BREKO | Menuhinstraße 6 | 53113 Bonn | Germany

Body of European Regulators for Electronic Communications (BEREC)
Addressed to the Chairpersons of the BEREC Market and Economic Analysis Expert Working Group (MEA-EWG)

BREKO Bundesverband
Breitbandkommunikation e.V.
Menuhinstraße 6
53113 Bonn

Tel.: +49 228 24999-79
Fax: +49 228 24999-72
steinhauer@brekoverband.de

03.09.2020

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)

Dear Ms. Caccinelli,

Dear Mr. Infante,

Dear Sir /Madam,

We welcome the opportunity to comment 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).

BREKO generally welcomes the fact that de-regulation for undertakings designated as having significant market power (SMP-Operator) can only be granted under Art. 76 of the EECC if an offer to co-invest complies with strict rules and criteria to maintain competition. Moreover, we welcome that the EECC as well as BEREC concur that only particular types of VHCN, namely only a VHCN that consists of optical fiber elements up to the end-user premises or base station, are subject to Article 76 EECC.

BREKO has followed BEREC's drafting processes regarding these draft guidelines closely and has participated in several workshops that were organized by BEREC and the BNetzA, the German National Regulatory Authority (NRA). We very much appreciate both BEREC's and BNetzA's efforts to involve stakeholders such as BREKO in the discussion process leading up to the drafting of the

Berlin Office | Invalidenstraße 91 | 10115 Berlin, Germany | Tel.: +49 30 58580-415 | Fax: +49 30 58580-412
Brussels Office | Rue de Trèves 49 | 1040 Brüssel, Belgien | Tel.: +32 2 290-0108
Norbert Westfal, President | Karsten Kluge, Vicepresident | Alfred Rauscher, Vicepresident | Bernhard Palm, Treasurer
Dr. Stephan Albers, Managing Director

Commerzbank AG Bonn · IBAN: DE50 3804 0007 0100 4480 00 · BIC: COBADEFFXXX · USt.-ID-Nr.: DE212241915 · Bonn-Innenstadt 205/5782/3443

guidelines. Nonetheless, throughout the drafting process as well as in said workshops several stake-holders including BREKO have repeatedly voiced concern regarding the lack of information and clarity presented on BEREC's plans for the guidelines.

Considering the draft guidelines in question we feel like those concerns were warranted as BEREC failed to produce guidelines that outline a clear and principled approach to foster the consistent application of Art. 76 EECC by NRAs. The current draft guidelines set out that any co-investment commitment must be based on "fair, reasonable and non-discriminatory terms" whilst achieving the objective of promoting effective and sustainable long-term competition. Nevertheless, no further de-tails are provided regarding the extent to which or criteria upon which these standards are to be analysed by NRAs. More specifically, these draft guidelines delegate many crucial decisions and the interpretation of many terms, which we hoped would be defined in BEREC's guidelines, to the NRAs. This in turn places an unwarranted burden on NRAs who would have to determine how to approach the analysis of a co-investment offer with little to no concrete guidance. While BREKO recognises the need for a certain degree of flexibility and discretion that must be afforded to NRAs in order to account for national market specifics, there is undoubtedly a need for clarifying guidelines and a uniform definitions of terms which neither the EECC nor BEREC has provided adequate clarifications on up to this point, in order to foster the consistent application by national regulatory authorities of the conditions set out in paragraph 1 of Art 76 ECC, and the criteria set out in Annex IV. Considering the degree of openness and lack of clarity of the draft guidelines we do not anticipate a consistent application of the criteria for assessing co-investments in new very high capacity network elements across all Member States. In the absence of definitions which specify the terms and conditions of Art. 76 EECC to which NRAs can refer in their assessments of co-investment offers, there will not be uniform or consistent application of Art. 76 EECC.

