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for Electronic Communications

BEREC

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BEREC Report on the outcome of the public consultation on the Draft 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)

11 December, 2020

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Introduction

This report summarises the responses provided by the stakeholders during BEREC's public consultation on the "Draft guidelines to foster the consistent application of the criteria for assessing co-investments in new very high capacity network elements (Article 76 of the European Electronic Communications Code, EECC)[1]", as well as BEREC's views on the issues raised by the respondents. The Draft guidelines were opened to public consultation from 16 June 2020 to 4 September 2020.

15 respondents responded to the public consultation, namely:

1. Associazione Italiana Internet Provider (AIIP)
2. Bundesverband Breitbandkommunikation e.V. (BREKO)
3. CETIN
4. Deutsche Telekom AG (DT)
5. European Competitive Telecommunications Association (ECTA)
6. European Local Fiber Alliance (ELFA)
7. European Telecommunications Network Operators' Association (ETNO)
8. FTTH Council Europe
9. Open Fiber SpA
10. OXERA
11. TIM
12. Association of the Providers of Telecommunication and Value-Added-Services (VATM)
13. Verband kommunaler Unternehmen e.V. (VKU)
14. Vodafone Group
15. One confidential contribution

Stakeholders welcomed the opportunity to provide input on BEREC's draft guidelines to foster the consistent application of the criteria for assessing co-investments in new very high capacity network (VHCN) elements set in paragraph 1 of Article 76 and Annex IV of the EECC[2], also based on their market-related experience with respect to co-investment offers and agreements.

Comments, observations and recommendations raised by the respondents are summarised here below, and BEREC's views are presented in separate boxes. The report is organised following the sections of the Draft Guidelines submitted to public consultation in June 2020, with an initial section on general issues. This summary is complemented by the final BEREC Guidelines (BoR (20) 232) which include the amendments presented here below and which will be published simultaneously.

[1] BoR (20) 113. June, 2020. See https://berec.europa.eu/eng/news_consultations/Closed_Public_Consultations/2020/7573-public-consultation-on-the-draft-berec-guidelines-to-foster-the-consistent-application-of-the-criteria-for-assessing-co-investments-in-new-very-high-capacity-network-elements-article-76-eecc

[2] Unless otherwise specified, all Articles and Annexes mentioned in this report are referring to the EECC.

1. General issues

AIIP is concerned that the actual Draft BEREC Guidelines are unbalanced towards ensuring an excessive protection to co-investors in VHCN which, at the end, would result in a breach of the principles underlying the EECC. AIIP suggests that BEREC clarifies that any VHCN project to be published under art. 76 EECC should be shared into several “lots”, each having the maximum territorial extension of a municipality or aggregate of neighbouring municipalities

BREKO and **ELFA** acknowledge the importance of flexibility that should be afforded to NRAs in order to account for specific national circumstances, but in their view, the guidelines in their current format do not provide enough guidance to both NRAs and undertakings. In this sense BREKO and ELFA see a lack of clarity and specificity regarding various aspects of the guidelines, ranging from definitions to complex legal decisions that will have to be made by NRAs in the absence of clear-cut criteria or potential benchmarks.

ECTA views critically what they consider BEREC’s proposals for restricting openness for purely pragmatic considerations; for a restrictive interpretation of how offers should be made publicly accessible; and the absence of guidance on what making an offer in good faith requires. ECTA believes that access seekers, while not being immediately eligible to access the capacity of the deployment under the same conditions as participating co-investors, must benefit from business continuity on terms that do not diminish their ability to keep delivering their services after deployment. ECTA considers that BEREC outlines an approach to smaller operators’ ability to participate in co-investments that is significantly at odds with the Code’s requirements. ECTA´s also addresses some formal issues on omissions in their view, as in the title of the guidelines, that in its opinion does not adequately reflect the mandate that BEREC has been given by Article 76(4) EECC, and over insufficiently precise citation to and the missing consideration of several aspects of the Annex, contrary to the explicit requirement of point (e) of the Article 76(1)(2) EECC. Finally, ECTA has sent an extensive proposal for redrafting of large parts of the guidelines.

One confidential respondent considers that BEREC Guidelines are well designed and safeguard against anti-competitive behaviours that could arise from an inappropriate design of co-investment agreements. The respondent agrees with BEREC’s, in its view, in-depth analysis of the definition of very high capacity networks and the timing of making the co-investment offer as well as the type of investments covered by the article 76.

The **FTTH Council** commends the objective of the treatment of co-investors to encourage co-investment in VHCN as a means to promote these investments and widen the scope of investment (by lowering cost/risk). In the FTTH Council’s view, BEREC’s guidelines can have an important function to limit investor uncertainties for co-investors and other investors alike. While the FTTH Council believes that Article 76 can be useful, it notes that there are risks associated with its application, which could result in limits on SMP controls. Without very specific guidance and clarifications Article 76 risks to be either unused or misused.

Open Fiber comments that from a general point of view, co-investment models are suitable for vertically-integrated operators, and do not represent a sustainable and attractive investment model for a wholesale-only operator, like Open Fiber. Besides that, Open Fiber sees further issues arising from the Draft guidelines. Open Fiber appreciates that BEREC has described in great detail the entry conditions that co-investment models should guarantee to all operators, while avoiding any kind of discrimination. But it points out that the Draft does not contain any mandatory requirements in case the co-investment agreement allows the acquisition of rights to be assigned by co-investors to other co-investors. Open Fiber believes that BEREC should define the way in which co-investors can acquire rights from other participants in order to guarantee an adequate and non-discriminatory level of competition in the market.

Oxera generally sees a need for guidance to NRAs on what conditions are required for an SMP operator's co-investment scheme to 'qualify' for reduced regulatory intervention is necessary and on what tools regulators can use to provide the right incentives to investors and encourage investment, whilst also protecting consumers from the risk of excessive prices. Oxera believes that it should be made very clear how exactly relevant commitments will be assessed by NRAs to determine the extent to which certain practices will be allowed, and considers that the Draft Guidelines from BEREC could provide further clarity in some areas.

For **VATM,** one of the most important requirements in connection with cooperation models such as co-investments is that the NRA retains comprehensive supervisory options and can intervene if contracts are not adhered to or if a disadvantageous development of the competitive situation on the market makes this necessary. VATM considers the formulation that VHCNs should be uniformly re-regulated regardless of their time of their establishment to be problematic or at least misleading. In VATM´s view, there has to be a clarification that this can only apply to companies with significant market power.

VKU believes that to prevent an abusive use of the proposed co-investment schemes, a framework with precisely defined criteria for a consistent application is highly important, but in **VKU's** view the draft guidelines still leave room for precise guidance. According to **VKU**, this may give leeway to NRAs which could jeopardise a consistent application of the Code's provisions on co-investments and remaining unanswered questions regarding the assessment criteria could result in legal uncertainty if not addressed in the guidelines.

BEREC's response:

BEREC thanks all stakeholders for having provided their input in the public consultation process, that has helped to improve the final version of the Guidelines.

On the proposal from **AIIP** asking BEREC to clarify that any VHCN project to be published under Article 76 should be shared into several "lots", BEREC considers that this potential requirement to split co-investment projects into lots is not set in the EECC. Providing such indication in the guidelines would result in additional requirements for co-investment projects to qualify for Article 76, and would go beyond the remit of giving guidelines on the EECC provisions.

On the opinion by **BREKO** and **ELFA** on the lack of clarity and specificity as well as **VKU**´s comments on the need for precisely-defined criteria to prevent abusive conducts or NRAs not applying a consistent approach, BEREC considers that the current Guidelines do help NRAs and undertakings to clarify and specify many aspects that needed clarification. BEREC also considers that a balance is also to be found between being highly specific and recognising that flexibility may be needed to take account of the heterogeneity of co-investment agreements. This being said, BEREC has carefully analysed each aspect addressed in Article 76 (1) and Annex IV, as well as the specific proposals raised by BREKO and ELFA.

On the redrafting proposal submitted by ECTA, BEREC has analysed it together with the separate comments sent, and the issues raised have been addressed in the different sections. BEREC has considered formal issues raised by ECTA (among them, the proposed changes in the title). Regarding Annex IV, BEREC considers that it is addressed in the guidelines along with other provisions in Article 76 (1). ECTA's criticism regarding restricting openness and smaller operators' ability to participate in co-investments is addressed in the corresponding sections.

