entering the co-investment at earlier stages than others. In such a scenario, it might be fair, reasonable and non-discriminatory, if the co-investment offer includes differing conditions to be able to compensate co-investors bearing more risk. A compensation can relate to all aspects of the agreement including its financial terms or the awarded rights. Most likely, compensation will either be upfront or recurring payments, as well as higher wholesale prices for access. In such cases, the assessment of the rationale for the compensation is likely to be a central aspect when determining whether the terms are fair, reasonable and non-discriminatory.

(70) In a perfectly symmetric setting, where all co-investors face the same deployment costs per household, connect the same number of households, enter the co-investment at the same time and thus bear the same level of risk, access conditions are less likely to differ. In such a case, co-investors will usually grant each other access on the *same* terms, in particular regarding granted rights, type and quality of wholesale access and its pricing.[27] However, if the terms and conditions differ between co-investors, NRAs should evaluate the rationale for these differences, as is the case, as previously described, in a non-symmetrical setup.

(71) As discussed in Section 2.2.1.2, it might be reasonable for the co-investment offer not to guarantee a late entry in a reciprocal access model after a certain time. Thus, any such condition in the offer may well be fair, reasonable and non-discriminatory. However, in such a case, an additional mechanism has to be put in place which ensures the effective openness of

[26] Nevertheless, rights granted to co-investors could be reciprocal but not necessarily identical to the ones granted to the undertaking leading the deployment in a particular area. E.g., reciprocal access could be offered by all co-investors to each other on the basis of an active product, while co-investors might (implicitly) enjoy a different kind of access to the network they deployed themselves respectively.

[27] As stated in the previous footnote, this does not exclude the possibility that the type of access that co-investors grant each other differs from the implicit access co-investors grant themselves for the area where they deployed the network themselves.

the co-investment offer as a whole, e.g. by additionally granting access to the co-investment based on the one-way access model.

2.3.1.1.3. One-way access models

(72) Compared to joint-venture and reciprocal access models, which by themselves involve a certain degree of co-ownership, the level of structural rights co-investors enjoy in one-way access models might be lower.[28] Therefore, in some cases there might be a higher risk that the SMP operator can use this potential imbalance to include terms in the co-investment offer that are unfair, unreasonable or discriminatory. However, by implementing specific provisions (e.g. access based on IRUs) one-way access models can generally fulfil the requirement of fair, reasonable and non-discriminatory terms. In this regard, the following paragraphs go into more detail on potential requirements for the co-investment offer's terms.

(73) The assessment of the co-investment offer's financial terms is of particular importance in the case of one-way access models in order to ensure that co-investors are able to compete effectively and sustainably in the long term. The financial terms are mainly determined by the effective wholesale prices that co-investors have to pay to supply end-users using the SMP operator's network. These prices might consist of recurring payments per end user connected, regularly also including or exclusively consisting of upfront payments that are linked to the level of the respective commitment a co-investor is making.

(74) Compared to joint-venture and reciprocal access models, one-way access models are more flexible regarding the potential for late entry of additional co-investors or regarding the potential to increase the participation of an existing co-investor. Those variations usually imply differences in the level of risk borne by the respective co-investor. Therefore, the co-investment offer might include conditions that differentiate wholesale prices depending e.g. at which point in time co-investors make a commitment or on the level of commitment co-investors make.[29]

(75) Especially in one-way access models, the type of wholesale access to the network that is being granted to other co-investors, as well as the quality of the wholesale access, are of particular importance. There can be circumstances where potential co-investors would need a specific type of wholesale access (e.g. passive access products like unbundled fibre access) to compete effectively and sustainably in the long term in downstream markets in which the SMP operator is active. Therefore, if the set of access products is limited by the SMP operator, NRAs have to assess whether additional wholesale products need to be included in the co-investment offer or whether changes to the quality of access are necessary.[30]

[28] One-way access models are defined in section 3.2.1.3. As stated before, in case of purchase agreements, these need to entail the acquisition of specific rights to capacity of a structural character in order for the offer to constitute a co-investment. Even though the level of structural rights co-investors enjoy might be lower in once-way access models, per definition they cannot contain the mere rental of capacity.

[29] See also paragraph (64) and footnote 24.