Not only do these draft guidelines hinder a consistent application of Art. 76 EECC by the NRAs, they also place an undue degree of legal uncertainty on undertakings. This degree of uncertainty affects both SMP and alternative operators, due to the fact that neither can have a clear understanding as to what criteria have to be fulfilled for specific types of co-investment offers to fall within the scope of Art. 76 EECC. While SMP operators arguably might have the resources to overcome this degree of legal uncertainty, some alternative operators, especially small or medium operators, might be ex-cluded from participating in or even considering co-investment offers for the simple fact that the legal uncertainty places an even heavier burden on them. We are of the opinion that the aforementioned lack of clarity and its results are contrary to Recital 199 of the EECC which clearly refers to providing

an opportunity to undertakings of different sizes and financial capacity to become infrastructure co-investors.

In the following, we would like to address several specific issues that should be considered by BEREC when finalizing the guidelines on the uniform application of Art. 76.

1. VHCN-Definition

BREKO welcomes the narrowing of the definition of VHCN in comparison to the broader definition under Art. 2(2) EECC, by focusing purely on FTTH/-P networks. However, BEREC did not provide any further explanations on the exceptional cases referred to in Recital 199 of the EECC, which addresses cases in which it is technically impossible to provide fiber elements to the premises. Recital 199 states that "where it is technically impracticable to deploy optical fibre elements up to the end-user's premises, very high capacity networks consisting of optical fibre elements up to the immediate proximity of, meaning just outside, such premises should also be able to benefit from the same regulatory treatment". A consistent application of Art. 76 EECC would most likely benefit from BEREC providing clarifying remarks as to how the 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.

2. Co-investment models

Art. 76 EECC introduces an entirely new opportunity for SMP operators to become de-regulated wholly or partially, which did not exist under European or national law before. Given the fact that there are virtually no best practice cases for these types of co-investment offers yet, it is of utmost importance for BEREC to lay out guidelines which provide further clarification on the criteria set out in Art. 76 EECC. These clarifying guidelines are indispensable, in order to avoid adverse effects on competition. Thus, we concur with BEREC's view that investments in existing physical infrastructure including upgrades or renovations of existing physical infrastructure, as well as the mere construction of physical infrastructure on a stand-alone basis, should not be covered by Article 76 EECC.

Before considering the different co-investment models mentioned in the draft guidelines, it must be pointed out that there is a general lack of clarity on the respective criteria for different types of agreements to potentially fall within the scope of Art. 76 EECC.

The Article itself states that these commitments could consist of co-ownership offers or long-term risk sharing agreements. Moreover, Recital 198 clearly excludes commercial access agreements that are limited to the rental of capacity do not give rise to specific rights to capacity of a structural character and therefore from being considered to be co-investments. In its draft guidelines BEREC acknowledges the fact that the EECC does not identify any particular co-investment model but makes a more generic reference to – among other possible scenarios – a cooperative structure based on either co-ownership or long-term risk sharing. Furthermore, BEREC considers structural rights to constitute an important underlying consideration when assessing any co-investment agreement under Article 76 EECC.

In its draft guidelines BEREC considers that at least joint-venture models, reciprocal access models and one-way access models may be able to qualify as a co-investment under Article 76 EECC. While this non-exhaustive list of possible co-investment models does not foreclose other types of co-investment models that undertakings may set up, it also does not provide sufficient clarity as to what types of agreements clearly cannot be considered to be able to qualify as co-investments under Art. 76 EECC. Thus, we propose the inclusion of criteria which render models incompatible with Art. 76 EECCC.

Whilst BEREC has put forward three potential models, it however did not provide much detail as to which criteria have to be fulfilled for these models to be able to qualify as co-investments. Moreover, 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. A consistent application of Art. 76 EECC across all Member States requires clear and principled guidelines which enable NRAs to assess co-investment offers based on transparent criteria. Transparent criteria regarding the assessment of co-investments are not only necessary to enable NRAs to conduct consistent assessments, they are also necessary to provide legal certainty and predictability to undertakings.