BEREC agrees with FTHH Council views on the relevance of the guidelines to limit uncertainties for co-investors and other actors and has tried to provide as much guidance and clarifications as possible, without restricting flexibility to address very different type of potential co-investment agreements.

Open Fiber and Oxera's comments have been addressed under the corresponding sections of this report.

BEREC agrees with VATM on the fact that NRAs should retain comprehensive supervisory options and can intervene if contracts are not adhered to or if a disadvantageous development of the competitive situation on the market makes this necessary. BEREC considers that it is clear that the exemption of SMP regulation only applies to SMP operators entering into co-investment agreements qualifying under Article 76.

2. Comments on the Guidelines and specific paragraphs

2.1. Guidelines on Article 76 Paragraph 1

2.1.1. Which VHCN fall in the scope of Article 76

Referring to footnote [5] of the Draft Guidelines submitted to public consultation, **ECTA** stresses that under no circumstances the current Guidelines should advise SMP operators on how to pursue deregulation.

BREKO and **ELFA** welcome the narrowing of the definition of VHCN in comparison to the broader definition set under Article 2 (2) EECC. However, regarding Recital (199) of the EECC, both actors believe that BEREC should provide further guidance as to how NRAs should determine a technical impossibility, rather than economical impracticability, to ensure that the exception does not become a catch-all exemption open to abuse.

BEREC's response:

Footnote [5] of the Draft Guidelines submitted to public consultation (now footnote [3]) has been redrafted, to make it clear that in the Guidelines, BEREC simply refers to the different alternatives that are available in the EECC, without prejudging the impact of these alternatives.

Regarding **BREKO** and **ELFA**'s comments, BEREC believes that at this point in time it is too early to provide further examples of the way Recital (199) of the EECC could be applied in practice, due to the limited experience with the type of co-investment schemes that may be covered by Article 76. This is an issue that may however be revisited in the future, once NRAs gain further experience with the application of Articles 76 and 79.

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

ETNO and **DT** consider that the cut-off date of December 2018 for the application of Article 76 is unjustified and overly restrictive. In ETNO and DT's view, the definition of new networks should be based on technological or economic factors, not on chronological considerations. A purely chronological interpretation could lead to an inconsistent and differing regulatory treatment of networks that would normally be considered equal from a functional-qualitative perspective.

DT points out that the approach chosen by BEREC would also be inconsistent with its draft Guidelines on the criteria for a consistent application of article 61 (3) EECC, which sets out different criteria for determining what constitutes a new network.

Also in **TIM**'s view, the interpretation BEREC provides in the draft Guidelines on what constitutes a new network ends up being at odds with the spirit and objectives of Article 76. In particular, the exclusion of investments publicly announced before the EECC entered into force in December 2018 is not explicitly mentioned in Article 76 or elsewhere in the EECC. In this regard, **ETNO** also notes that given that many operators have already deployed VHCN which may have been based in co-investment models, treating similar situations differently merely on the basis of timing considerations may bring about a complex environment, that could render the idea of co-investment under Article 76 unattractive.

BEREC's response:

On the issue of what should be considered a new VHCN, BEREC reiterates that the purpose of Article 76 is to encourage investment in VHCN under uncertain economic conditions. The temporal perspective is thus an inherent condition of Article 76, which refers to the regulatory treatment of "new" VHCN.

It is not surprising that what constitutes a new network deployment may have different meanings in the context of Article 61 (3) and Article 76, taking into account that they refer to different regulatory initiatives. Indeed, Article 61 (3) deals with the prospects of symmetric regulation and the impact on regulatory action in recent network deployments, while Article 76 deals with the regulatory treatment that may be implemented for new VHCN beyond *ex-ante* (SMP) regulation.

BEREC in any event notes that the Guidelines provide NRAs with sufficient flexibility in this regard. In particular, as indicated in footnote [10] of the Draft Guidelines which were submitted to public consultation, investments in VHCN publicly announced prior to December 2018 may still qualify in exceptional circumstances as a new VHCN, *"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"*.

In the final Guidelines, BEREC has moved former footnote [10] to the text under paragraph (14) in the final version, to make this statement clearer.

2.1.3. Timing for making an offer to co-invest

According to **ETNO** and **TIM**, BEREC's interpretation on the timing for the formal review by NRAs of the co-investment offer, risks to delay the deployment of a VHCN, in contrast with the spirit of Article 76. ETNO and TIM believe that any delay in the transposition should not prevent NRAs from applying the Article 79 procedure in the transitional period between 21 December 2020 and the effective date of transposition.

In the view of the **FTTH Council**, co-investment offers should not apply retroactively. Only once the EECC is effectively transposed and the BEREC Guidelines are adopted, will co-investors be able to make a full assessment of the co-investment opportunity. Likewise, **ECTA** considers that offers made prior to the entry into force of the EECC should in general be unable to benefit from the special regulatory treatment retroactively.

BEREC's response:

Regarding the point in time at which NRAs should engage in the formal review of a co-investment offer under the commitment procedure, on the basis of the submissions received, BEREC concludes that this is an issue that will have to be assessed by NRAs on the basis of national law. In the Guidelines, the reference to the point in time when the formal review by NRAs should start is thus deleted.

Regarding FTTH Council and ECTA's comments, BEREC clarifies that the co-investment schemes that can be assessed by NRAs under Article 76 are co-investment offers that may have been published after December 2018, for as long as the SMP operator has clearly indicated in its offer its intention to subject the offer to the provisions of Articles 76 and 79. Under these conditions, potential co-investors should be able to make a full assessment of the co-investment opportunity. Regarding the offers published (where networks have not been deployed) before December 2018, BEREC clarifies that these offers – if republished under Article 76 – may still qualify in exceptional circumstances as a new VHCN, if there are *"substantial changes"*.

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

According to **CETIN**, distinguishing between the "new" and "old" sections of the co-invested infrastructure may lead to confusion over the network elements which are/are not part of a co-investment offer. CETIN believes that the Guidelines should not restrict the co-investments to 100% green-field deployments, but rather allow all offers of VHCN co-investments that provide new coverage at premises. Also, in **ETNO**'s view, excluding the upgrade or renovation or existing physical infrastructure from the scope of Article 76 may be contrary to the underlying principles that justified the adoption of said provision in the first place.

For **DT**, the build-out from FTTC to FTTH (= newly built physical infrastructure) should not be deemed merely an upgrade but constitute a new VHCN investment.

Vodafone, on the other hand, believes that the BEREC Guidelines should explicitly indicate that access to civil engineering (as a remedy) does not qualify for the specific regulatory treatment foreseen in Article 76, even in cases where the physical infrastructure is the result of a new investment. Vodafone notes that the EECC foresees the most upstream access product, namely access to civil engineering assets, as a priority remedy which should be assessed before any other remedies are imposed.

BEREC's response:

The Guidelines strive to make a distinction between investments in existing physical infrastructure (including upgrades/renovation) and investments in new physical infrastructure built for the specific purposes of deploying a new VHCN, recognizing that the latter may be deemed an integral part of the co-investment scheme and thus be covered by Article 76. Without prejudice to the need for NRAs to assess this issue on a case-by-case basis depending on the specific circumstances at stake, this distinction is important, because – as noted by Vodafone – access to the physical infrastructure of the SMP operator is in many countries essential for the development of competition by alternative operators and should in general be promoted. Furthermore, Article 76 aims at sharing risks and overcome investment barriers, which is why new investments in physical infrastructure likely qualify for the treatment foreseen in Article 76 and already existing physical infrastructure likely does not. The latter could thus in principle still be covered by SMP regulation.

DT, the **FTTH Council**, **Open Fiber** and **VKU** indicate that the Guidelines should clarify whether upgrades of an existing fibre network leading to the deployment of optical fibre networks up to the home are covered by Article 76.

AIIP considers that the scope of paragraph 27 in the Draft Guidelines submitted to public consultations should be clarified, as it is not clear whether the reference contained therein relates to the fully new VHCN infrastructure, or to all the lines downstream to the improvement.

BEREC's response:

On DT, FTTH Council, Open Fiber and VKU's point, BEREC points that the upgrade from a FTTC to a FTTH network would in principle qualify for the regulatory treatment envisaged under Article 76, in line with what is indicated in paragraph (20) of the final Guidelines.