[30] For this evaluation, past decisions on imposed access remedies could potentially be used as assessment material. However, in many cases, the assessment of the co-investment offers' terms regarding wholesale access cannot directly be compared to past regulatory decisions such that an independent assessment based on all relevant (case-specific) factors needs to be performed.

(76) In this context, different wholesale or participation prices could be justified for different forms of wholesale access to the network (e.g. active and passive access products). In general, wholesale products higher up the value chain – meaning products where the SMP operator creates more value added (e.g. Layer 3 bitstream access products) – will generally bear higher prices because of the higher value added.

2.3.1.1.4. Mixed-form models

(77) Relevant factors for the assessment of the NRA that have been mentioned for each of the co-investment types separately will usually also be of relevance in cases where a co-investment agreement consists of a mix of more than one of these types. However, there might also be specific factors that become relevant when combining such co-investment types. Most likely, these will be case-specific and, as such, subject to scrutiny by NRAs according to the principles of fair, reasonable and non-discriminatory terms.

(78) In case different types of co-investment alternatives are implemented within a given co-investment offer, it might be justified that the offer's terms (including the financial terms) differ across the different types of co-investors. In this regard, various sets of rights and protection granted to co-investors could justify different financial terms as these different types might be linked to differences in the level of risk that the varying types of co-investors bear.

2.3.1.1.5. Considerations for all types of co-investment models

(79) Irrespective of the type of the co-investment model, when evaluating whether the co-investment offer's terms and conditions are fair, reasonable and non-discriminatory, NRAs in particular have to assess the potential variations that might be included in the offer's terms as described above. In this respect, NRAs should evaluate whether proposed differences in the terms offered are based on reasonable economic grounds and where applicable, whether these differences are based on the level of risk associated with different levels, types or timings of commitments[31]. This aspect is of particular importance to ensure that the offer's terms allow co-investors to compete effectively and sustainably in the long term in markets in which the SMP operator is active.

(80) For the assessment of the financial terms, NRAs could make use in particular of information that forms the basis for the network deployment's business case. For example, information about anticipated costs, expected evolution of demand and revenues, as well as the resulting economic risk associated with the deployment might be of interest to the NRAs and could be evaluated.

(81) If possible, NRAs could also use information gathered from benchmarks of comparable co-investment agreements that are already in place or other agreements between market participants. However, the amount of agreements already in place as well as the comparability

[31] It is important to note that different undertakings participating in a co-investment potentially evaluate the level of risk associated with a given commitment differently. This could especially be the case when comparing the SMP operator with other co-investors, which are often smaller and thus cannot achieve as great efficiency as the SMP operator through economies of scale.

between different existing agreements and thus different deployment projects might be very limited. This is particularly relevant for the comparison of projects across different countries.

(82) Furthermore, NRAs should look at undertakings actually operating in the market and their ability to compete effectively and sustainably in the long term based on the given terms and conditions. This assessment should take into particular consideration the results of the market test conducted in accordance with Article 79 (2).

(83) In case the NRA concludes that an efficient undertaking cannot compete effectively and sustainably when accepting the proposed terms of the co-investment offer, these terms usually cannot be considered being fair, reasonable and non-discriminatory and thus do not comply with the conditions of Article 76 (1) (b) (i). As a possible implementation, NRAs could potentially evaluate the terms of the co-investment offer by assuming a hypothetical efficient provider of electronic communications networks and/or services. If there are different business models present in the market, NRAs could also make use of several different hypothetical providers of electronic communications networks and/or services for this type of assessment.

2.3.1.2. "Access to the full capacity of the network to the extent that it is subject to co-investment"

(84) *"Access to the full capacity of the network"* implies that the co-investment offer's terms should allow other co-investors to have access to the full potential of the new very high capacity network and that the granted access can – if at all – only be limited by given (technical) circumstances that equally affect all co-investors, including the SMP operator, and not be restricted otherwise.

a. Capacity of granted access may not be unduly limited by SMP operator

(85) The condition implies that co-investors must be allowed to have access to the full capacity/performance of the network, including the possibility to provide services (i.e. wholesale and retail services) without undue restriction by the SMP operator, so as to be able to compete with the SMP operator in downstream markets.

