



ecta RESPONSE

**TO THE PUBLIC CONSULTATION BY BEREC
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)**

BoR (20) 113

4 SEPTEMBER 2020

Introduction

1. **ecta**, the **European competitive telecommunications association**,¹ welcomes the opportunity to respond to BEREC's consultation on this set of draft guidelines.
2. By introductory remark, in acknowledging BEREC's mandate under Article 76(4) of the European Electronic Communications Code (hereinafter: 'EECC'),² **ecta** wishes to recall that the premise underlying Article 76 EECC must not be construed as 'investment from deregulation'. **ecta** therefore finds it shocking, and strongly opposes, that the guidance advises SMP operators on how to pursue deregulation.³
3. As **ecta** and its members have shown, and continue to show on a daily basis, it is competition that drives investment. Indeed, Article 76 EECC is an attempt to prompt undertakings who command significant market power (hereafter: 'SMP operators') to engage in the competition to upgrade network infrastructures across the EU to optical elements, a process that has traditionally been led, and continues to a large extent to be led, by competitive operators.
4. An appropriately long-term view of effective and sustainable competition provides operators with a strong incentive to co-invest by increasing their return on capital employed (ROCE): a higher ROCE indicates more efficient use of capital and liberates resources for innovation.
5. **ecta** therefore sees BEREC's mission in relation to Article 76 EECC, the associated Annex IV and the commitments procedure of Article 79 EECC as continuing to foster effective and sustainable competition, at both infrastructure and service levels, while paying particular attention to the extraordinary nature of the co-investment setting.
6. To this end, the guidelines under consultation are to provide national regulatory authorities (hereinafter: 'NRAs') with direction when interpreting and applying the conditions of Article 76(1) as well as the criteria of Annex IV thereof and corresponding national transposition measures, so as to ensure their consistent application.
7. To achieve this, BEREC is to elaborate relevant guidance on the conditions and criteria in question, which serve to facilitate the assessment of co-investment offers made by SMP operators in the context of commitments that such operators may propose to their NRAs.
8. The introduction of the commitments procedure in general and, within that context, of the possibility for SMP operators to issue offers for other electronic communications providers to jointly deploy very high capacity networks with them, acceptance of which trigger some degree of regulatory forbearance, marks the conceptually most important change in the development of regulated competition in the EU electronic communications sector since the onset of liberalisation.

¹ <https://www.ectaportal.com/about-ecta>

² Directive 2018/1972/EU, (2018) OJ L321/36.

³ BoR (20) 113, note 5, at 5.

9. Given the unique importance that the administration of this provision will play relative to the evolution of market regulation in the EU, **ecta** welcomes the constructive approach chosen by BEREC to make the text of the Guidelines itself available for interested parties to propose editorial amendments. This, **ecta** considers, would have been equally desirable in relation to other draft guidelines on which BEREC has consulted, and **ecta** encourages BEREC to pursue consultations in the same format on all future guidance documents likely to shape NRAs' administrative practices and thereby the level of consistency that these practices will realise.
10. With this submission, **ecta** avails of the opportunity to propose wording in order to promote greater consistency through carefully considered, equitably balanced and, ultimately, more sustainable interpretive choices that foster infrastructure and services competition alike. Keen to engage with other market participants in further dialogue on how to evolve a practicable framework for co-investments in very high capacity networks, **ecta** has chosen to also publish its redrafting proposal for general comments.
11. The present document does not pretend to provide a summary of all the dogmatic and analytical choices underlying **ecta**'s redrafting proposals. Acknowledging the complex nature of BEREC's guidance mandate, **ecta** expresses its appreciation for BEREC's work wherever it has left the originally proposed text of the guidance unamended.⁴
12. However, **ecta** does consider it necessary to highlight a number of particularly severe concerns in the draft Guidelines that the final version of the document needs to address. These regard:
 - i. The responsibility of SMP operators;
 - ii. The role of co-investors;
 - iii. The perspectives for access seekers;
 - iv. The special situation of smaller operators;
 - v. Incompleteness of the guidance: not all points addressed
13. Article 76, in conjunction with the commitments procedure in Article 79, amounts to a unique repositioning of SMP operators in the collective deployment effort to upgrade the EU's communications infrastructure. It is unique not only because of the special treatment that the procedure may bring about for, but also because the initiation of the procedure is entirely in the hands of SMP operators.
14. SMP operators therefore must make good on their special standing in the relevant market(s) and the special benefits they can derive from conducting co-invested deployments with the participation of other electronic communications providers—and without the threat of additional regulatory obligations—by proposing commitments and making offers that justify these benefits.
15. The principal responsibility for the success of the new co-investment regime thus resides with the undertakings that by virtue of their market position, control of network infrastructure and access products, and access to financial markets and resources

⁴ Unless explicitly marked otherwise.

generally dispose of non-replicable structural advantages. It is this inequality of starting points for negotiating co-investment agreements that the conditions and criteria of the Code seek to address.