Regarding AIIP's suggestion to clarify paragraph (27) of the Draft Guidelines which were submitted to public consultation (now paragraph 22), a new wording is proposed.

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

BREKO and **ELFA** consider that BEREC should provide more detail on the criteria that the listed models should fulfil to qualify as co-investments. In their view, the Draft Guidelines do not provide much guidance as to how and on what basis NRAs should assess the structural nature of possible co-investments. **BREKO** and **ELFA** state that a consistent application of

Article 76 across all Member States requires clear and principled guidelines. This would enable NRAs to assess co-investment offers based on transparent criteria in order to avoid ambiguity concerning the national transpositions of the EECC and BEREC's guidelines.

AIIP makes the following remarks in relation with each of the co-investment models: (i) the joint venture model should not be limited to co-ownership of a new entity but also cover the direct ownership of the network or part of the network, (ii) the reciprocal access model should further include an unbalanced agreement between the SMP and small operators and (iii) the one-way access model should foresee the extension of the right to access to the VHCN that exists in the whole area in order to prevent Article 76 from jeopardizing the scope of the regulation.

ECTA suggests, in line with **AIIP**, redrafting the paragraph 32.1 of the Draft Guidelines concerning the joint venture model to link the co-ownership to the co-invested deployment.

The **FTTH Council** believes that a detailed case by case examination of every co-investment scheme will be necessary as the non-exhaustive list of possible schemes for co-investment is generic and any of them can be implemented in a way that might potentially give rise to concern.

BEREC's response:

Section 2.1.5 of the final Guidelines (former 3.1.5) sets out a taxonomy of the main co-investment models. The objective is twofold: (i) explain to which extent they are expected to have the structural nature that BEREC considers to be an important feature to be taken into consideration by NRAs when assessing the co-investment agreements and (ii) enable the analysis of the sub-conditions (i)-(iv) of Article 76 (1) (b) on the basis of the distinctive features of the joint venture, reciprocal access and one-way access models. As further indicated in paragraph (33) of the Draft Guidelines submitted to public consultation – now paragraph (28) – this list of models is not exhaustive.

Establishing the concrete criteria which the co-investment models should comply with to qualify as co-investment under Article 76, therefore falls out of the scope of the Guidelines. That approach would make the guidelines too prescriptive and would also carry the risk of unnecessarily limiting the number and range of co-investment agreements that operators might reach[3].

It would also be hard to implement due to the different national circumstances and the differences within each category for co-investment models, which are far from being homogeneous. Furthermore, NRAs are better placed to establish such criteria, if necessary, since they would have all the relevant information and details of the co-investment agreements.

Paragraph (32.1) of the Draft Guidelines submitted to public consultation – now paragraph (27.a) – has been redrafted according to the wording proposed by ECTA to make the definition of the joint venture model more precise. By contrast, BEREC does not further amend the other definitions as AIIP proposes. As currently stand they meet the above-mentioned objectives of

[3] See also Section 1 "General issues"

new Section 2.1.5; it is therefore not necessary to either clarify that a specific agreement such as an unbalanced reciprocal access agreement would be included or add any consideration about the possible consequences of the one-way access model on the existing regulation. The latter issue is covered in the following sections of the Guidelines.

In **AIIP's** view, BEREC should clarify that the "structural character" shall be assessed also over time and that any co-investing agreement should be "lasting", irrespective of its form and that a duration of any co-investment agreement should not be less than 15-20 years. AIIP requests BEREC to (i) clarify in former paragraphs (31), (32), (34) and (36) that "time" is of the essence in order to assess the "structural nature" of a co-investment agreement in any form and (ii) require co-investment agreements to have a duration of not less than 15-20 years.

Vodafone makes a similar proposal as **AIIP** by stating that a requirement on the duration of the scheme is necessary to ensure that any alternative co-investor would enjoy investment protection for the economic lifetime of the network.

According to **Vodafone** a co-investment model under the Article 76 must include clear rights of participation for co-investors about geographical sequence of investments of the planned build out as well as on the temporal sequence of the investments. Moreover, product features should be developed and defined jointly with co-investors.

AIIP makes a similar point as **Vodafone** and asks BEREC to (i) stress the importance that all co-investors have a certain degree of co-determination in managing the co-investments and (ii) amend paragraphs (31)-(32) of the Draft Guidelines accordingly to keep this into account

For **Vodafone** it would also be useful that BEREC defined, at least as an example, the precise meaning of Indefeasible Right of Use ('IRU').

ECTA considers that co-ownership without appropriate participation in decision-making related to the co-invested network elements will not generally suffice to ensure co-investors a level of involvement that is commensurate with Article 76 (1). ECTA proposes to add this point in paragraph 38 of the Draft Guidelines as well as a new paragraph at the end of this section setting out that the governance structure provided for in the agreement would constitute a second key element when assessing the level of co-determination that a given co-investment agreement achieves. The first element would be the ownership structure.

ECTA further proposes to clarify that the structural nature is present in the reciprocal access model only when the co-investor has the opportunity to materially co-determine the access conditions subject to which the SMP operator grants and receives access.

BEREC's response:

BEREC does not consider appropriate to further elaborate on the structural nature. BEREC is of the view that this issue is addressed sufficiently in paragraph (38) of the Draft Guidelines submitted to public consultation – now paragraph (33) – by linking the structural nature of the agreement to the ability of the co-investors to have sufficient capacity to take relevant strategic decisions as to the roll-out, maintenance of the VHCN, the service provision and the adaptation/evolution of the agreement.

In this regard it is worth underlining that, according to also paragraph (38) of the Draft Guidelines submitted to public consultation, the structural nature is not considered to be a necessary condition that NRAs must check when assessing co-investment agreements but rather as an important element to take into account in such assessment, depending on the particular circumstances. This approach is consistent with the following facts: (i) the EECC does not identify any concrete co-investment model but makes a more generic reference to a cooperative structure based on either co-ownership or long-term risk sharing and (ii) the structural nature, in the form of structural rights, is a feature that only refers to a particular type of co-investment agreement (i.e. purchase agreements), as indicated in paragraphs (29) and (31) of the Draft Guidelines submitted to public consultation, respectively.

The definition of the precise meaning of IRUs is also out of the scope of the current Guidelines based on the differences between the national legal frameworks.

The proposal to strengthen the criteria to assess the structural nature (and thus the level of co-determination) by referring to both the ownership and governance structures is not only over-prescriptive but more importantly over-restrictive. Such proposal would not be consistent with the provisions contained in Article 76 (and the related recitals) because it could exclude co-investment agreements that would fulfil the sub-conditions (i)-(iv) under point b) but would not meet the two-tier structural conditions that ECTA proposes to include.

The term “governance structure” has been replaced by term “governance rules” in paragraph (32) of the final Guidelines because the former is suitable for joint venture where an entity is created, but not necessarily for the other co-investment models; especially, the one-way access model. Governance rules are more generic and fit in any of the listed co-investment models.

Vodafone finds the one-way access model to be the most likely co-investment scheme where an alternative non-SMP investor would not enjoy sufficient level of protection. Vodafone is concerned about the possibility that, according to paragraph 36 of the Draft Guidelines, a simple risk sharing model with only “minimum buying commitments and volume discounts” could qualify as a co-investment.

In this regard, **ECTA** proposes to add a paragraph stating that *“agreements limited to mere capacity rental, not leaving to the contracting party any say about the network’s operation and the products provided, therefore manifestly cannot qualify as co-investment agreements covered by Article 76 (1) EECC, and NRAs should not proceed to assess them in further detail*”.

BEREC’s response:

While agreeing with Vodafone that a priori such a simple risk-sharing model would not qualify as co-investment, BEREC would like to point out that identifying, within the Guidelines, the concrete types of agreements that would not be susceptible to the application of the provisions of Article 76 is neither suitable nor feasible because of (i) the variety of agreements that operators can reach and (ii) the risk of limiting the benefits that the trade and the pro-competitive cooperation among operators could have on investments in VHCN.

Bearing in mind the above considerations BEREC cannot accept ECTA’s new proposed paragraph. BEREC further notes that paragraph (30) of the Draft Guidelines submitted to public consultation – now paragraph (25) – already contains the reference to Recital (198), which is the basis that ECTA uses to draft such new paragraph. So, there is no need for (i) repetition, on the one hand, and (ii) the explicit exclusion of a particular co-investment model without the individual assessment of the NRA, on the other hand.