(86) This requirement holds irrespective of what the SMP operator offers to its own retail arm. It applies to all kinds of co-investments addressed by this Article and is not dependent on the level of risk a co-investor is committing for.

(87) However, this does not imply that the SMP operator is required to offer the co-investors better conditions than it would be able to offer itself. Rather, the offer's terms should ensure that the SMP operator provides unrestricted access to the technical capacity of the network. This capacity can especially be influenced by any limitations given by the network's architecture or other technical conditions. In certain cases, access to the full capacity may have to be ensured by providing the possibility for passive access (e.g. access to dark fibre).

b. Extent of granted access may be limited by network topological and/or geographic extent of co-investment

(88) However, the previously described – in a technical sense unrestricted – access to the network is limited by "*the extent that the network is subject to co-investment*".

(89) This implies that access only needs to be granted to new network elements that are subject to the co-investment. Other elements of the network – e.g. other parts of the SMP operator's network that are not part of the co-investment scheme and possibly already existed before – are generally not covered by this requirement and thus do not need to be accessible under the co-investment offer. However, in some cases compliance with this condition could be complex and there might be cases where it is necessary to grant access to (some) other elements of the network (e.g. by offering wholesale products that use other parts of the network)[32] in order to ensure that co-investors are able to compete effectively and sustainably. The assessment if such access is necessary for other co-investors to compete effectively and sustainably is dependent on the specific circumstances of the co-investment in question and thus should be done by NRAs on a case-by-case basis.

c. Number of accessible lines may be limited by co-investment share

(90) Furthermore, access is also limited based on the commitment a co-investor invests into and thus also on the level of risk an individual co-investor bears with its commitment, independent of the specific type of the co-investment vehicle.[33] This implies that, for example, a co-investor committing for only the minimum participation is not entitled to serve all end-users based on the terms of the co-investment agreement, but only a share of these lines corresponding to the risk the co-investor incurs with its current commitment. However, BEREC points out that this does not limit the number of end-users that the co-investors can address on the retail level because co-investors continue to have the possibility to compete for and address additional end-users. They can do so by, for example, increasing their participation according to Article 76 (1) (b) (iii) or by buying additional capacity as an access seeker.

2.3.2. Guidelines on Article 76 Paragraph 1 Point B) (II)

(91) In general, it is recognised that the requirement for flexibility needs to be balanced against incentivising early and material commitment to the co-investment project, so that the benefits of co-investment in terms of pooling of costs and risks can be realised. However, additional[34] co-investors may emerge at different stages of the network deployment project, including after the commencement of the project itself, with the financial conditions having to be set in a way that reflects the different levels of risk accepted by the individual co-investors.

Point b) (ii): "*flexibility in terms of the value and timing of the participation of each co-investor*;"

[32] For example, a co-investment agreement could be about upgrading an existing FTTC network to a FTTH network. In that case, the co-investors might not be able to compete with the SMP operator effectively and sustainably based on access at the location of street cabinets because the cost of reaching all street cabinets with their own infrastructure might be too high. Therefore, co-investors might need to receive bitstream access at a more central access point or alternatively dark fibre capacity to reach these access points.

[33] This possible limitation applies to all types of co-investment agreements. However, it may be more relevant in case of one-way access or joint venture models, while in reciprocal access models co-investors might often allow each other access to all addressable end-users.

[34] Paragraph 2 of Article 76 requires that at least one potential co-investor has entered into a co-investment agreement with the undertaking designated as having significant market power.

(92) Flexibility in terms of the value of the participation of each co-investor could be achieved in various ways, depending on the specifics of the co-investment arrangement. For example, offering co-investors the option to commit more or less capital for a larger or smaller share of the project or options to purchase an IRU to different amounts of capacity.

(93) Under this flexibility, variations in financial terms may be possible, subject to these being justified on the basis of the same objective(s), such as the financial commitment of the co-investor, transparency, non-discrimination and predictability[35].

(94) In determining whether the flexibility provided in the offer meets the requirements of Article 76, NRAs need to be cognisant of the considerations to safeguard the economic viability of the co-investment project.