BREKO generally considers joint-venture models as suitable models for co-investment, as they provide a clear structure and division of rights and obligations, granting each co-investor participation in the decision-making process. While the exact ownership structures and voting rights each co-investor has will likely vary from one joint-venture to another, a common characteristic in the joint-venture model will normally be that the co-investors own a relative stake of the new company and thus are entitled to participate in the decision-making process concerning new

investments, upgrades of the network, entry of a new partner, etc. Consequently, the risk of imposing unfair or unreasonable conditions as well as adverse effects on competition can be minimized. BEREC states that where terms differ for each of the parties to the venture, it is up to the NRA to determine whether the rationale for the differences is justified, however BEREC fails to state on what criteria this should be decided by the NRAs.

In contrast to joint-venture models, it is obvious that the reciprocal access model entails differing levels of risk. In the guidelines, BEREC states that the NRA should evaluate whether the rationale for differences is based on economic grounds and mentions that compensation should be provided if different levels of risk are borne at different locations. Again, no guidance is provided as to the criteria on which the NRA is to base its assessment and decision and what metrics can be used to determine the level of risk distribution that potentially distorts competition on the wholesale and retail market.

BREKO sees the greatest issues in relation to the one-way access model. BEREC itself states that these types of agreements bear a higher risk of an imposition unfair, unreasonable or discriminatory terms by the SMP operator. Yet BEREC fails to address how these risks are to be accounted for and what criteria should be used to counteract these potential imbalances. The NRAs must be able to assess whether these types of agreements are compatible with the objective of fair competition, and there needs to be the possibility to determine, on objective criteria, that such one-way access agreements do not qualify as co-investments under Art. 76 EECC. Given the differing market structures in Member States, it may be the case that in some Member States, the conditions of competition are such that a one-way access model must always be inadmissible under Art. 76 EECC as it would otherwise completely distort national or local competition. To make such determinations, it must be clear what economic metrics are to be used, and what legal benchmarks must be fulfilled before an NRA can make an informed decision. Furthermore, recital 198 clearly excludes commercial access agreements that are limited to the rental of capacity do not give rise to specific rights to capacity of a structural character and therefore from being considered to be co-investments. The recital also distinguishes between purchase agreements and commercial access agreements, of which the former could constitute a co-investment, whereas the latter cannot. However, BEREC does not expand on the difference between the concepts and what criteria can be used to identify and determine the nature of an agreement. For instance, a non-exhaustive list of examples to illustrate how structural rights may

operate in practice could have been provided to enable both undertakings and NRAs to rely on clear and transparent criteria when evaluating co-investment proposals.

Having regard to the three models which within themselves lack clear assessment criteria, the question arises how NRAs are supposed to tailor their assessment to the different models, as it seems that some are potentially more harmful and bear much more risks to competition than others. Generally, one can infer that an NRA should be less inclined to qualify one-way access models as co-investments, and that there must be a clear and transparent framework of criteria for those decisions to be based upon. However, the models that bear more risk must be subject to greater scrutiny and a stricter (legal) test. In the draft guidelines, BEREC suggests that potential metrics that could be used by NRAs include information about anticipated costs, expected evolution of demand and revenues or resulting economic risks. However, to ensure uniform and consistent application, such provisions require prescriptive explanations in order to be useful in practice. Furthermore, BEREC contends that an NRA could potentially evaluate the terms of an offer by assuming a hypothetical efficient provider exists to determine whether the proposed terms are fair and reasonable. However, the specific criteria and scope that this analysis should encompass is not further elaborated on, which underlines the overall lack of clarity and specificity of the guidelines.

Given the fact that the EECC is currently already being transposed into national law, BEREC's guidelines should provide much more clarity. In order to avoid ambiguity concerning the national transpositions of the EECC and BEREC's guidelines, clear and principled guidelines are indispensable.

