

Deutsche Telekom – Input on the BEREC draft guidelines on Article 76 EECC

Deutsche Telekom welcomes the opportunity to contribute to the draft BEREC guidelines regarding the criteria for assessing co-investments in VHC network elements (Art. 76 EECC).

1. Point 3.1.2. – what is a new VHCN for the purposes of Art. 76

Point (19) of the guidelines foresees that VHCN roll-out before the EECC entered into force (Dec. 2018) is not considered “new” under Art. 76. We consider this overly restrictive interpretation unjustified, due to several reasons:

- The definition of “new” networks is not within the scope of BEREC’s competences, which are limited to provide guidance on the conditions laid down in Art. 76 (1) (sub-para 2).
- We consider that the definition of “new” networks should be solely based on technological considerations instead of taking a chronological interpretation. As also previously supported by BMWi¹, the aim should be a uniform regulation of VHC networks (regardless of the point of time they were set-up). A purely chronological interpretation would instead lead to an inconsistent and differing regulatory treatment of networks that would normally be considered equal from a functional-qualitative perspective.
- The approach chosen by BEREC would also be inconsistent with its draft guidelines on symmetric regulation (Art. 61 (3)), where under point (91), a different definition of “new” networks is foreseen (networks not older than 5 years). It is not comprehensible why the criteria of what constitutes a new network under the EECC should differ when looking at Art. 76 or 61 (3).

2. Point 3.1.4. – Type of investments which may be covered by Art. 76

Under point (23), BEREC takes the view that the “upgrade or renovation of existing physical infrastructure” should not fall under Art. 76 (“even when such upgrade or renovation is undertaken for the specific purposes of deploying VHCN”). For reasons of legal certainty, it should be better clarified in the guidelines that the continued build-out from FTTC to FTTH (= newly built physical infrastructure) is not considered merely an upgrade but constitutes a new VHCN investment.

3. Point 3.1.5. – Co-investment models which may be covered by Art. 76

Assessing co-investment agreements based on the “*structural nature*” of purchase agreements does not fall within the competences of BEREC – it should thus limit its assessment to the consideration of whether such an agreement foresees “structural rights” – otherwise, it would artificially minimize potential options for purchase agreements solely based on their “nature” instead of assessing their actual content.

¹ Eckpunkte zur TKG-Novelle 2019, p. 12

4. Point 3.3.1. – Art. 76 (1) lit. b) i) – fair, reasonable and non-discriminatory

It should be made clear that the requirement under Art. 76 that co-investors “*can compete effectively and sustainably in the long term*” does not necessarily mean they need to start making revenue right from the beginning of the investment. “In the long term” entails that investments may be depreciated over the entire term and not only linear. This could mean for co-investors that a shortfall in costs needs to be accepted in the beginning of the co-investment.

5. Point 3.3.1.2. – “Access to the full capacity of the network to the extent that it is subject to co-investment”

Regarding the requirement of access to the “full capacity”, BEREC takes the view that access to the full technical capacity of the network (points 91 & 93) needs to be provided.

If access to the “full” capacity of the network meant that the technical performance of the network had to be fully exploited and that access had to be granted, an appropriate and mutually acceptable agreement would, conversely, require that the co- Investor would be to the same extend responsible for the financing and risk-taking as the SMP operator.

This would however take away the intended flexibility of the co-investment instrument and run counter to the objective of recital (198) EECC (enabling smaller enterprises to invest on economic terms). To grant unrestricted access to every co-investor, even with only a small participation, would not only be unjustified towards the SMP operator, but also to other co-investors with a larger participation. Consequently, and to illustrate this view, an SMP operator should not be (automatically) obliged to make offers available to co-investors that – despite being technically possible – would go beyond its own retail offers.

A co-investor’s use of the network is therefore limited to the proportion of capacity or the number of accesses to the network for which it has co-invested.

Further, BEREC stipulates under point (93) that “in certain cases”, access to the full capacity may have to be ensured by providing the possibility for passive access (e.g. access to dark fibre”). While it remains unclear, which “certain cases” BEREC envisages here, it should be made clear that an active access is usually sufficient and thus constitutes the rule rather than the exception.

6. Point 3.3.3. – Art. 76 (1) lit. b) iii) – increase participation in the future

With regard to point (104), under which BEREC interprets the Article in a way that “the offer could also allow existing co-investors to decrease their participation”, it should be clarified that this would inherently also decrease the financial risk – which could conversely get compensated by higher prices.

7. Point 3.4. – Art. 76 (1) lit. c) – 6-month publication period

With regard to the pre-defined publication period of 6 months, it needs to be clarified that a restart of such period would not be justified solely based on the need to rework certain conditions upon each request of the NRA – as 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.