(95) In principle, small providers of electronic communications networks and/or services should not be prevented from participating in the co-investment. Nevertheless, it may be reasonable for the SMP operator to set a minimum share of participation to ensure the effective management and governance of the project and to manage the level of its own risks. Undertakings that only commit to a very small share do not bear much of the investment's relevant risks and thus are more comparable to access seekers (addressed in point (d)); they should not get the same treatment as co-investors which bear material risk associated with the investment (otherwise this would undermine incentives to participate in the first place). In determining whether any minimum share specified by the SMP operator meets the requirements of Article 76, the NRA should assess whether it achieves this purpose, and ensure it goes no further than this. The minimum share should not be specified in such a way that it prevents the participation of undertakings that would otherwise make a material positive contribution to promoting effective and sustainable long-term competition in any downstream markets in which the undertaking designated as having SMP is active.

(96) Concerning the flexibility in terms of the timing of participation, the co-investment offer may allow potential co-investors and third-party undertakings to join the project (i.e. potential participants that are not in the initial list of co-investors) at different stages regardless of the stages of the co-investment project. Flexibility for existing co-investors to change the level and/or share of their participation is considered below, under point b (iii).

(97) The terms faced by co-investors participating at different points in time need to satisfy the requirement under point b (i) such that the terms of the co-investment offer are fair, reasonable and non-discriminatory (discussed above).

2.3.3. Guidelines on Article 76 Paragraph 1 Point B) (III)

Point b) (iii): "*the possibility to increase such participation in the future*;"

[35] For example, provided the overall financial expenditure for the same services is the same, the fact that in a scenario where one co-investor pays a large part of the cost in the form of an up-front investment and lower ongoing costs, and another co-investor pays a smaller part of that the cost in the form of an upfront investment but pays higher ongoing costs totalling the same, the different payment mechanisms could be considered as being non-discriminatory, provided that the possibility of investing is open to everyone equally up front such that they each have equality of opportunity.

(98) The co-investment offer shall confer flexibility for existing co-investors to increase the level and/or share of their participation.[36] In principle, the offer could also allow existing co-investors to decrease their participation, subject to the existence of another co-investor willing to buy their share or right of participation.

(99) In some cases, the level of participation will not place any limit on a co-investor's ability to compete at the retail level. For example, under a joint venture model, co-investors may contribute a share of the financial outlay required to fund the network deployment, in exchange for a share of ownership of the company responsible for rolling out the VHCN. It is then possible that the co-investors would be free to utilise any amount of capacity on the network, subject to their downstream business paying the per line access charges.

(100) However, it is recognised that under some forms of co-investment the level of participation may be specified in such a way that it relates to a share of capacity on the network. For example, under a one-way access model, participants may purchase an IRU to a proportion of capacity on the network. Where this is the case, the co-investment offer must ensure that once the co-investor reaches this level of capacity, it is not prevented from competing for customers at the retail level. The requirement for flexibility to increase participation in the future could satisfy this requisite. Alternatively, the offer could set out arrangements for co-investors which have exhausted their own share of capacity to access other co-investors' share of capacity.

(101) It is recognised that the requirement to provide flexibility to increase participation could raise issues once rights to the capacity of the new VHCN are fully allocated. Participants seeking to join the co-investment offer or increase their share at a later point in time can only do so by acquiring rights from those who already hold it, thus diluting the rights of the latter co-investors. There are various approaches the co-investment offer could adopt in such a scenario, including arrangements for the reallocation of capacity (the co-investment offer would then need to set out the mechanism, including how existing co-investors are to be compensated), and potentially extended to placing limits of the degree of flexibility offered. In assessing whether the offer meets the requirements of Article 76, NRAs will need to consider whether the approach adopted is appropriate, bearing always in mind the aim of enabling effective and sustainable long-term competition downstream.

(102) Finally, BEREC considers that the level of participation of a provider of electronic communications networks and/or services should not place a limit on the retail market share which they may compete for. This is because such limits could result in an outcome where the retail market is *de facto* shared between co-investors, and such an outcome would run counter to the aim of promoting effective and sustainable long-term competition at the downstream level.