3. Open Offer

BEREC contends that there could be cut-off points for joint ventures or reciprocal access models to enable effective negotiation, but clearly states that one-way access models would have to remain open to enable co-investors to join at any stage. Based on simple economic rationale, this could incentivize co-investors to delay their investment until a much later stage when the project is almost completed, as the risk of the investment can be better calculated at that point, and it is likely to be much lower than in the early stages of a project. BEREC acknowledges that existing co-investors could demand compensation, however, there is no guidance on how this could work in practice. There need to be clear criteria that establish how appropriate levels of compensation are to be calculated without reducing investment incentives for both initial

investors and those that join at a later stage. BEREC also states that the offer should stay open even after the allocation of structural rights is exhausted, meaning that an undertaking must acquire rights from an existing co-investor, which requires a compensation mechanism. BEREC asserts that NRAs are to consider whether the agreement to re-distribute structural rights is appropriate in light of sustainable long-term competition, though no further guidance is provided. It must be noted that the criteria of an agreement having to ensure long-term competitiveness can be circumvented if rights can later be changed, especially where the number of investors is reduced. Furthermore, this demonstrates that initial benchmarks on the acquisition of structural rights and appropriateness of structural agreements must be set first before secondary issues, such as redistribution, can be dealt with.

While BREKO acknowledges the complexity of Art. 76 EECC and in particular the issue of the openness of offers, we expected BEREC to provide at least general criteria to determine the appropriateness and reasonableness regarding possible cut-off points. Thus, we would like to emphasize that such criteria should certainly be part of the final guidelines.

4. Access Provisions

BEREC states that access only needs to be granted to new network elements that are subject to the co-investment, and that other parts of the network are not covered. This could potentially be open to abuse by an SMP, if the SMP makes only a small part of its network open to co-investment and subsequently only needs to grant access to that small part rather than the entire network. BEREC also needs to deal with the implications of only parts of a network being available for co-investment in relation to the exemption set out in Art. 76. There need to be practical guidelines in how far only a part of a network that has been established through co-investment is exempt from regulation, whereas the rest of the network is not. If not clarified, this could lead to a scenario where the rest of the network becomes de facto exempt from regulation as it is practically impossible to divide a network into tangible elements.

5. Procedural Considerations

BREKO concurs with BEREC that a 6-month time limit for publication can be adequate to provide opportunity for potential co-investors to enquire about and assess an involvement in a co-investment. However, there should be strict rules imposed on the proposing undertaking to provide all the necessary information at the beginning of the 6-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.

BREKO considers clear procedural guidelines and the provision of substantial information for the undertakings and NRAs essential for the fair and consistent application of Art. 76 EECC. The time limit of 6-months can only be appropriate if all the information necessary to make an educated decision on a co-investment offer is made available beforehand. Any deviation from this will inevitably lead to the exclusion of possible co-investors and especially of small and medium sized undertakings.

6. Minimum Share Participation

BEREC states that a minimum share participation could be set by an SMP, and that the NRA should determine whether the minimum share requirement meets the overall requirements under Art. 76. It is obvious that a minimum share requirement should not be specified in a manner that disincentivizes potentially interested undertakings from making a contribution, nevertheless there needs to be a certain benchmark on how low such a requirement can be set, and BEREC should define certain criteria that are to be used to determine the effect of minimum requirements on the overall competitive impact of the co-investment agreement.

7. Conclusion

Overall, BREKO has outlined a general lack of clarity and specificity regarding various aspects of the guidelines, ranging from simple definitions to complex legal decisions that will have to be made by NRAs in the absence clear cut criteria or potential benchmarks. This in turn raises the question of how, in practice, NRAs are supposed to deal with such procedures in an effective but timely manner given their limited resources and the fact that neither the EU-Commission nor BEREC were able to provide further clarity or guidance on the practical questions arising from Art. 76 EECC. It is evident that the complexity of Art. 76 EECC will create intricate issues that are left to the NRAs to determine. However, if on a European level it seems rather impossible, due to the complexities of Art. 76 EECC, to establish a catalogue of guidelines that will reduce the burden on NRAs, it seems unreasonable to expect NRAs to evaluate co-investment proposals in the absence of clearly defined benchmarks and criteria. BREKO acknowledges the importance of flexibility that should be afforded to NRAs in order to account for specific national circumstances, however guidelines in a non-exhaustive format can provide an appropriate

starting point when NRAs begin to tackle these requests. In their current format, the guidelines are incapable of providing sufficient guidance to both NRAs and undertakings.

Should you have any further questions, please do not hesitate to contact us at any time.

Jan-Niklas Steinhauer

Head of Regulatory Affairs & European Law, Counsel