Response to the consultation on the draft ‘ BEREC report on Co-investment and SMP in NGA networks’

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The FTTH Council Europe thanks BEREC for the opportunity to comment on the 'draft BEREC report on Co-investment and SMP in NGA networks'.

The FTTH Council Europe is an industry organisation with a mission to accelerate the availability of fibre-based, ultra-high-speed access networks to consumers and businesses. The Council promotes this technology because it will deliver a flow of new services that enhances the quality of life, contributes to a better environment and increased competitiveness. The FTTH Council Europe consists of more than 150 member companies. Its members include leading telecommunications companies and many world leaders in the telecommunications industry (additional information is available at www.ftthcouncil.eu). Telecoms operators are not members of the FTTH Council and we have our own perspectives regarding the appropriate regulatory policies to accelerate NGA deployments.

The FTTH Council's interest is to see the benefits of FTTH made available to the greatest extent possible and in the shortest possible period of time. A competitive market dynamic is central to achieving our objective both for accelerating FTTH deployment directly where competitive deployment is possible and also indirectly, by driving service innovation and demand, where competitive deployment is not possible.

Concerning the topic of co-investment, the FTTH Council congratulates BEREC on what is a thorough review of current practices and the factors which may impact on the state of competition in an SMP assessment in the Article 7 procedures. The FTTH Council believes that who the entity undertaking the network investment is and the form of that investment may be important in terms of the effectiveness of the investment in stimulating network deployment and subsequently, take-up. While we appreciate and understand to some extent the limited scope of the review in terms of the factors under consideration, the Council's perspective is necessarily broader. The FTTH Council believes BEREC should come to a view on the effectiveness of the various co-investment mechanisms which exist now or which could exist in the future (for example models of co-investment which are in the 'network of networks' format with mobile and fixed line operators sharing infrastructure and co-investment members including road and rail infrastructures as well as telecoms and power utilities) and to also have consideration of how to enable or encourage favourable outcomes where a particular model is identified.

The FTTH Council encourages BEREC to extend the scope of its review and to answer the question of when a particular co-investment structure is desirable and how NRAs could actively encourage and facilitate such an outcome.

One striking feature in BEREC's report is Table 2 on page 10 where the number of NRAs including fibre in or out of their market analysis is summarised. The FTTH Council does not wish to comment on the table other than to observe that considerably different approaches also exist in terms the co-investment models that have been adopted by NRAs around Europe. Those models have had differing results. The main examples discussed in the report are those of the Netherlands, Portugal, France and Italy though a number of others are also mentioned. While co-investment schemes have evolved and developed in different circumstances right across Europe, the FTTH Council believes that there are lessons to be learned from those different results.

The circumstance of the Netherlands is unusual in that it is more an example of an M&A activity rather than a typical co-investment scheme. The Council believes such a model will be atypical where a firm (Reggefibre) outside the sector builds a fibre network by itself without an initial client base unless it does so in co-operation with others. We note that in Portugal, France, Italy and a host of mentioned smaller deployments, the NRA and Government, including local government, have been very active in managing the market outcomes. The Council believe that unless there is active engagement and management of co-investment outcomes by NRAs, such schemes they will not happen in general or will not be as coherent as they could have been without NRA involvement. Government Ministries could also act to facilitate such co-investment vehicles. However, the FTTH Council believe that given their expertise and understanding of the market, NRAs are better placed to fulfil this role.

The FTTH Council believes that there are sufficient examples of co-investment across Europe to allow a view to be taken on whether co-investment is desirable or not. The FTTH Council for its part believes co-investment can be a very positive mechanism for stimulating investment in certain circumstances.

It is difficult to imagine a corporate governance structure which could be put in place to govern a common infrastructure without a high degree of separation between operation of the asset and the sale of consumer facing services. Co-investment therefore implies a significant degree of business separation in its design in the Council's view. The extent to which business structures which are inherently structurally separated will be acceptable to entrant or incumbent operators will necessarily vary but where there is such separation, the FTTH Council believes that this will have a significant impact on the market outcomes (and the regulations that should apply).