As already mentioned, in light of the variety of potential access agreements NRAs are better placed to perform the task, on a case-by-case basis, of checking to which extent the agreements leave some of the parties without any say as to the relevant strategic decisions.

On the other extreme, **DT** argues that assessing co-investment agreements based on the “structural nature” of purchase agreements does not fall within the competences of BEREC and calls for BEREC to limit its assessment to the consideration of whether such an agreement foresees “structural rights.”

Along this line, **ETNO** agrees with BEREC’s statement in paragraphs (32)-(33) of the Draft Guidelines, that the list of possible co-investment models is not exhaustive and thus 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. ETNO states that its priority is to make co-investment workable and to leave room for market developments and new models beyond the well-known co-investment models used today.

BEREC’s response:

Making no reference to structural nature would not be justified because Recital (198) identifies a particular type of agreements among competitors, i.e. commercial access agreement, which should not be considered as co-investment (and thus not susceptible to fall under Article 76 provisions), precisely due to the lack of specific rights to capacity of a structural character.

The fact that BEREC does not explicitly consider the structural nature to be a necessary condition that co-investment agreements should necessarily meet does not imply that NRAs should refrain from assessing such feature under the concrete national circumstances. As stated in paragraph (38) of the Draft Guidelines submitted to public consultation, the structural nature, i.e. the capacity of the co-investors to take relevant strategic decisions, may in many cases be an important element to take into consideration in the assessment of the agreement. Otherwise, NRAs would face the opposite risk, i.e. the risk of considering as co-investment certain agreements that would be very close to mere commercial access agreements, based only on rental of capacity, and therefore should not be taken into consideration when assessing whether to maintain or withdraw the SMP remedies in place.

In sum, BEREC considers that the current wording strikes a better balance between the prescriptiveness and flexibility that the Guidelines aim for.

2.2. Guidelines on Article 76 Paragraph 1 Point A)

2.2.1. Open offer

The concept of open offer

ETNO remarks that the concept of "open" in *"open at any moment during the lifetime of the network"* should be clarified in the sense that co-investment offers may provide different type of openness:

- The timeframe T1: during which a provider of ECN/S can access to a co-investment offer;
- The timeframe T2: during which a provider which benefits from a co-investment offer – a signed agreement – can use it to access to the network, increase its participation in the co-investment, etc.

The **FTTH Council** agrees with BEREC's view that the ability for co-investment participation must be available throughout the lifetime of the network.

BEREC's response

BEREC does not consider necessary to make a distinction between the initial period when a provider can access the co-investment offer and the period during which a provider uses its access to the co-investment offer. Access to the co-investment offer is primarily referring to the offer to co-invest, which needs to be open during the lifetime of the network, and to which the paragraph (42) of the Draft Guidelines – now paragraph (37) – refers to, and not to the terms of access to the network.

As for the second comment, BEREC welcomes the fact that FTTH Council shares the same understanding that ability for co-investment participation must be available throughout the lifetime of the network.

Models of co-investment

To **VKU**, as outlined in paragraphs (47)-(50) of the Draft Guidelines, certain models of co-investment do not allow for alterations after the initial deployment. The prospect of having to re-allocate shares among shareholders is unattractive for all participants of the co-investment. It seems much more tenable to grant subsequent co-investors indefeasible rights of use (IRU) via whole buy purchase agreements.

BEREC's response:

In BEREC's view, the current wording of the paragraph (48) of the Draft Guidelines – now paragraph (43) –already covers the VKU suggestion, as indefeasible rights of use (IRUs) are an example that is already mentioned in the text (the one-way access model example). Furthermore, the fact that this is stated as an example ***("e.g.** by combining the joint-venture* *model with a one-way access model"*) implies that the list is open to the any other combination of models.

Cut-off points

BREKO and **ELFA** acknowledge the complexity of Article 76 EECC and in particular the issue of the openness of offers, but expected BEREC to provide at least general criteria to determine the appropriateness and reasonableness regarding possible cut-off points.

TIM proposes to draft paragraph (48) in the Draft Guidelines more explicitly with regard to specific cut-off dates: "*the co-investment offer should include specific cut-off dates after which a late entry into the joint-venture itself does not need to be guaranteed*". TIM also suggests to include in paragraph (50) of the Draft Guidelines, as an obligatory condition, specific cut-off dates after which a late entry into the reciprocal access model itself does not need to be guaranteed.

VKU outlined that, in paragraphs (48) and (50) of the Draft Guidelines, it should be clear that there is the possibility for the investors to set an early cut-off date and take out the lifetime-long openness requirement, if other co-investors receive access on the basis of purchase agreements.

BEREC's response:

First of all, BEREC would like to highlight the fact that openness is a condition of the EECC that has to be fulfilled by the co-investments offers, irrespectively of their setup. The requirement for openness of a co-investment offer, during the lifetime of the network, is essential in safeguarding the contestability of the markets and a non-negotiable criterion. However, in some cases (for certain set-ups), as it is specified in the Draft Guidelines, it might be difficult to implement such an openness. Therefore, while it might be appropriate and reasonable to define cut-off dates, it does not mean that these cut-off dates have to be necessarily defined. Moreover, in these exceptional cases, it might be reasonable to allow for excluding further access to the co-investment on a specific type of participation, but this is only acceptable if, at the same time, there are mechanisms introduced to ensure the openness of the co-investment offer, e.g. on the basis of other types of participation that are generally acceptable under Article 76.

As for the request for BEREC to provide some general criteria to determine the appropriateness and reasonableness regarding possible cut-off dates, as already mentioned in the "General issues" section of this document, BEREC considers that it is important not to be excessively prescriptive, in order to not limit the operators' flexibility to address different type of situations that might appear. In that sense, the inclusion of specific cut-off dates will depend on each type of agreement.

2.2.1. Lifetime of the network

The relationship between the technical and the commercial lifetime

AIIP does not agree with paragraph (54) of the Draft Guidelines: according to AIPP, the commercial “lifetime” of a VHCN may not be calculated in not less than approx. 30 years as to civil works, 20-25 years as to ducts and mini ducts and 15 years as to optic fibre cables and requests that this paragraph be amended accordingly.

In **ETNO’s** view, it is insufficiently clear, in economic terms, what exactly BEREC refers to as “commercial” lifetime, whether to a longer period than the pay-back period or to the contractual clauses.

BEREC’s response:

BEREC understands the concern expressed by AIIP, notwithstanding as BEREC mentioned in former paragraph (53) of the Draft Guidelines, now paragraph (48), each network is unique, also in terms of parts/components, which makes impossible to have precise parameters that apply universally or consider a specific and unique timeframe to all the projects. In BEREC’s view the lifetime of a specific VHC network is the lifetime of that specific project, clearly set in the co-investment agreement.

With the aim of clarifying what exactly BEREC refers to as “commercial” lifetime, as suggested by ETNO, the text of paragraph (49) of the final Guidelines will be subject to some minor changes.

The relationship between the technical lifetime and the commitment period

To **ETNO** it is unclear what the relationship is between the lifetime of the network and the duration of the binding co-investment commitments approved by the NRA according to article 79 (3), 2nd subparagraph EECC. ETNO believes that to ensure legal certainty, the *“commercial or economic relevant lifetime”* of the network will not be defined as such in the co-investment offer, but the commitment on the duration of the right of use of the network will be in the agreement that will be endorsed and made binding by the NRA following the procedure referred to in Article 79. Thus, in ETNO’s view there is no need for BEREC to include general statements or terminology that is open to interpretation in the Guidelines. For that purpose, ETNO proposes the paragraphs (54) and (55) of the Draft Guidelines to be removed and to be replaced by an explanation in line with their above understanding of the term.

In the view of **FTTH Council**, the difference between the commercial lifetime of the project (a subjective decision largely under the control of the initial co-investors) and the technical lifetime of the co-investment could have important consequences and warrants some adequate qualification of this provision.

TIM calls for giving to the SMP operator the possibility to re-define, at the moment of the renovation of the commitments, the conditions for potential co-investors willing to join the co-investment later. The initial commitment period should be 7 years pursuant to the 2nd subparagraph of Article 79(3), and only in exceptional circumstances the NRA may set a longer timeframe.

BEREC's response:

Regarding the comment made by ETNO about the relationship between the lifetime of the network and the duration of the binding co-investment commitments approved by the NRA according to Article 79 (3), 2nd subparagraph EECC, BEREC acknowledges that this point could be made clearer in the text and have introduced a new paragraph (51) in the final Guidelines with the purpose of explaining it.

