Brussels, 3 September 2020

ETNO Contribution to the Public Consultation on BEREC's proposed Guidelines on Criteria for Co-investment

We appreciate BEREC's efforts to engage in a dialogue with the key stakeholders and hope that our feedback will help you in finalizing the proposed Guidelines.

The ultimate goal of Article 76 is the promotion of development of Very High Capacity Networks (VHCN) through co-investment and enhanced competition. The recitals do refer at very broad level to all types of uncertainties for VHCN investments, for which co-investments projects are welcomed to bring a solution, and which thus justify the regulator to refraining from regulation.

> *(198) Due to current uncertainty regarding the rate of materialisation of demand for very high capacity broadband services as well as general economies of scale and density, co-investment agreements offer significant benefits in terms of pooling of costs and risks, enabling smaller-scale undertakings to invest on economically rational terms and thus promoting sustainable, long-term competition, …*

This same goal should be clearly reflected in the upcoming Guidelines. In ETNO's view, this can be achieved

- on the one hand, by adhering to the clear scope set by the EECC for the Guidelines, namely, by focusing on providing guidance to NRAs on how to interpret – when assessing voluntary co-investment offers published by network operators – the conditions laid down in Art. 76.1, which are listed in subparagraph 2 (lit. a-e) of this paragraph and in Annex IV.
- and by leaving, on the other hand, enough flexibility in the Guidelines to ensure ease of application and effectiveness.

We therefore urge BEREC to clearly delimit in the Guidelines the respective roles and responsibilities of the different parties (SMP-operator, NRAs and BEREC) in line with the text of the EECC.

In our contribution to the public consultation below, we will focus on the following elements:

1. Definitions of "new" investments, renovations, upgrades … 3
2. Leave room for market developments and new models 6
3. Other co-investors compete effectively and sustainably in long term in downstream markets.... 6
4. Open during the "lifetime of the network" 7
5. "Fair, reasonable and non-discriminatory terms" 8

6. Publication period of 6 months for offers to co-invest ... 10
7. Access rights for access seekers not participating in the co-investment ... 11
8. Adaptation mechanisms for access at a certain time if not participating in the co-investment .. 13

1. Definitions of “new” investments, renovations, upgrades …

Under Section 3.1.2. of the proposed Guidelines, BEREC proposes to include a definition, for the purposes of Article 76, of the meaning of “new“ in “new Very High Capacity Networks”.

In doing so, the proposed Guidelines define very restrictively the investments that can be considered as “new”: in particular, according to BEREC, Article 76 cannot apply to a VHCN investment that was publicly announced <u>before</u> entry into force of EECC (December 2018).

ETNO clearly disagrees with this approach and proposal.

- First, defining the term “new” is outside the scope of the Guidelines. In fact, BEREC’s task is to clarify the <u>conditions</u> laid down in Art. 76.1, which are listed in subparagraph 2 (lit. a-e) of this paragraph and in Annex IV. The wording of Art. 76.4 (“consistent application […] of <u>the conditions set out in</u> paragraph 1”) is clear and univocal in this respect, corresponding to the wording in paragraph 1 subparagraph 2 (“the following <u>conditions</u>”) and not to the whole paragraph.

- Second, should BEREC elaborate on the term “new”, ETNO calls for a uniform regulatory regime for VHCN:

    1. The term “new” in the framework is to be assessed in economic terms, not chronologically in relation to the entry into force of the Directive: the relevant criterion to assess what is new under this regulatory regime is indeed whether a network is still in the *initial* process/start-up of the roll-out, and not *yet mature* in terms of take-up / penetration etc. Such networks are still characterised by competition to the market instead of on the market.

       The European legislator clearly underlines in general terms a positive stance of the EECC towards all co-investment projects, and towards regulators in such case refraining from regulation. Co-investment has been identified, on one hand, as a mean for promoting the deployment of VHCN, consistently with the objectives laid down at article 3 of the EECC, and on the other hand, as a model which safeguard competition and thus requires the removal of ex ante obligations. The underlying *ratio legis* in the recitals does not at all make this lighter regulatory regime conditional on being chronologically new in relation to the entry into force of the EECC.

    2. Indeed, “new” should not be considered chronologically in relation to the market analysis or the transposition of the Code, but in relation to the conclusion of the co-investment agreement.

