BEREC Board of Regulators

Re: Public consultation on Draft BEREC Guidelines on co-investments in new VHCN (Art 76 EECC)

Art76EECC_Guidelines@berec.europa.eu

AIIP comments 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)*"

Associazione Italiana Internet Provider ("**AIIP**") has been set up in 1995 and represents the interests of almost 60 electronic communications operators and Internet access providers in Italy (cfr. https://www.aiip.it/associati/).

AIIP is grateful to BEREC for the opportunity of submitting its own comments to BEREC Guidelines on co-investments in new very high capacity network ("VHCN") elements.

AIIP contribution is divided into two parts: (i) preliminary comments on a general nature, upon which are based (ii) specific comments on the Draft Berec Guidelines (with reference to relevant parts and paragraph thereof).

1. Preliminary comments of a general nature

1.1 AIIP submits its own comments to BEREC Guidelines on co-investments in new very high capacity network ("VHCN") elements with the view to find the correct balance between the interests of both potential co-investors as well as access seeker, as:

- several associated operators are active in providing FTTx access in grey and white areas of the Italian territory. Such associated operators are heavily infrastructured with optic fibre networks in defined areas, extended to one or more neighbouring municipalities as well as to one or more provinces, where they have sufficient density economies to install their own FTTx networks[1]. They are very interested in co-investments in VHCN and some of them recently requested to

1 Operators associated to AIIP at December 31, 2017 have together installed with private investments more than 7,250 Km of FTTH access networks, the 30%-50% of which in white and grey areas, and forecast to further extend of not less than 9,000 Km by 2021, for a total n excess of 16,250 Km of FTTH access networks and around 1,000,000 household "passed" (i.e., those which may be linked with an incremental expense lower than € 350 each) by December 2021.

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develop co-investment projects in defined areas both to the incumbent and to the operator selected to install FTTH network in white areas in Italy financed with State aids;

- many associated operators are active in providing UBB services to the public by investing in access infrastructure such as IRU on mini-ducts or optic fiber cables, with both reciprocal and one-way access models;

- all AIIP associated operators, even when vertically integrated with FTTx access infrastructure, also acquire capacity and wholesale services, as access seeker, in order to integrate their offer or to provide services on areas/locations not covered.

AIIP stresses the need the BEREC provides a guide on application of the criteria to assess co-investments pursuant to art. 76 of the EECC such to ensure a regulation preserving the correct balancing between stimulating investments in VHCN infrastructure, on one side, and guaranteeing access to both VHCN infrastructure and services, on the other (as clarified hereunder), without burring the ladder of investment principle embedded in the previous regulation[2], which made possible to many operators to sustainably act on the market and progressively step up the ladder.

AIIP is worried that the actual Daft BEREC Guidelines are too much 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.

1.2 As clarified by the EECC, co-investment agreements are aimed at overcoming "*current uncertainty regarding the rate of materialisation of demand for very high capacity broadband services as well as general economies of scale and density*" through "*pooling of costs and risks, enabling smaller-scale undertakings to invest on economically rational terms*" (whereas n. 198; see also Daft Guidelines, §§ 17-18).

The aim of co-investments in VHCN is to reduce uncertainty, among other, as to economies of density, as well as to the rate of materialization of demand, also to enable smaller-scale undertakings (SME electronic communications operators) to invest on economically rational terms, thus promoting sustainable, long-term competition.

In this regards, AIIP stresses the need that BEREC considers the following:

1.2.1 Several SME operators have sufficient economies of density to sustainably install VHCN and provide UBB services to the public only in defined territories in grey and white areas, but not to expand into neighboring areas (where, by reason of proximity, they however have a number of clients), where their economies of density

2 Especially the "Framework Directive" and "Access Directive".

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are not sufficient to ensure sustainability of a stand-alone VHCN investment.

However, to stimulate such operators to participate to VHCN co-investments to cover such other areas with VHCN might become vital to ensure sustainability of the whole VHCN co-investment project, as they would add their density economies to those of the incumbent and of the other co-investor operators.

In this regard, at the time being it is unclear the territorial extension of VHCN co-investments projects in order to fall within art. 76 EECC: if they were proposed only on a nationwide territorial coverage, it is very likely that SME operators would not be in a condition not participate, thus disregarding the principles set forth under whereas 198 of the EECC.

Therefore, in order to extend the participation of SME operators to VHCN co-investments projects into areas where they would not have enough density economies AIIP suggests that BEREC should clarify 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 neighboring municipalities (for more details, see AIIP comments to §§ 74-75 of BEREC Draft Guidelines, hereunder).