BEREC does not agree with the suggestion of removing the paragraphs (54) and (55) of the Draft Guidelines submitted to public consultation, now (49) and (50), as the lifetime of the network concept has raised some comments, doubts and clarification requests in the public consultation, but, as referred above, a new paragraph was introduced, to take account of ETNO suggestion of clarifying the text.

BEREC agrees with FTTH Council that the lifetime of the network and the technical lifetime of the co-investment could have important consequences that deserve some adequate qualification of this provision in BEREC Guidelines. However, BEREC does not share the view that the commercial lifetime of the project is a subjective decision largely under the control of the initial co-investors, because it will have to be clear in the infrastructure co-investment agreement, with no room for doubt.

The possibility of redefining, at the moment of the extension of the commitments, the conditions for potential co-investors willing to join the co-investment later, as suggested by TIM, is out of the scope of Article 76 Par 1 Point A). Notwithstanding, BEREC would like to point out that after the first commitment period, a subsequent commitment period has to be previously assessed by the NRA (according Article 79 (4)).

The proposal by TIM of considering the initial commitment period of no more than 7 years, and that only in exceptional circumstances the NRA may set a longer timeframe, is out of the scope of Article 76 Paragraph 1 Point A).

2.2.2. Guidelines on Article 76 Paragraph 1 Point B)

ETNO notes that paragraph (57) of the draft Guidelines mentions: *"NRAs may define additional sub-conditions pursuant to point (b)"*. ETNO's understanding is that this could only occur in relation to the Article 79 regarding the binding procedure, which is not in scope of the BEREC Guidelines.

TIM considers that the terms listed at points (i)-(iv) of Article 76 are exhaustive and the EECC does not give NRAs the flexibility to introduce other terms, therefore TIM believes that the statement at paragraph (57) of the Draft Guidelines ("*NRAs may define additional sub-conditions pursuant to point (b) in order to meet this objective*") should be deleted.

DT suggests clarifying under Section 3.3.1. of the Draft Guidelines that the requirement under Article 76 that co-investors "can compete effectively and sustainably in the long term" does not necessarily mean that co-investors need to start making revenue right from the beginning of the investment, but only in the long-term.

BEREC's response:

Regarding namely the comments made by TIM, BEREC notes that the wording of Article 76 Paragraph 1 Point B) is subject to varying and potentially legitimate interpretations as to the exhaustive nature of the list of criteria mentioned therein. Considering that (i) the main goal of the guidelines is to ensure consistency in the application of Article 76 by the NRAs, and (ii) that Annex IV explicitly allows the NRAs to add additional criteria "to the extent they are necessary to ensure accessibility of potential investors to the co-investment", former paragraphs (57) and (58), have been removed from the Guidelines.

On the comment raised by ETNO, BEREC notes that Article 79 (2) is not in the scope of the guidelines and therefore, this issue is not to be addressed in this context.

On the point raised by DT, BEREC points out that no such requirement regarding profitability from the beginning of the project can be found in the EECC itself or the Draft Guidelines. Therefore, BEREC does not see a need to include an explicit reference in the text of the Guidelines to provide clarification as suggested by DT. Nevertheless, BEREC agrees that the ability for other co-investors to compete with the SMP operator does not necessarily imply that the co-investment's business case guarantees its co-investors (including the SMP operator) profits in every period of the co-investment.

2.2.2.1. Guidelines on Article 76 Par 1 Point B) (I)

According to **Open Fiber**, BEREC should ensure that the provisions on former paragraph 3.3.1, on the availability of the open offer are not undermined in practice by the introduction of limitations on the terms (i.e. pricing). In particular, it is important to ensure that SMP operators do not set minimum entry requirements as a condition to be part of the co-investment. This means that all operators in the market must be able to participate without any discrimination, also in terms of size.

BEREC's response:

BEREC agrees that for the market to be contestable via the possibility to participate in the co-investment offer as a co-investor, the offer does not only have to be open during the lifetime of the network, but also that the other terms and conditions, especially pricing terms and potential minimum shares of participation, allow potential co-investors to enter the co-investment and compete effectively and sustainably with the SMP operator. However, regarding the minimum share of participation, BEREC is of the opinion that such requirements can be reasonable, if they are designed to *"ensure the effective management and governance of the project and to manage the level of its own risks"* (see paragraph (101) of the Draft Guidelines, now paragraph (95)).

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

For **ETNO,** it is not yet clear how the different regulators will approach the reflection of risk in the pricing for those co-investors entering at a later stage as mentioned in point (62) of the Draft Guidelines. ETNO favours an approach based on economic principles. Generally, ETNO is of the opinion that the Guidelines should be principle based and not seeking to define all the details. Terms could also reflect the extent of commitment made at any time i.e. the level of risk which a co-investor is offering to share. Early and significant investment will then provide better terms than later and more limited investment and risk sharing.

TIM believes that, in order to promote a consistent application by NRAs, BEREC could provide on the issue raised in point (62) of the Draft Guidelines some principle-based guidelines on how different levels of risk could be reflected in the conditions for co-investors joining the co-investment later in the process.

Open Fiber is also of the opinion that BEREC should clarify how investment risks should be evaluated, i.e. during the market test.

AIIP suggests that BEREC clarifies that the condition of "fair" economic terms is deemed to be pricing according to FDC+WACC (fully distributed costs plus weighted average cost of capital).

Oxera comments that BEREC has provided little guidance on how price differentials for co-investments might be calculated depending on time of joining the investment. The price paid by any latecomer should accurately reflect the risk profile of the project at that particular point in time, relative to the risk faced by the original co-investors at the time the investment is first made. To achieve this, Oxera proposes that regulators take appropriate account of the opportunities and risks faced by investors over the lifetime of investments through an approach known as the '*fair bet framework*'. Such a risk assessment should capture two categories of risks in Oxera's view: (i) A systematic risk: a risk inherent to the entire market, not just a particular stock or industry—is captured in the asset beta parameter of the capital asset pricing model (CAPM) framework, and (ii) non-systematic or idiosyncratic risks (also sometimes referred to as 'specific risks'), such as volume take-up, pricing levels, costs, and the like.

BEREC's response:

BEREC acknowledges the suggestions to provide more detail on how NRAs can evaluate risk and pricing differentials by providing principle-based approaches, for instance by making use of the so called "*fair bet approach/framework*" or on the basis of other specific approaches.

However, BEREC is of the opinion that by doing so, the Guidelines might be far stricter than the Article itself and might limit the options for designing co-investment agreements capable of being considered for Article 76. By going into more details, the Guidelines would not be able to remain on a sufficiently abstract level that can comprise all possible applications of Article 76 and potentially very different co-investment models and business cases. BEREC sees the risk that NRAs would be overly limited in their approach to evaluate terms and conditions, especially pricing terms, based on risk assessments provided by the SMP operator or carried out by NRAs themselves. Notwithstanding, NRAs can make use of the mentioned specific frameworks or principles in case they deem such an approach to be suitable and helpful to assess risks of a specific co-investment project. Furthermore, BEREC wants to point out that there is the potential for future work of BEREC (e.g. on the basis of reports or best practice reports) that can give more information and/or guidance regarding aspects of risk and pricing evaluation at a later point.

ECTA suggests to move parts of footnote [35] of the Draft Guidelines (now footnote [19]) from the specific section regarding one-way access models to the general part of this chapter as the statements made there are not only valid for these types of co-investment models, but for all types.

BEREC's response:

BEREC recognises that the relationship between timing of entering into the co-investment agreement and the corresponding risk associated with this decision is not always linear. This is clearly stated in footnote [35] of the Draft Guidelines submitted to public consultation, now footnote [19]. However, BEREC agrees that this aspect is related to all types of co-investment models and therefore moves this aspect to the general former subchapter 3.3.1.1 (now 2.3.1.1).

The **FTTH Council** points out that in their view BEREC's interpretation of risk sharing in former section 3.3.1.1. may open up a number of possibilities for discriminatory pricing behaviour that will require a lot of interpretation. In FTTH Council's view, there should be no presumption that appropriate option prices can be set to correctly compensate for risk as they require NRAs to have perfect market information and any price discrimination ought to be fully justified on a case by case basis.