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[36] An example of the form this could take is set out in Annex IV, point (c): "*The offer shall allow flexibility … for example by means of an agreed and potentially increasing percentage of the total end-user lines in a given area, to which co-investors have the possibility to commit gradually and which is set at a unit level enabling smaller co-investors with limited resources to enter the co-investment at a reasonably minimum scale and to gradually increase their participation while ensuring adequate levels of initial commitment.*"

2.3.4. Guidelines on Article 76 Paragraph 1 Point B) (IV)

Point b) (iv): "*reciprocal rights awarded by the co-investors after the deployment of the co-invested infrastructure*;"

(103) Reciprocal rights are of particular importance in the reciprocal access model. For example, where co-investors are individually and separately responsible for the deployment of specific parts of the network, reciprocal rights of access to the co-invested infrastructure should be granted for the purposes of providing services downstream, including to end-users[37]. However, reciprocal rights may also be relevant in other co-investment models.

(104) Annex IV requires that if a co-investment vehicle is created, it shall provide access to the network to all co-investors, whether directly or indirectly, on an equivalence of inputs basis and in accordance with fair and reasonable terms and conditions. This implies that the terms of access should be non-discriminatory between co-investors, irrespective of their value share[38].

(105) In principle, where reciprocal rights are granted between equal co-investors, the terms should be identical. Any differences should be objectively justified. For example, as discussed under point b (i), differences in terms may be justified to reflect differences in the level of risk accepted and agreed upon by the individual co-investors.

2.4. Guidelines on Article 76 Paragraph 1 Point C)

Point c)

"*it is made public by the undertaking in a timely manner and, if the undertaking does not have the characteristics listed in Article 80(1), at least six months before the start of the deployment of the new network; that period may be prolonged based on national circumstances*;"

(106) According to Article 76 (1) (c), when NRAs assess – following the procedure set in Article 79 – the commitments on co-investment offered by the SMP operator, they should assess, among other conditions, that the publication of the co-investment offer is done in a timely manner.

(107) The aim of this provision is to allow the potentially interested providers of ECN/ECS to participate in the project from the beginning of the deployment (i.e. the roll-out) of the new network, having at their disposal enough time to evaluate all the elements needed to take the most appropriate decision before the deployment starts and to allow them to compete from the beginning with the SMP operator. The EECC considers appropriate that a period of at least six months is allowed to companies, for these to carry out all the internal steps needed to participate in the co-investment project. Nevertheless, each NRA, based on the national circumstances, may extend that period under justified reasons in the context of the

[37] As per Annex IV, conditions are to be made transparent in the co-investment offer and subsequent agreement.

[38] Annex IV, paragraph (c), first bullet states: *"Non-discriminatory terms in this context do not entail that all potential co-investors shall be offered exactly the same terms, including financial terms, but that all variations of the terms offered shall be justified on the basis of the same objective, transparent, non-discriminatory and predictable criteria"*.

commitment procedure. The practical declination of the "timely manner" principle is therefore an announcement period for the co-investment offer not shorter than six months prior to the official start of deployment of the project.

(108) The period limit of "at least six months" refers only to the case in which the SMP operator is not a wholesale only operator**.** In the case of an SMP wholesale only operator, this period could be shorter, absent the advantage of the vertically integrated SMP operator to start retail offers immediately after the deployment, in advance of competitors (all co-investors will be in the same position regarding the launch of retail offers).

(109) It is important to clarify how to assess whether the co-investment offer is made public "in a timely manner", also considering that this offer will be presented in the context of the complex commitment procedure according to Article 79.

(110) It is clear from the text that the relevant period of at least six months starts from the date of the publication of the co-investment offer and ends when the deployment of the new network starts.

(111) BEREC's interpretation regarding the requirement for publication of the co-investment offer is that it mainly aims to ensure transparency. Therefore, for such publication to satisfy the requirements of Article 76 (1) (c), it should not be necessary for the offer to be already binding towards stakeholders.

(112) The SMP operator may offer commitments under Article 79 in relation to a specific co-investment offer in order to obtain the deregulation of the new network. The publication of the co-investment offer can be done at a different time from the offer for commitments to the NRA (before/during/after the commitment procedure). When the SMP operator decides to publish the co-investment offer before the commitment procedure ends, the operator may clearly state that the offer is considered valid only in case the NRA will issue a deregulatory decision.