In addition, by limiting the territorial dimension of each VHCN co-investments project would also to guarantee a better balancing as to the governance of each project carried out by way of Joint Venture or reciprocal access model, as the parties would be on a more symmetrical position than in a nationwide (for more details, see AIIP comments to § 69 of BEREC Draft Guidelines, hereunder).

1.2.2 In order to reduce the current uncertainty regarding the rate of materialisation of demand for VHCN services, AIIP suggests that BEREC Guidelines clarify that in a given area where a VHCN is being installed on a co-investments basis, transition from the old to the that the new VHCN platform takes place in the most rapid way for all the operators concerned (i.e. those active on the area).

This implies that migration to VHCN services of all the customers of communications services which are located in such an area shall be accelerated as much as possible by bringing all customers (of co-investors as well as of access seekers) on the new platform, on terms fair and such not to discourage investments (e.g., by providing or a risk premium for co-investors: see hereunder for more details).

Instead, in the chapter of the Guidelines relating to art. 76, Par 1, Point D, BEREC seems to suggest that access seeker be allowed to access to VHCN platform and services in a further moment from the beginning (when co-investors start using it)

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and with a quality limited to wholesale services purchased before the co-investment.

According to AIIP such a regulatory decision is wrong for -at least- a twofold set of reasons.

Firstly, if the terms and conditions of the commitments to open to co-investment the deployment of new VHCN (consisting of optical fiber elements up to the end-user premises or base station) offered to the national regulatory authority by the SPM operator, according to arts. 76 and 79 of the EECC, will replace regulatory obligations, then they have to ensure full access to access seeker under fair/cost-oriented, transparent and non-discriminatory conditions (i.e., the regulatory principles under previous regulation) and access seeker should not be discriminated as to quality and to timing of the VHCN platform and services wholesale offer, however, they may be applied a reasonable risk premium in prices (which of course, will decrease over time, for considering risk reduction)..

Secondly, if the FRAND principles are not stated as effective for all the operators (co-investors and access seeker) since the very first moment there would be no interest for access seeker to move as soon as possible their own customer basis to the new VHCN services/platform, and they will try to maintain their own customer basis over the old network, thus making less sustainable the co-investment by not increasing the economies of density underlying the VHCN.

Therefore, AIIP suggests that mere access seeker be not excluded from new VHCN services/platform at the very same top level of quality from the very first moment but that may be requested to contribute to reduce uncertainty through a price structure for VHCN wholesale services based on costs plus WACC, such to keep into account also the risks embedded into the new VHCN infrastructure and a reduction factor constituted by the migration to VHCN platform of all the customers of such an area (for more details, see AIIP comments to §§ 130 foll. of BEREC Draft Guidelines, hereunder).

Based on the above general (although pivotal) comments of a nature, therefore, here follow the specific comments on BEREC Draft Guidelines by following their index and contents.

2. Specific comments on the Draft BEREC Guidelines with reference to relevant parts and paragraph thereof

1 Introducion

AIIP has no specific comments on the above

2 General issues and terminology input from stakeholders

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AIIP has no specific comments on the above

3 Guidelines on article 76

3.1 Guidelines on Article 76 Par 1

3.1.1 Which VHCN fall in the scope of Article 76

AIIP has no specific comments on the above

3.1.2 What is a new VHCN for the purposes of Article 76

AIIP has no specific comments on the above

3.1.3 Timing for making an offer to co-invest

AIIP has no specific comments on the above

3.1.4 Type of Investments which may be covered by Article 76

According to BEREC "*When applying the provision of Article 76, NRAs have to take account of the scope of the project to avoid regulatory complexity. For instance, if the network is deployed from the ODF, all the downstream lines may have to be submitted to the same regulatory regime* (Draft Guidelines, § 27). AIIP stresses the need that the exception from regulation, if any, subsequent to a commitment to co.-investment, in this specific case under § 27 should only relate to the fully new VHCN infrastructure, but should NOT be extended to all lines downstream to the improvement.

3.1.5 Co-investment models which may be covered by Article 76

As to the co-investment models which may be covered by Article 76, it is clear that they have to grant to all the co-investors "*specific rights to capacity of a structural character, involving a degree of co-determination*".

According to AIIP BEREC should also clarify that the "*structural character*" shall be assessed also during 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. This implies that either the co-investing parties have full co-ownership of the new VHCN infrastructures or they have at least an IRU on the same or part thereof for a long term duration (i.e., not less than 15-20 years, by benchmarking the whole expected life of the new VHCN infrastructures).