BEREC's response:

BEREC acknowledges the concerns regarding the potential for discriminatory behaviour by the SMP operator based on the possibility of pricing differentials. However, the ex-ante evaluation of the co-investment offer's terms and conditions by the NRA and the possibility for other market participants, especially potential co-investors, to voice specific concerns regarding the offered terms during the market test are designed to minimise/exclude such potential. Nevertheless, BEREC agrees that NRAs will generally not have perfect market information and thus assessments of pricing differentials, and the underlying risks of different co-investment alternatives/timings have to be based on all information and estimates that NRAs gathered (e.g. from the planned co-investment's business case, from market participants' statements during the market test as well as from other sources within the NRAs' regulating activities).

In case of variation or adaptations of the terms and conditions of the co-investment agreement, **one respondent** to the consultation suggests to replace the simple notification process with a public consultation proceeding giving co-investors the possibility not only to assess, but also to intervene on such changes by effectively opposing them in case they were inappropriate.

BEREC's response:

In case the SMP operator proposes changes to the terms and conditions at a later stage, BEREC agrees that current and potential co-investors not only need to be able to assess these proposed changes, but have to be able to express potential concerns that might arise. NRAs should nevertheless have the flexibility to make use of a public consultation or, alternatively, other forms of participation of co-investors and other market participants. Therefore, BEREC clarifies these issues in paragraph (59) of the final Guidelines and changes the last sentence to: "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 changes are in line with the conditions of this Article before they are implemented and, if necessary, raise potential concerns related to these changes."

2.2.2.2.1 Reciprocal access models

Open Fiber calls for BEREC to clarify the main conditions (access prices) applicable to reciprocal access as Open Fiber considers it essential that the reciprocal access model does not allow co-investors to exclude each other in the areas to be covered by market sharing in which the whole territory is divided between at least two large (typically vertically integrated) operators.

BEREC's response:

BEREC acknowledges the concern that the reciprocal access model could be used to create and manifest a duopolistic market situation by excluding others from effectively competing with two large operators granting each other access to their respective networks based on a co-investment model. However, such a model and the corresponding co-investment offer needs to fulfil all of the conditions of Article 76 to be eligible for the foreseen regulatory treatment, specifically also the requirement for the offer to be open during the lifetime of the network. Therefore, this condition works as a safeguard against the described market foreclosure for other potential co-investors.

2.2.2.2.2 One-way access models

AIIP questions BERECs statement in former paragraph (79) of the Draft Guidelines that pricing in one-way access models usually consists of recurring payments per end user connected. In their view, upfront payments in IRUs will be the norm.

BEREC's response:

BEREC agrees that there might be different forms of pricing structure and therefore rephrases the corresponding sentence in paragraph (73) of the final Guidelines to: "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."

AIIP is of the view that the level of structural rights of co-investors should not be lower in any way to the ones for the SMP operator if approval shall be granted.

BEREC's response:

BEREC clarifies that the statement regarding the level of structural rights solely concerns the comparison between the mentioned models regarding their inherent set-up and governance. However, it does not imply an assessment about which levels are acceptable as per the conditions of Article 76 and which are not. Paragraph (31) in the Draft Guidelines, now paragraph (26) makes clear that the structural nature of a co-investment agreement is an important feature in the assessment of such an agreement irrespective of the specific model employed by the SMP operator (and co-investors).

2.2.2.3. "Access to the full capacity of the network"

One **confidential respondent** points to the importance of the condition that unrestricted access to the full capacity must be granted. This requirement is essential for co-investors to be able to compete effectively and gives them the possibility to independently design and set the quality parameters of the service they intend to provide over the co-invested network.

TIM calls BEREC for clarification that a co-investor's access to the full capacity is limited by technical constraints and the respective co-investment share.

With respect to the right to access the full capacity of the network, **DT** is of the view that such access should not be granted to every co-investor independently of their respective commitment, but that giving such access to smaller co-investors would be unjustified. Additionally, DT states that SMP operators should not be (automatically) obliged to grant access to other co-investors that would go beyond its own retail offers.

DT and **ETNO** remark that the term "full capacity" needs clarification. They are of the opinion that each co-investor may use the network in which it has co-invested up to the proportion of capacity or the number of accesses to the network for which it has co-invested. Furthermore, **ETNO** states that such "full capacity" is to be understood in relation to (i) either the geographical scope or (ii) the exclusion of any technical limitation in the use of the network subject to co-investment and considers that it likely requires amendments to section 3.3.1.2. of the draft Guidelines.

BEREC's response:

BEREC acknowledges the differing views regarding the conditions to grant access to the full capacity of the network. As some respondents seem to have misinterpreted parts of the Draft Guidelines in this subchapter, BEREC redrafted former paragraphs (91), (92), (95) and (96) of the Draft Guidelines - now (85), (86) and (89) – and introduced subheadings to clarify in which way access may and in which way it may not be restricted. In particular, BEREC points out that the extent to which a co-investor shares the risk of the co-investment limits its right to access the network in regards to the number of lines / end users that it can supply making use of the co-investment offer's terms based on their current commitment. However, co-investors are not limited in how many end users they can serve at the retail level as they can compete for and address additional end-users by, for example, increasing their participation (Art. 76 (1) (b) (iii)) or by buying additional capacity as an access seeker.

BEREC disagrees with DT's statement that the access to the network should be restricted in its capacity for co-investors that incur only a small proportion of the risk. BEREC reiterates that all co-investors have the right to access the full capacity of the network, meaning that it cannot be unduly restricted by the SMP operator. Limiting the capacity or performance of the network to product characteristics and other service parameters that the SMP operator offers its own retail arm might be such an unduly restriction that limits the co-investors' ability to compete effectively and sustainably. Therefore, BEREC clarifies this aspect in paragraph (86) of the final Guidelines, by adapting the text.

AIIP emphasises that for upstream network elements which are not part of the co-investment, regulation needs to be preserved.

BREKO and **ELFA** raise concerns that the Draft Guidelines are open to abuse by SMP operators regarding the possibility to exclude access to network elements or parts that are not included in the co-investment. Because of practical impossibility to divide networks into tangible elements, BREKO and ELFA see the potential for scenarios, where the rest of the network (not co-invested) becomes de facto exempt from regulation as well or where the SMP operator opens up only a small part of the network to co-investment.

CETIN, in line with its previous comment on paragraph (23) of the Draft Guidelines, believes that all elements, new and existing, used for the specific VHCN deployment under the co-investment scheme, should be accessible by access seekers.

The **FTTH Council** sees with concern that a partial co-investment (for instance upgrading a VDSL network to FTTP) which would only cover the final segment could not be guaranteed equivalent access from the exchange to the street cabinet.

BEREC's response:

BEREC points out that the identified need for regulation of sections of the network (geographically or topologically) that are *not* part of the co-investment, will remain unchanged by the procedures of Article 76 in conjunction with Article 79. Therefore, also the conditions of Article 76 (specifically also the requirement to grant access to the full capacity) do not apply to those network elements or sections, as these continue to be covered by the regulation regime.

On the other hand, all network elements that *are* part of the co-investment, irrespective of their deployment date, should be accessible by co-investors.

Regarding the aspect of effective access in case of network upgrades or if the co-investment only covers access to part of the network, BEREC acknowledges the concerns that BREKO, ELFA and the FTTH Council raise. BEREC points out that paragraph (95) and the corresponding footnote [38] of the Draft Guidelines submitted to public consultation address the complex issue of how access should be granted in case of co-investments that do not build up a whole new network but make use of existing infrastructure in more upstream parts of the network. As stated in the Draft Guidelines, there may be scenarios, where access has to be given to such elements as well, for example by providing wholesale products that not only use the part of the network that has been co-invested, but more upstream elements as well. However, 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. Seeing the potential importance of this aspect, BEREC clarifies and moves the content of former footnote [38] into the main text of paragraph (89) of the final Guidelines.

In reference to paragraph (93) of the Draft Guidelines, and the statement that in certain cases providing passive access to the network might be necessary to ensure access to the full capacity, **DT** stresses that an active access is usually sufficient and thus constitutes the rule rather than the exception.

BEREC's response:

BEREC acknowledges DT's request to clarify that an active access (in contrast to passive access) is usually sufficient. However, BEREC points out that in this aspect, the Draft Guidelines do not make an assessment of which form of access has to be granted as a rule and which form of access constitutes an exception. The assessment of which form of access is necessary to ensure that co-investors have access to the full capacity of the network in general will be case-specific and thus has to be conducted by the respective NRA on a case-by-case basis.