(113) Regarding the six-month period, BEREC identifies two possible scenarios depending on when the co-investment offer is published:

1. Publication of co-investment offer *after* the commitment's procedure ends

In this scenario, the SMP operator decides first to offer commitments on co-investment before the publication of the offer. Consequently, the NRA – taking into account the results of the market test – can make them binding and declare to not impose any remedy in relation to the new network (declaring that the deregulation will apply from the moment when at least one company entered into the co-investment agreement). Then, the SMP operator publishes the co-investment offer and after (at least) six months the deployment of the network starts. The commitments need to be sufficiently clear and precise so that NRAs can verify the compliance with Article 76 and Annex IV, and stakeholders are able to participate at market test with their comments.

2. Publication of co-investment offer *before* or *during* the commitment's procedure

In case the SMP operator publishes the offer of co-investment before or during the commitment procedure and then the offer *significantly* changes during this procedure, the NRA will assess case by case the need to set a reasonable additional notice period, taking into account that the "modified project" is not completely new but only changed in order to meet the requirements of Article 76. Moreover, in order to guarantee the highest level of transparency to stakeholders, if the SMP operator publishes the offer before the commitment procedure, BEREC recommends that the SMP operator should clearly indicate in the publication the intention to propose commitments under Article 79 of the EECC on the basis of that offer. This information is required for the publication of the offer to count towards the six-month period.

(114) According to Article 76 (1) (c), the six-month period *"may be prolonged based on national circumstances"*. Such prolongation may be justified by reasons strictly related to the co-investment scheme, for example, by the need for other co-investors to prepare for the start of marketing activity (so that the SMP operator does not get a first-mover advantage), by complex co-investment schemes or products, or the need to implement new interfaces. It is reasonable that NRAs evaluate such extensions in the context of the commitment procedure at the request of the SMP operator or alternative providers of ECN/ECS (during the market test). To favour the process of deployment of new VHCN, NRAs will use their best effort to carry out the assessment of the co-investment projects as efficiently as possible.

(115) Annex IV sets out the criteria that the co-investment offer must meet at a minimum, in order to allow NRAs to accept commitments and make them binding.

(116) Annex IV, point b, indicates different levels of transparency for a co-investment offer:

a) Necessary elements of the offer must be published on the website for interested undertakings to understand the offer ("*shall be available and easily identified on the website of the undertaking*");

b) Full detailed terms of the offer would not necessarily be made available immediately through the publication but only after a bidder expresses its interest (**"***full detailed terms shall be made available without undue delay to any potential bidder that has expressed an interest"*);

c) The process/road map for the establishment and development of the co-investment project "*must be set in advance, shall be clearly explained in writing to any potential co-investor, and all significant milestones shall be clearly communicated to all undertakings without any discrimination*".

(117) Concerning the information to be published on the website (point a. listed above) of the SMP undertaking, the published offer should include information that is essential to allow potential co-investors to judge whether they might have an interest in the co-investment proposal. This information should include a description of the co-investment project (content of the project, including technical characteristics and the geographical area/areas involved and *"all significant milestones"*).

(118) Regarding the information to be made available without undue delay to any potential bidder that has expressed an interest (point b. listed above), Annex IV, point b refers to disclosure of the full detailed terms, which are to include, but not necessarily be limited to, the following terms:

a) the <u>legal form</u> of the co-investment agreement (*e.g., (a) special purpose vehicle (e.g. Joint venture), (b) reciprocal access model (e.g. joint-build consortium (with terms regarding financial consideration required for the acquisition of specific rights, during the building phase and during the exploitation phase, for example indefeasible rights of use contracts ("IRUs")), (c) one-way access model managed by SMP operator*);

b) financial conditions and conditions for late entry;
c) technical characteristics of potential wholesale products or more detailed information about the deployment areas;
d) conditions and the adaption mechanism related to access seekers as per Article 76 (1) (d);
e) the heads of term of the governance rules of the co-investment vehicle (when relevant).

(119) On the process/road map (point c. listed above), the milestones of the roadmap could also be published on the website and the detailed terms would then be communicated in writing to any potential co-investor afterwards, upon request, in a non-discriminatory manner.