<u>AIIP requests that BEREC expressly integrates §§ 31, 32, 34 and 36 of its Draft Guidelines in order to clarify that "time", is of the essence in order to assess the</u>

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“structural nature” of a co-investment agreement in any form (Joint Venture to one way access model) and that any co-investment agreement should be “lasting”, with a duration of not less than 15-20 years. For the sake of clarity, in such a case, a joint venture realized through a SPV featured by governance under shareholders agreements that confer to a party a “plain” call option right to be exercised after 5 year time should not be considered as a co-investment for the purpose of art. 76 EECC and should not bring to deregulation.

AIIP wishes also that BEREC stresses the importance that all co-investors will have a certain degree of *co-determination* in managing the co-investments and requests that §§ 31-32 of BEREC Draft Guidelines be amended in order to keep this into account. In order to reach such an aim, it would be important to clarify the maximum territorial extension of a VHCP co-investment project, so to maximize operators participation and better contribute to a distribution of decision in order to reach a full co-determination.

AIIP has the following remarks as the co-investment models (§ 32 of the Draft Guidelines):

(i) As to “**joint venture model**”, BEREC is expressly limiting the JV model to co-ownership of “a new entity/company (co-investment vehicle)” by co-investors. AIIP suggest BEREC to integrate § 32.1 of the Draft Guidelines in order to include also direct co-ownership of the network or of part thereof (e.g., sharing ownership of the ducts and/or mini-ducts). If a dedicated legal structure is requested, it would not easy feasible to have a JV for a limited infrastructure or for a limited geographic area and this would make it difficult to maximize the scope economies of minor operators (which are very focused on limited areas and where they have high economies of density).

According to the above, BEREC should also amend §§ 35 and 45 of the Draft Guidelines, in order to make clear that also long term contracts (and not only separate legal entities) might be considered JV.

(ii) As to the “**reciprocal access model**”, AIIP stresses the need to integrate § 32.2 in order to clarify that also an unbalanced one (small operators vith SMP) would fall within this example;

(iii) As to the Under the “**one-way access model”,** AIIP stresses the need to integrate § 32.3 of the Draft Guidelines in order to clarify that the right of access in favour of co-investors has to be extended to the VHCN existing in the whole area. Differently, an *incumbent* may open to jeopardised co-investments and be released of regulatory obligations. According to Co-

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investment and art. 76 EECC should NOT jeopardize the extent of regulation.

3.2 Guidelines on Article 76 Par 1 Point A)

3.2.1 Open Offer

At § 40 of the Draft Guidelines AIIP suggests that BEREC clarifies that the "lifetime" 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. In addition, the extension of the lifetime expected of the network shall also be published among the information that SMP operator should publish under Annex IV EECC.

At § 42 of the Draft Guidelines AIIP suggests that BEREC clarifies that by "fair" the economic condition are deemed to be a pricing according to FDC+WACC (would be fine as applied to new infrastructures).

3.2.2 Lifetime of the network

AIIP does not agree at all with § 54: 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 § 54 be amended accordantly.

A shorter duration of the network would imply artificially higher costs for co-investors in ducts and mini-ducts as well as for access seekers.

3.3 Guidelines on Article 76 Par 1 Point B)

AIIP stresses the need to clarify (possibly in §§ 56, 62 and 65) that if physical capacity of the co-investment is saturated and there is no further room for structural co-investment, access seeker should be considered as co-investors as to conditions of access.

3.3.1 Guidelines on Article 76 Par 1 Point B) (I)

3.3.1.1 "Fair, reasonable and non-discriminatory terms"

As far as to the provision that co-investment shall take place at *"Fair, reasonable and non-discriminatory terms",* AIIP stress the need that BEREC keeps into account all of the above comments, which directly or indirectly affect such a provision,

3.3.1.1.1 Joint-venture models
3.3.1.1.2 Reciprocal access models
3.3.1.1.3 One-way access models

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3.3.1.1.4 Mixed form models
3.3.1.1.5 Considerations for all types of co-investment models
[AIIP will deal together with the three subparagraphs]

As clarified above, in order to allow co-investments also to smaller operators very focused in given areas and thus having the necessary economies of density in order to successfully install VHCN, it would necessary a reduction of the geographic extension of the co-investment in VHCN as it brings to a more homogeneous level of risk for investors and helps in achieving more symmetric setting of co-investment (same issue under §§ 69, 75 and 76).

This is especially necessary as to § 75, as reduction of the geographic extension of the co-investment in VHCN brings to a more homogeneous level of risk for investors and need to differentiate conditions of co-investment (§75). It also helps in achieving more symmetric setting of co-investment (§76)

AIIP requests BEREC to better explain the statement at § 80 of the Draft Guidelines according to which: "*Compared to joint-venture and reciprocal access models, which by themselves involve a certain degree of co-ownership, the level of structural rights co-investors enjoy in one-way access models might be lower*" In particular, the reasons of such statement are not clear. The level of structural rights of co-investors should not be lower in any way if approval shall be granted and regulation overcome. As far as the subsequent statement under same § 80 "*the co-investment offer might include conditions that differentiate wholesale prices depending e.g. at which point in time co-investors make a commitment or on the level of commitment co-investors make*".

