

4 September 2020

## Contribution to the 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)

- In **section 3.1.4. Type of Investments which may be covered by Article 76, point (23)**, BEREC states that investments in existing physical infrastructure (upgrade) should not be covered by Article 76, even when such upgrade or renovation is undertaken for the specific purposes of deploying a VHCN. The roll-out of new VHCN by an SMP operator would most often entail the use of some sections of existing physical infrastructure or dark fibre, where available, for both economic and environmental reasons and to speed up the deployment.

We would like to point out that 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 and subsequently of an access offer and the withdrawal of obligations. It may effectively deter both the SMP operator from entering the commitments process under this Article and any potential co-investors.

It is also unreasonable to require the SMP operator to double some infrastructure, such as build a new ODF cabinet next to an existing one if it has or can be upgraded with sufficient capacity to allow the placement of components by co-investors and access seekers.

In short, the present Guidelines should not restrict the co-investments to 100% green-field deployment but rather allow all offers of VHCN co-investments that provide new coverage at premises.
- Regarding **section 3.3.1.2. “Access to the full capacity of the network to the extent that it is subject to coinvestment” point (95)**: BEREC states that “access only needs to be granted to new network elements that are subject to the co-investment”. Our argument above implies that all elements, new and existing, used for the specific VHCN deployment under the co-investment scheme, should be accessible by access seekers.
- Concerning **section 3.4. Guidelines on Article 76 Par 1 Point C) point (124)**, the draft Guidelines require that a detailed offer made to any bidder having expressed interest contains “technical characteristics of potential wholesale products or more detailed information about the deployment areas (e.g. household-level data).”

We note that at the stage of publication of offer for the co-investment project, it may not be possible to give household-level data. While the SMP operator may have a concrete geographic area in mind for deployment, the decision to pass specific addresses would often be made after the co-investment project receives clearance from the NRA and/or the potential co-investors express interest.

Generally, investment plans containing such detailed information (addresses passed) so early on in the deployment process are commercially sensitive. The co-investment projects are not exempt from

competition law guidelines. Disclosing sensitive information to all bidders who have vaguely expressed interest would identify the SMP operator's deployment strategy. In turn, disclosing investment strategy of the SMP operator may negatively influence total investment in the market in two ways: 1. other network operators can pre-empt the SMP operator's (co-)investment with their independent deployments in cherry-picked locations, thus demotivating the SMP operator from (co-)investing in the wider geographic area; 2. other network operators may adopt a "wait and access" or "wait and co-invest" approach instead of independent deployment.

Detailed co-investment offer should not require household-level data to be disclosed to bidders at the stage of its publication, especially if the time period to the start of deployment is more than 6 months.

**Section 3.5.1 Access as before the deployment, point (133)** seeks to clarify the term "end user reach" as "End-users addressable before the deployment should also be addressable thereafter." It is unlikely that the co-invested VHCN network can fully overlay the legacy infrastructure. Generally, where new elements need to be installed, especially fibre in-building wiring, the success rate of negotiating access to buildings is typically less than 100% of the legacy infrastructure's footprint, mostly for legal reasons (no permit by the owner to install elements) or technical complications (buildings are renovated). Hence the requirement that end-users addressable before the deployment should be also addressable thereafter essentially rules out legacy network switch-off. We note that where Art. 76-1-d of the EECC refers to an adaptation mechanism, it should in our view 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 (this does not necessarily mean they are not being served by other infrastructures and providers).

#### Contact

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