The FTTH Council would expect to see different responses to co-investment models due to the varied nature of competition across Europe and the varied co-investment plans invoked in that context. So we would expect see different approaches to imposed regulation and a one size fits all model of co-investment and regulation would not be appropriate.

Finally, given that the timeframe of all the co-investment models is long (beyond 5 years at least and normally considerably longer), the FTTH Council believes that this needs to be reflected in the consistent treatment of remedies over a number of market review periods. Such certainty of treatment over time will be an important enabler of co-investment agreements.

The FTTH Council believes that any co-investment implies a high degree of vertical separation between business units with consequences for market dynamics and the consequent regulatory obligations.

The Council notes what has been achieved in Portugal in particular in its co-investment model. In Portugal a plan was devised to achieve a number of network roll-out targets in the context of a national broadband plan, all relevant bodies then took practical measures to see it implemented. The parties involved were Government, Anacom, all the operators and a host of local and regional authorities. In urban areas, operators were invited to build their own networks using a very well developed duct access product. However, it was clear that in less dense areas a different approach would be required, so in less dense areas a single shared FTTH network which is independently owned and managed is available to all operators on an equal footing. The design of the network has had input from all operators, the future customers of the network owner. This is a model of co-investment with considerable merit because it covers commercially difficult to reach areas in the context of a national broadband plan. It also creates an ownership structure which appears to satisfy all the different stakeholders. While a new monopoly has in fact been created, its ownership structure is such that it may not require extensive regulation or regulation which needs to be overly detailed.

In France ARCEP has been extremely active in encouraging technical solutions on the ground and working with operators to find common solutions to extend the network reach of all the operators by sharing the areas to be covered. While a variation on the Portuguese model, the Council believes that this is another important example of an NRA enabling a co-investment structure.

The FTTH Council believes co-investment models need proactive facilitation by NRAs and NRA participation in establishing the parameters of such a model. The FTTH Council believe that co-investment schemes may be inherently more competitive depending on their design.

The FTTH Council believes that the Portuguese example has a particular resonance in a context where the Commission is proposing to distribute significant funds through the Connecting Europe Facility (CEF), significant thought needs to be given to the mechanisms that will be used to absorb such large funds. Even if the CEF does not proceed as envisioned, it is clear that significant funds will be available whatever the mechanism, even if it is through the normal structural funds. The FTTH Council believes that BEREC should give consideration to co-investment models which can be used to absorb public finances and that these models should be designed in advance. NRAs that have experience of co-ordinating the relevant stakeholders in establishing a co-investment vehicle could contribute their experience to such an exercise in order to arrive at an appropriate an functional design.

Many operators have highly leveraged balance sheets and even if they perceive significant returns on their investments they do not wish to overextend themselves. Co-investment vehicles which have a range of contributors but no majority holder would allow debt to be held off balance sheet. An appropriate call option may also be an important element in such a vehicle for certain strategic investors and the benefits or such a model should be considered.

The FTTH Council believes that significant public funds can be potentially distributed using co-investment models to reach areas where competition cannot reach commercially. Co-investment has positive implications for competitors using that network to reach end users.

One final and critical issue in the FTTH Council's opinion concerns the narrative at pages 43 which highlights the need to avoid costly network duplication where 'only a layer 1 monopolist is economically possible'. The FTTH Council believes that it is too early to seek to prejudge the boundaries of where infrastructure competition will and will not be possible or what the form of that competition will be. The FTTH Council therefore believes that all possibilities should be left open for as long as possible.

The FTTH Council believes that the scope for physical infrastructure competition is not yet known and that it should not be prejudged in advance.

In conclusion, the FTTH Council believes that models of co-investment can facilitate and encourage investment which would not otherwise happen. However, the Council notes that the most likely forms of co-investment (between operators) need active facilitation and management by NRAs. Without such active facilitation such schemes simply will not exist or at least not extensively. NRAs must therefore decide when and how co-investment is a positive factor in a markets development and choose whether to facilitate it. The FTTH Council believes a second report on co-investment is required which goes beyond a consideration of the impact on SMP coming from co-investment agreement and which considers such factors as the merits of co-investment in terms of accelerating investment and the role that NRAs can play to facilitate co-investment agreements.

Yours sincerely,

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