(120) As noted above, there are different levels of transparency required in terms of Annex IV with regards to the information included in the co-investment offer. While essential elements must be made publicly available on the website of the undertaking, full detailed terms would not be made available immediately through publication, but only after a potential bidder expresses interest. In any case, when the SMP operator presents commitments, they need to be complete and sufficiently clear and precise for NRAs to verify the compliance with Article 76 and Annex IV, and for stakeholders to be able to contribute to the market test with their comments.

(121) It is important that the information should be available on a transparent and non-discriminatory basis. NRAs must take into account the rights and obligations of undertakings and potential co-investors with regards to commercially sensitive/confidential information and without prejudice to any affected party and/or stakeholder. Where any of the relevant undertaking(s) consider(s) certain aspects of information included in the co-investment offer to be of a confidential and/or commercially sensitive nature, and thus only to be shared with interested bidders upon request and subject to confidentiality provisions, the relevant undertaking(s) should provide in any case the NRA with complete details of such information along with objective reasons justifying why it considers the information to be confidential and/or commercially sensitive. The NRA should then consider the classification of the information as "confidential" in accordance with its own criteria for dealing with confidential information and decide accordingly.

(122) If and when any of the commercially sensitive and/or confidential information identified ceases to be commercially sensitive and/or confidential, it must be made available by the relevant undertaking on its publicly available website without undue delay.

(123) Any actions regarding the exchange of information and level of transparency in the context of Articles 76 and 79 are without prejudice to competition law.

2.5. Guidelines on Article 76 Paragraph 1 Point D)

Point d)

"*access seekers not participating in the co-investment can benefit from the outset from the same quality, speed, conditions and end-user reach as were available before the deployment, accompanied by a mechanism of adaptation over time confirmed by the national regulatory*

> *authority in light of developments on the related retail markets, that maintains the incentives to participate in the co-investment; such mechanism shall ensure that access seekers have access to the very high capacity elements of the network at a time, and on the basis of transparent and non-discriminatory terms, which reflect appropriately the degrees of risk incurred by the respective co-investors at different stages of the deployment and take into account the competitive situation in retail markets;"*

(124) The main goal of this provision is to maintain the "competitiveness of markets" - see Recital (200) - by means of granting access to third parties, i.e. those that are not part of the co-investment. Therefore, efficient access seekers should be able to enter the market and/or remain a relevant competitive force. Any offer or adaptation mechanism which is likely to prevent this is not in line with Article 76 (1) (d).

(125) On the other hand, the adaptation mechanism has to maintain the incentives to participate in the co-investment, i.e. it has to give the co-investors advantages compared to access seekers (with respect to the access to the new VHCN or to elements of the network).

2.5.1. Access as before the deployment

(126) According to Article 76 (1) (d) existing and potential new access seekers have to benefit from the outset (i.e. the activation of the VHCN) from the same quality, speed, conditions, and end-user reach that were available before the deployment. Access of this form can be provided either using the new VHCN elements or via the 'old' ones (i.e. legacy infrastructure, if it is still in place).

(127) The achievable download and upload speeds have to be the same as before the deployment. Other relevant quality parameters that may be considered are, for example, delay, jitter, packet loss, and availability. However, speed is likely to be the most important parameter. The term "conditions" includes prices, processes for ordering and repair, provision of information, etc. End-users addressable before the deployment should also be addressable thereafter. If decommissioning of the legacy network leads to a reduced reach of the network, this should be done with a sufficient period of notice in line with Article 81. If business grade quality characteristics were available before the deployment, they should also be available after the deployment.

2.5.2. Access to very high capacity network elements

(128) Access to the VHCN elements could be either in the form of active access (e.g. virtual unbundling) or passive access (e.g. fibre unbundling). In the form of active access, it would mainly refer to access to higher bandwidths (higher than before the new VHCN deployment). In case of passive access, the access seeker in principle can offer to its customers any bandwidth that would be technically possible.

(129) The form (active, passive or both) and conditions of access to third parties should be part of the co-investment offer, which is subject to the scrutiny of the NRA and to a market test. This part of the offer should also describe the adaptation mechanism, either by laying down the timing and nature of the adaptations or by describing the triggers which will lead to

adaptations and the form of these adaptations. If relevant, quality characteristics should also reflect quality needs for access seekers providing services to business users.