AIIP requests BEREC to better explain the statement at § 79 of the Draft Guidelines according to which: "*...in the case of one-way access models ... [t]he financial terms are mainly determined by the effective wholesale prices that co-investors have to pay to supply end users using the SMP operator's network. These prices usually consist of recurring payments per end user connected*" As a matter of fact., in such cases the agreement would usually be an IRU one, where the payment is one-off and it is not recurring over time.

Finally, AIIP does <u>not</u> agree that a "*premium increasing over time shall be considered to be justified for commitments made at later stages and for new co-investors entering the co-investment after the commencement of the project, to reflect diminishing risks"*. As a matter of fact, although this is stated in Annex IV(c), second bullet, one should also keep into account the fact that SMP investing will benefit of the "first mover advantage".

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AIIP requests BEREC to expressly clarify at § 84 that the terms of "*different co-investment alternatives within a given co-investment offer*" might differ, provided that proportionality is complied with.

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

AIIP has no specific comments on the above. However, it evidences, with regard to the statement under § 95 ("*access only needs to be granted to new network elements that are subject to the co-investment. Other elements of the network – e.g. other parts of the SMP operator's network that are not part of the co-investment scheme and possibly already existed before– are generally not covered by this requirement and thus do not need to be accessible under the co-investment offer*"). As a matter of fact, according to AIIP it would be important to preserve regulation (if any) to access to upstream infrastructure which is necessary to benefit of co-investments on VHCN parts of the network

3.3.2 Guidelines on Article 76 Par 1 Point B) (II)

According to AIIP, BEREC should integrate §§ 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*".

For the reasons above explained, this option would allow to achieve the aims set forth by whereas 198 EECC.

Namely, according to § 101 BEREC should expressly set a principle that the co-investment project be split into several different limited areas (extending to one or more neighbouring municipalities) each opened to co-investment. As a matter, as already clarified, of fact, if it were a single project on a national basis, it would not be possible for a SME operator (with large density economies in limited areas) to participate and this would detrimental to the whole operation, which would be more sustainable with SME on board (unless, as contrary to economic rationale, it is conceived to exclude SME competitors from the market...).

Finally, AIIP does not share with BEREC statement under § 101 of the Draft Guidelines, according to which "*Undertakings that only commit to a very small share do not bear much of the investment's relevant risks and thus are more comparable to access seekers (addressed in point (d))*". The point may prove to be wrong if it is not assessed "horizontally", but "vertically", by assessing the whole project in a given limited area, that is to say on the specific territory of one or more neighbouring municipalities, as already suggested by AIIP.

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3.3.3 Guidelines on Article 76 Par 1 Point B) (III)

AIIP has no specific comments on the above

3.3.4 Guidelines on Article 76 Par 1 Point B) (IV)

With regards to § 109, AIIP only stresses the risk that, in the worst case, "*Reciprocal rights are of particular importance in the reciprocal access model*" might bring to a duopoly which might benefit of the release from regulation, with a serious for the market.

3.4 Guidelines on Article 76 Par 1 Point C)

AIIP suggests that BEREC integrates § 113 by clarifying that the co-investors participation shall start from planning up to any subsequent phase, including execution of works etc.

3.5 Guidelines on Article 76 Par 1 Point D)

AIIP evidences that BEREC should expressly provide for a clear system of migration of the customer base form the od platform to the new one in a seamless manner, as well as for a specific system for VHCN access line/service portability between operators.

3.5.1 Access as before the deployment

AIIP does not agree with statement in § 133 that "*speed is likely to be the most important parameter*".;:Covid 19 experience has shown that for tele-learning and tele-medicine, latency and jittering are of the essence, more than speed

3.5.2 Access to very high capacity network elements

<u>According to AIIP the whole paragraph 3.5.2 should be deeply revised by taking into account AIIP introductory remarks</u>.

In addition, § 135 should be integrated by clearly stating that prior publication should also include the conditions of the wholesale access to passive and active elements (including, among technical and economic conditions, also SLA and penalties). Access to be provide at transparent, cost oriented (if so they were before) and non-discriminatory conditions

3.6 Guidelines on Article 76 Par 1 Point E)

AIIP has no specific comments on the above

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4. REVIEW CLAUSE

AIIP has no specific comments on the above

* * *

Should you need any further information, please do not hesitate to contact our Association.

Kind regards,

Giuliano Claudio Peritore – Presidente AIIP

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