       Investments carried out and opened up to co-investors prior to the transposition of the EECC must retrospectively qualify for an NRA assessment and eventual exemptions from SMP regulation. A chronological interpretation would imply lack of regulatory commitment vis-à-vis the ultimate goals of Art. 76 and disincentivise SMP operators to invest (or at least, delay investment decisions).

If BEREC is concerned that this will mean that networks already deployed will be covered by the Article, when it might be argued they do not need the benefit of the risk reduction made possible by co-investment, then BEREC could consider whether it might be reasonable to specify that any agreement includes, to a sufficient degree, network investments which have not yet been made. The co-investment agreement would then include both existing investments plus further network expansion (and new investment) for which the new co-investment regulations have provided extra incentives.

Also, it is important that existing agreements already fulfilling the Art. 76 conditions are taken into consideration by NRAs in any new market analysis. In ETNO's view, for the sake of consistency and predictability a uniform regulatory regime for VHCN is necessary (regardless of when the network was deployed).

In addition, it is important to consider the effect of the announcement of new regulatory provisions on the markets and investments. Indeed, the new regulatory framework introduced by the EECC has started producing expectations on investors well before its final adoption, given that the European Commission's initial legislative proposal, which already included co-investment, dates back to September 2016.

Therefore, if existing co-investments satisfy the conditions of article 76 (or are duly modified to respect the conditions as indicated in footnote 10 of the guidelines) they should also be able to benefit from the regulatory relief once the NRAs concludes the article 79 procedure.

3. From a practical point of view, the Guidelines should not exclude that previous investment are included as well and made subject to the same conditions regarding openness. This would from a co-investors point of view be a logic step and aim at a simplification of frameworks and conditions for all parties.

   Given that most operators have already deployed VHCN based on co-investment models to a certain extent (varying from country to country), we would fall into an awkward situation if the latter were not to be valid, even if satisfying the criteria of article 76. Indeed, it would mean that networks that are operationally functioning as one whole would be regulated under different regimes. Such regulatory treatment could even be different from street to street or city quarter to city quarter, depending on when the investment happened vis-a-vis the cut-off date BEREC adheres to.

   If BEREC were to follow the suggestion to apply a hard cut-off point on 21/12/2020, not only would this create an artificial situation, but it would also bring about a complex environment, that further renders the idea of co-investment under article 76 unattractive. We are sure this is not what the legislator meant to do.

- Third, a critical point in the proposed draft Guidelines is that BEREC conditions the formal review of co-investment schemes (i.e. application of article 79 procedure) to the transposition of the EECC into national legislation.

Though we understand that the application of the EECC provisions requires their transposition into national law (due by 21 December 2020); Article 124 of the EECC also provides that "*Member States shall apply those measures from 21 December 2020*.". Therefore, any delay in the transposition should not prevent an NRA from applying the Article 79 procedure in the transitional period between 21 December 2020 and the date of the effective national transposition. This is paramount for the achievement of the objectives of Article 3of the EECC and of the EC Communication on the Gigabit Society. There is indeed a real risk that network deployment will be delayed, if NRA's sit still in attendance of a late transposition.

Moreover, we are also of the opinion that the criteria listed in Art. 76 and Annex IV are precise and prescriptive; and can thus be applied without transposition. Therefore, once the Guidelines are finalized, there will be no reason not to allow the application of the provision, even in the absence of the national transposition.

- Further, should BEREC elaborate on the term "new", the Guidelines should clarify positively that Art. 76 also applies to network extensions and upgrades towards very-high capacity networks, even if existing infrastructure (also of third party such as utilities) are used

In the proposed Guidelines, BEREC currently follows a different stance, stating that:

> *(23) In BEREC's view, investments in existing physical infrastructure, as well as the mere construction of physical infrastructure on a stand-alone basis, **should not be covered by Article 76. This conclusion applies in particular to the upgrade or renovation of existing physical infrastructure** (even when such upgrade or renovation is undertaken for the specific purposes of deploying a VHCN). This is because such upgrade or renovation would still pertain to infrastructure that already exists, and that was built before the entry into force of the EECC provisions.*

In ETNO's view, excluding upgrade or renovation of existing physical infrastructure from the scope is contrary to the underlying philosophy of Article 76. It would undermine the new objective laid down in Art. 3, para. 2 a) of the EECC namely to promote connectivity and access to, and take-up of very-high capacity networks. Notwithstanding, ETNO does agree with the ideas developed in paragraphs 24 to 27 of the draft Guidelines.