(130) According to Article 76 (1) (d), access to the VHCN elements has to be provided to access seekers at a time which appropriately reflects the degree of risk incurred by the co-investors at different stages of the deployment, taking into account the competitive situation at the retail level. Therefore, different types of adaptation mechanisms are possible depending on the risk incurred and the retail market developments, in particular the competitive situation in retail markets.

(131) Timing, pricing, and quality (mainly speed) are the main factors of the adaptation mechanism.

(132) Timing: The offer may determine a time at which access seekers (which are non-co-investors) get access to the VHCN elements (e.g. in the form of higher bandwidths). In order to maintain incentives to participate in the co-investment, co-investors may be allowed to benefit from a first-mover advantage with regard to the selling of higher bandwidths, which usually have the highest margins. The appropriate length of this period depends on the degree of risk incurred by the co-investors. A longer period may be justified, if the risk is high, e.g. where the rollout cost per customer is particularly high and there is significant uncertainty about future demand and willingness to pay for high bandwidths. However, a very long period (e.g. beyond five years) may not meet the criteria of Article 76 (1) (d) since it is unlikely that access seekers remain competitive during such a long period without access to the VHCN elements/higher bandwidths.

(133) Pricing: The prices for access to VHCN elements may vary over time. For example, prices may be higher in the beginning reflecting higher retail prices of the co-investors and/or demand uncertainty and could then be reduced over time. Furthermore, effective wholesale price levels for access seekers could be higher than for co-investors to reflect the risk that co-investors incur, and to maintain the incentives to participate in the co-investment. The price differential would effectively be limited by the condition that efficient access seekers should be able to enter the market and/or remain a relevant competitive force.

(134) Quality: The quality of access for non-co-investors (in particular the speed) might be restricted compared to the quality available to co-investors. This would be similar to a first-mover advantage as discussed under 'Timing'. Nevertheless, co-investors must provide access seekers from the outset at least with the same quality as available before the deployment of the new VHCN.

(135) The offer can contain one or several of these factors when determining the terms of wholesale access to non-co-investors. NRAs need to assess the offer against the background of national market characteristics to decide whether it allows efficient access seekers to enter the market and/or remain a relevant competitive force and therefore meet the requirements of Article 76 (1) (d).

(136) Adaptations may occur only once (e.g. when access to fibre unbundling is granted), or several times (e.g. when the network is upgraded repeatedly. Or – in case of active wholesale products – co-investors increase their retail bandwidths repeatedly, or there are changes in the competitive situation in retail markets). The timing of adaptations or the triggers leading to

adaptations should be communicated from the outset in a way which provides sufficient predictability for access seekers and co-investors. In case of changes to the adaptation mechanism, the access seekers and the NRA should be informed with due notice. The NRA has to confirm the adaptation mechanism (and potential changes to it) in its assessment, and monitor or enforce its application over the period of the commitments.

(137) The requirements of Article 76 (1) (d) have to be viewed as minimum requirements in order to maintain the competitiveness of markets. Therefore, co-investors may also decide to grant access to the very high capacity elements of their network from the outset.

(138) Once supplied, access to the VHCN elements has to be offered on the basis of transparent and non-discriminatory terms. Therefore, the terms of access should be published by the co-investors. Non-discrimination applies among access seekers, but not necessarily between co-investors and access seekers.

(139) The NRA should review the access conditions and the adaptation mechanism periodically, at least every five years (or a comparable timeframe as set for market analyses).

2.6. Guidelines on Article 76 Paragraph 1 Point E)

Point (e)

"*it complies at a minimum with the criteria set out in Annex IV and is made in good faith*."

(140) The criteria set out in Annex IV are an integral part of the conditions (a) to (d) of Article 76 and have therefore also been assessed in the context of these Guidelines. BEREC may revisit its position on this aspect at a later stage.

(141) No relevant issues regarding the condition of a co-investment being made in good faith have been identified for this point so far.

3. REVIEW CLAUSE

BEREC intends to report on the practical application of these guidelines in accordance with Article 4 (1) (j) of the BEREC Regulation.[39] This report will provide input to an assessment of the need to revise the guidelines. This assessment will be undertaken within five years after the adoption of the Guidelines.

[39]REGULATION (EU) 2018/1971 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R1971&from=EN