16. The principal safeguards against limited access co-investment agreements upending competition market development where the conditions for competition are anyway particularly challenging are the requirements for openness, timely publication and good faith in presenting offers. **ecta** therefore views critically BEREC's proposals for restricting openness for purely pragmatic considerations; for a restrictive and statutorily unmerited interpretation of how offers should be made publicly accessible; and the complete absence of any guidance proposal on what making an offer in good faith requires, considering the numerous, repeated and persistent abuses engaged in by SMP operators.
17. Secondly, it is of the utmost importance to keep in mind this imbalance of starting points when considering the relationship between SMP operators and providers envisaging co-investment on the former's terms. The legislature has paid particular attention to this relationship by foreseeing four specific items that a co-investment offer has to fulfil in order to ensure that potential co-investors agreeing to an SMP operator's offer can effectively challenge that operator in a sustainable manner, consistent with the long-term engagement they enter into.
18. Beyond a series of redrafting proposals needed to make these items effective and provide for competitive opportunity for a variety of co-investors with different preconditions for and approaches to joining in the co-invested deployment of very high capacity networks, **ecta** therefore considers it fundamental to underline that it are the SMP operator's commitments that provide the basis for the special regulatory treatment that is triggered where NRAs decide to make them binding.
19. This means that where these commitments are found to be inadequate or their offers lacking, SMP operators are the ones to assume responsibility and face the regulatory implications, including possible supplementary obligations. In no case, **ecta** believes, should ex ante regulatory obligations be extended to co-investors where subsequent analysis reveals that undertakings by the SMP operator have not been honoured or otherwise proven unsuitable to fulfil the conditions and criteria of Article 76(1)(2) EECC and Annex IV. Close attention to how SMP operators discharge their good faith negotiation and compliance reporting duties by NRAs will be required in this regard.
20. Thirdly, a key aspect of the Code's co-investment regime is the attention that the legislature has attached to maintaining competitive dynamism in the transition to very high capacity networks by guaranteeing access seekers the possibility to remain a competitive force. While not being immediately eligible to access the capacity of the deployment on par with participating co-investors, access seekers must benefit from business continuity on terms that do not diminish their ability to keep delivering their services after deployment.

21. This not only requires a suitable adaptation mechanism that the NRA should confirm only after taking into utmost account access seekers' comments, but also clear guarantees for appropriate migration scenarios to and upgraded wholesale access products on these new networks. **ecta** observes that the latter aspects are essential requirements, which are sorely missing from BEREC's draft guidance, despite their importance to ensuring the maintenance of differentiated service competition as well as the possibility for more parties to progressively join the co-investment.
22. Fourthly, **ecta** wishes to emphasize the situation of smaller operators in the context of co-investment. While immensely important to ensuring service delivery as well as targeted products for their local clients, often combining different types of digital services in their retail offers, notably in the small and medium-size business segment, these operators often do not command resources and means to engage in complex negotiations or to financially engage in multiple co-investment offers within their footprint at the same time. Importantly, some of the EU's most important business-to-business providers, including **ecta** members, fall into this category.
23. This, however, must not spell impossibility for these operators to evolve their business into a future where co-invested deployments may become more common and inability to gradually gain access to and subsequently co-invest in new deployments may effectively threaten their viability. **ecta** therefore observes with concern that BEREC not only focuses its discussion of the adaptation mechanism largely on the protection of co-investors, but goes further as to suggest that undertakings able to commit only to a comparatively small share of the overall investment should not be given the same treatment as more weighty co-investors. Read in conjunction notably with its pragmatic limitations to co-investment participation, **ecta** considers that BEREC here outlines an approach to smaller operators' ability to participate in co-investments that is significantly at odds with the Code's requirements.
24. Finally, these substantive concerns are reinforced by a number of omissions and formal problems, ranging from the proposed incomplete title of the consultation document, which does not adequately reflect the mandate that BEREC has been given by Article 76(4) EEC , over insufficiently precise citation to the incomplete or entirely missing consideration of several aspects of the Annex, contrary to the explicit requirement of point (e) of the Article 76(1)(2) EEC and notwithstanding assertions to the contrary.⁵
25. **ecta** underlines that these formal defects are prone to promote inconsistent application. Moreover, in a domain marked by great statutory complexity, non-consideration (and thus non-interpretation) of additional indications that the legislature has provided in the operative part is a serious missed opportunity. This is all the more problematic where a number of Member States have patently omitted transposition of Annex IV from their draft bills.

⁵ BoR (20) 113, paras 4f and 146, at 3, 30.

26. For [ecta](#), ‘getting co-investment right’ is one of the key challenges for the implementation of the new legislative regime that becomes applicable with the Code and attendant transposition measures at the end of this year. To ensure that the special new rules of Articles 76 and 79 EECC, in conjunction with Annex IV, make a balanced and positive contribution in this respect, [ecta](#) herewith submits its redrafting proposals including a multi-faceted review approach that will also allow for the Commission’s review of these provisions to be specifically informed by the experiences gained by BEREC’s members, including associated dispute resolution proceedings.
27. [ecta](#) and its members will be pleased to contribute to the evolving discussion about this guidance document and remain available to detail the proposed contents of its redrafting⁶ at BEREC’s convenience. Given the substantively incomplete nature of the consultation draft, the views submitted may be subject to evolution.

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In case of questions or requests for clarification, we cordially invite BEREC to contact Mr Oliver Füg, Director of Competition & Regulation at [ecta](#), at ofueg@ectaportal.com.

⁶ While aiming to be comprehensive in its approach, this does not necessarily cover all relevant aspects.