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

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

AIIP suggests that BEREC integrates former paragraphs (98) and (101) in order to clarify that flexibility should also relate to the "size" (i.e., territorial extension) of the co-investment, so that *"small providers of electronic communications networks and/or services should not be prevented from participating in the co-investment"*.

BREKO and **ELFA** argue that a minimum share requirement should not be specified in a manner that disincentivises potentially interested undertakings from making a contribution, nevertheless there needs to be a benchmark on how low such a requirement can be set, and BEREC should define criteria that are to be used to determine the effect of minimum requirements on the overall competitive impact of the co-investment agreement.

The FTTH Council calls for BEREC to ensure that the provisions of former section 3.3.1on the availability of the open offer are not undermined in practice by the introduction of limitations on the terms (e.g. on pricing) that will apply depending on the moment of investment.

BEREC's response:

AIIP's suggestion for integration of former paragraphs (98) and (101), now (92) and (95), is not deemed necessary, given that the current text sufficiently underlines the need to ensure that the possible setting of a minimum share of participation by the SMP operator should not prevent small providers of electronic communications networks and/or services from participating in the co-investment. Also, the current text calls for AIIP's suggestion for integration of former paragraphs (98) and (101) have already been addressed in former paragraph (101), now (95) which seeks to ensure a balance between the setting of the minimum share of participation with the size of the co-investment project. This is important to safeguard the economic viability of the relevant project.

BEREC also shares the views of and agrees with BREKO and ELFA that minimum share requirements should not be specified in a manner that disincentivises potentially interested undertakings from making a contribution. However, BEREC does not consider the need to define criteria to determine the effect of minimum requirements on the overall competitive impact of the co-investment agreement as such assessments should remain in the hands of NRAs to analyse specific co-investment agreements on a case-by-case basis and would go beyond the scope of the guidelines.

As for the comment by FTTH Council, BEREC considers that the current text already specifies that the terms of the co-investment offer need to be non-discriminatory irrespective of co-investor's point of entry. The text provides for setting minimum shares of participation depending on the individual situation in each Member State.

2.2.2.5. Guidelines on Article 76 Par 1 Point B) (III)

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

In **DT's** view, it should be clarified under former paragraph (104), that the flexibility mentioned regarding a possible decrease of participation *"would inherently also decrease the financial risk – which could conversely get compensated by higher prices"*.

VKU - In extension of former section 3.2.1., retaining flexibility in a co-investments agreement in terms of participation is viewed critically among VKU members. Reallocation of shares and the associated dilution of shares is a contentious issue among shareholders.

BEREC's response:

BEREC considers that the current text seeks to ensure sufficient safeguards to the co-investment project and that the flexibility of entry or exit and to increase / decrease the share of participation is balanced with potential risks to ensure the viability of the respective project. Regarding DT's argument, BEREC points out that paragraph (104) of the Draft Guidelines, now paragraph (98) do not make a statement that co-investors can unilaterally decrease their participation without another co-investor willing to buy their share voluntarily.

2.3. Guidelines on Article 76 Par 1 Point C)

Publishing obligations

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*;"

AIIP suggests that BEREC extend paragraph (113) of the Draft Guidelines, by clarifying that the co-investors participation shall start from planning up to any subsequent phase, including execution of works, etc.

BEREC's response:

The Guidelines do not exclude the possibility for interested parties to participate in any phase of the project (early and late entrants). The announcement, in particular, allows interested parties to decide if and when to participate. Regarding the "planning" phase, the SMP operator may decide to publish the project after having already planned it with some other operators. In this case, third parties - after the publication of the offer - may join the project asking, if needed, to adapt the planned activities, that could be consequently modified (if accepted by SMP operator and other co-investors, in case the changes have an impact on their participation, i.e. reciprocal access or joint venture).

ETNO believes that a publication period of six months would allow enough time for potential co-investors to evaluate the offer and for the NRA to carry out and conclude the market test. While ETNO acknowledges the importance of a defined publication period for reasons of transparency, the due market tests or any changes to the offer should not delay the start of deployment. Therefore, ETNO disagrees with the inclusion in the Draft Guidelines of the possibility for NRAs to re-count the six-month period (in case of significant changes during the commitment procedure) or to extend it (due to allow the *"preparation of marketing activity"* or due to the "*complexity*" risks). ETNO points out the reference to such equivocal concepts risks to extend the publication period uncontrollably long and should be deleted.

Moreover, according to ETNO's views, setting out the concrete elements to the possibility for extension of the six-month period is not in line with the *ratio legis* of the relevant provision of the EECC. Article 76 (1) (c) EECC explains that the period may be prolonged "based on *national* circumstances" which are per definition specific to the case at hand in a specific Member State. These can thus not be addressed beforehand, at this stage, in a generic way in the Guidelines. Six months should therefore be the rule.

TIM also disagrees with BEREC on the idea that, in case of significant changes, the six-month period should restart from the date of publication of the amended co-investment offer, while conceding that this is a matter for case-by-case analysis (as it would create an inflexible wedge of minimum one year between the decision to co-invest and the start of deployment, ultimately makes Article 76 inapplicable and thus jeopardizes its very objectives). In TIM's view a more balanced solution may foresee an extension of maximum one month of the period during which initial co-investors may participate at more favourable conditions than co-investors participating at a later stage. This solution would not confer the SMP operator an undesirable first mover advantage, to the extent that the activation of the new VHCN connections is not immediate and any additional co-investor would have the time to swiftly join the deployment.

With regard to the possibility to extend the six-month period as mentioned in paragraph (120) of the Draft Guidelines, TIM is of the view that BEREC Guidelines should clearly state that NRAs should use their best effort to avoid setting a prior publication period longer than six months or a restart of the period. Any extension should be limited both in terms of timing (maximum one month) and scope (exceptional and grounded circumstances, objectively proven by the NRA for the specific case at hand).

BEREC's response:

BEREC acknowledges the concerns expressed by stakeholders on the risk that an automatic restart of the six-month period would slow down the VHCN deployment. Therefore, BEREC considers appropriate not to refer to an automatic restart of the six-months period but instead to leave the assessment of a reasonable additional notice period to NRAs, which may indicate this period on the basis of a case by case analysis, considering also that the project may not be completely new but only modified in order to meet the requirements of Article 76.

BEREC modified the text of the paragraph (113) of the final Guidelines accordingly.

ETNO and **TIM** point out that Article 79 procedure should be concluded before the end of the six-month period. In case of delays in the conclusion, co-investors should in any case be allowed to start the deployment. Indeed, Article 76 (2) requires that the NRA shall make the commitment binding and shall not impose any additional obligations after the conclusion of the market test, but does not exclude that, in the meanwhile, co-investors can start the deployment.

Irrespective of the fact that the commitment procedure starts after or before the publication, it is for **TIM** in any case paramount that the Guidelines state a strict deadline of maximum six months to evaluate the co-investment project, in order to provide legal certainty.

BEREC's response:

Regarding the request to NRAs to conclude the procedure before the end of the six-month period, BEREC cannot give in the Guidelines a "limitation period" for NRAs (duration of market test or evaluation of co-investment project) as it is not established in the Code. Nevertheless, BEREC recognises the need for co-investors to avoid delays in the deployment due to the procedure timing and to assure legal certainty. For these reasons the Guidelines will specify that NRAs will use their best effort to carry out the assessment of the co-investment projects as efficiently as possible.

In case the procedures last over six months, co-investors may decide to start the deployment after the six months from publication but before the end of the procedure. In such a case, they will consequently take the risk that the NRA does not consider the project compliant with Article 76.

DT calls for clarification that a restart of the six-month period would not be justified solely based on the need to rework certain conditions upon each request of the NRA. **DT** is concerned that this could lead to artificial delays risking the aim of swift VHC expansion and might discourage network operators from entering co-investment agreements due to legal and planning uncertainty.

BEREC's response:

BEREC points out that NRAs generally will intervene after the market test (and in light of it) by asking for changes to the project at this stage, so that usually not single change requests will be made at different moments during the procedure. In any case, for the reasons explained above BEREC modifies its approach on the automatic restart period.

BREKO and **ELFA** consider clear procedural guidelines and the provision of substantial information for the undertakings and NRAs essential for the fair and consistent application of Article 76 EECC. The time limit of six-months can only be appropriate if all the information necessary to make an educated decision on a co-investment offer is made available beforehand. There should be strict rules imposed on the proposed undertaking to provide all the necessary information at the beginning of the six-month period. Moreover, further documentation, has to be made available to the interested parties at the earliest possible time to enable potential investors to make educated decisions.

BEREC's response:

BEREC considers that the text of the Guidelines, that make reference also to Annex IV, guarantee to potential co-investors the availability of all the necessary information to make an informed decision on the co-investment offer.

In **CETIN's** view, detailed co-investment offers should not require household-level data to be disclosed to bidders at the stage of its publication, as they are commercially sensitive, especially if the time period to the start of deployment is more than six months.

BEREC's response:

BEREC acknowledges the concerns of CETIN and agrees that household level data should not necessarily be disclosed to potential co-investors at the stage of publication as such data could be considered as confidential and commercially sensitive.

BEREC modified the text of the Guidelines accordingly.

2.4. Guidelines on Article 76 Par 1 Point D)

2.4.1. Access as before the deployment

ECTA text suggestion: Access of this form can be provided either using the new VHCN elements or, if it is still in place, via previous legacy infrastructure. In the former case, NRAs should impose access products with at least comparable functionality and quality. SMP operators should, in any case, outline a migration pathway as part of the co-investment offer and will need to ensure that replacement of legacy infrastructure complies with the requirements of Article 81.

BEREC's response:

BEREC considers that migration from legacy infrastructure is not in the scope of Article 76 as it is dealt in Article 81 EECC.

CETIN believes that the requirement that end-users addressable before the deployment should be also addressable thereafter essentially rules out legacy network switch-off. In CETIN's view, where Article 76 (1) (d) refers to an adaptation mechanism, it should also include a mechanism to enable the decommissioning of legacy infrastructure even if the end user reach on the new co-invested infrastructure does reach all legacy end-users.

BEREC's response:

In BEREC's view it is very unlikely that a legacy network is decommissioned if there is not at the same time a VHCN roll-out. Therefore, the addressable customer base should not change. For exceptional cases where the legacy network is decommissioned and no VHCN is built, the following sentence is added in paragraph (127) of the final Guidelines: *"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."*

According to **VKU**, third party access seekers that are not co-investors should be granted access only to the new infrastructure from the outset of its operation in order to incentivise co-investments schemes. If the monopolist's old (copper) network is kept operating, the co-investment network is very likely to experience an inefficient rate of utilization.

BEREC's response:

As expressed in former paragraph (132), now paragraph (126), *"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)."* There is no need to maintain legacy infrastructure.

ETNO believes that it is not correct to state in the Guidelines that the term "conditions" includes not only ordering and repair process, but also "prices" (paragraph (133) of the Draft Guidelines). According to ETNO, this interpretation cannot be derived from Article 76 Par 1 Point d) EECC and is also not in line with Recital (200) EECC which does not refer to "prices". Thus, including prices under the "former conditions" is not in line with the underlying ratio of the provision.

BEREC's response:

In BEREC's view, the price is among the most important conditions of access. Not setting out the methodology with regard to price-setting of legacy products can therefore lead to undesirable outcomes, in the extreme case to a de facto denial of access (if very high prices are charged).

ECTA text suggestion: *"BEREC considers it important to highlight that the requirement of equivalent access as specified in the preceding paragraphs also applies where a deployment is entirely new, i.e. the new network elements do not replace legacy infrastructure. In those circumstances, the relevant reference product(s) defining the minimum requirements from which access seekers must benefit through the imposition of new access products should be* *based on the highest available specifications for regulated legacy products offered by the SMP operator."*

BEREC's response:

Regarding ECTA's suggestion, BEREC points out that Article 76 (1) (d) focuses on scenarios in which legacy infrastructure exists in the respective area and does not explicitly mention the scenario described by ECTA. In BEREC's view, this scenario is very unlikely since so far only the incumbent with a ubiquitously available copper network has been found to have SMP. Therefore, BEREC does not see the need to adapt the Guidelines in this aspect.

2.4.2. Access to very high capacity network elements

TIM argues that a requirement to publish the prices in the co-investment offer would contradict the very spirit of Article 76, which provides for the non-imposition of ex ante obligations, including the obligation to publish price in a reference offer and the price control obligation. As long as the criteria for the formulation of access prices are clearly and transparently indicated, and non-discrimination across access seekers is respected, there is no need to publish the prices in the offer according to TIM's view.

BEREC's response:

The price-setting methodology needs to be transparent to the NRA, to (potential) co-investors, and to the access seekers. The only way to achieve this in BEREC's view is a publication in the co-investment offer.

According to **AIIP** the whole paragraph 3.5.2 of the Draft Guidelines should be revised by taking into account AIIP introductory remarks. Access seekers should have access to the full capacity of the new VHCN from the beginning.

BEREC's response:

The minimum level of access provided from the outset is set in the EECC as *"the same quality, speed, conditions and end-user reach as were available before the deployment"*. Access to the full capacity of the new VHCN can be provided on a voluntary basis, but it is not an obligation.

ETNO remarks that BEREC refers to a period of five years as adaptation timing. In ETNO's view, this is in general rather short, especially given the time it takes for a project in roll-out to get started and get to full speed. Moreover, ETNO does not agree where BEREC makes the transition period of five years conditional on the need for existence of retail competition "from other infrastructures" and believes that BEREC's unbalanced emphasis on retail competition from "other infrastructures" does not take into account of the effect of the enhanced retail competition resulting by those that co-invest.

One **confidential respondent** is of the view that the imposition of a deadline/threshold date (e.g. five years) for giving access to access seekers to a very high capacity network is not compliant with the EECC. For reasons of preserving the incentives to participate in a co-investment, the respondent argues that the EECC provides very clearly that the time for granting access to the access seekers is strictly linked with the risk incurred by the co-investors and the competitive situation of the retail markets and should not be defined a priori on the basis of mere assumptions, as in paragraph (138) of the Draft Guidelines.

BEREC's response:

BEREC mentions five years as an example for a very long period. Given the increasing demand for bandwidth by consumers and businesses it is likely that access seekers will not remain competitive if they do not have access to the VHCN elements after such a period. A significant first-mover advantage can normally be achieved in a much shorter timeframe (many operators e.g. conclude up-front contracts before the roll-out). While BEREC agrees that the exact determination of the period is subject to a case by case analysis, it believes that normally this period will be less than five years. In the end, it will depend on NRAs to assess what the optimal period will be.

BEREC agrees with ETNO that competition can come from co-investors as well as from other infrastructures and therefore deletes the part "especially in the absence of retail competition from other infrastructures" in paragraph (138) of the Draft Guidelines, now paragraph (132).

Regarding the comment by the anonymous respondent, BEREC states that the balance between promoting competition and fostering investment is to be determined by NRAs using the tools and information at their disposal (timing, pricing, quality).

According to **Oxera,** while BEREC has set out some guidance on how the terms of access may change over time, particularly in relation to timing, pricing and quality and why some of these elements may be permitted to vary to take into account the degree of risk incurred by the co-investors, it is not clear how NRAs should determine whether the exact terms of adaptation would result in a 'fair return' for the co-investors (while also assessing whether it allows efficient access seekers to enter the market and/or remain a relevant competitive force).

BEREC's response:

According to the EECC, the terms have to maintain the incentives to participate in the co-investment. The BEREC Guidelines give several examples how this can be achieved. The exact terms have to be assessed by each NRA on a case-by-case basis.

TIM objects to impose in paragraph (142) of the Draft Guidelines an obligation to notify 6 months in advance any adaptations, an obligation which is not envisaged in the EECC and which should be therefore not included in the Guidelines.

BEREC's response:

BEREC made clear in the Guidelines that this part is about changes to the adaptation mechanism. In addition, since different types of changes of the adaptation mechanism may require different notification periods, such periods should be set depending on the circumstances. Therefore, the expression "(at least six months in advance)" in former paragraph (142), now paragraph (136) has been deleted.

ECTA drafting suggestion: *"The timing of adaptations should be continuously reviewed, and at least twice a year, to ensure that spikes in take-up can appropriately be accounted for. NRAs may require relevant data to be provided as part of SMP operators' annual compliance reports."*

BEREC's response:

In BEREC's view, the frequency of the review has to be decided by each NRA.