Art. 76 aims at rewarding a type of self-regulation in the form of an open co-investment allowing others to join the co-investment, with sizeable commitments and under binding, regulatory controlled conditions. This is justified on the basis of enhanced competition through co-investment.

It should therefore have an **inclusive approach supporting any co-investments** that bring fibre to the end-user premises or base station, independently from the starting point of the investment.

- Finally, it would be improper that regulators are allowed to easily designate SMP status to operators, and impose new regulatory obligations in relation to networks that were pre-existing to such SMP designation, but that these regulators would not be allowed to qualify such pre-existing infrastructure as being susceptible for withdrawal of regulation in the presence of beneficial effects, as underlines the EECC, "in terms of in terms of pooling of costs and risks, enabling smaller-scale undertakings to invest on economically rational terms and thus promoting sustainable, long-term competition." (recital 198)

2. Leave room for market developments and new models

We agree with BEREC's statement in § 32-33, that the list of possible co-investment models (e.g. joint-venture model, reciprocal access model, one-way access model), is

> *"**not exhaustive** and the providers of electronic communications networks and/or services **might conclude other types** of co-investment agreements that may also fall under Article 76. For instance, they could combine features of the abovementioned co-investment models"*

Indeed, Article 76 and recitals indicate clearly enough that there are different possible models for co-investment, including purchase agreements of a structural character without co-ownership.

ETNO's priority is to make co-investment workable and to leave room for market developments and new models beyond the well-known co-investment models used today.

3. Other co-investors compete effectively and sustainably in long term in downstream markets

Article 76 (1) (b) sets out that

> *"it would allow other co-investors which are providers of electronic communications networks or services to compete effectively and sustainably in the long term in downstream markets in which the undertaking designated as having significant market power is active, on terms which include: …"*

The ability to compete effectively and sustainably should be assessed in relation to the variable cost per access that a co-investor may incur.

- It should be explicit that this capacity to compete effectively is related to the sole co-investors and not to other access seekers using the VHCN under other access regime (for example the anchor product).

- It is also important that there is an incentive for co-investors to effectively co-invest at the beginning of the co-investment timeframe and beyond the minimum step of co-investment provided in the offer.

Therefore, an offer that makes co-investors able to compete effectively and sustainably only if they have sufficiently (both in timing and value) and reasonably co-invested should be stated as satisfying this criterion.

In Paragraph 57, the draft Guidelines mention: “NRAs may define additional sub-conditions pursuant to point (b)”. Our understanding is that this could only occur in relation to the Article 79 EECC regarding the binding procedure, which is pursuant the EECC not in scope of the BEREC Guidelines.

4. Open during the “lifetime of the network”

First, the concept of “open” in “open at any moment during the lifetime of the network” should be clarified in the sense that co-investment offers may provide different type of openness:

- The timeframe T1: during which a provider of ECN/S can access to a co-investment offer;
- The timeframe T2: during which a provider which benefits from a co-investment offer – a signed agreement – can use it to access to the network, increase its participation in the co-investment, etc.

Concretely,

- The timeframe T1 is defined in accordance to the procedure set out in the second paragraph of art.79 3.
- The timeframe T2 is defined as a key item of the offer.

The fact that the co-investment offer is open (e.g. T1) during the lifetime of the network implies that the stability over time of the possibility to co-invest for any new provider of ECN/S should be duly reflected in the stability overtime of the exemption of access remedies. This also confirms the interpretation of the word “new” explained above, as this exemption should be renewed during the following market analysis and not only the first one after the implementation of the EECC.

In addition, it should be put explicitly that conditions will – and should – also be different depending on when actors decide to co-invest, in order to provide the necessary incentive to investors and reflect the proper level of risk sharing and commitment.

Second, BEREC indicates in the proposed Guidelines that there could be different approaches to the concept of “lifetime of the network”, referring to a difference between technical and commercial lifetime of the network (§54).

In this respect, at this stage BEREC concludes that,

> *"the purposes of Article 76, the lifetime of the network can only be understood with reference to the* ***expected life of the commercial co-investment scheme*** *during which the network is fully operative, rather than the technical operating lifetime of any of the network components (that is likely longer than the commercial lifetime)." (§54)*

It is however insufficiently clear, in economic terms, what exactly BEREC refers to as "commercial" lifetime.

- Does it refer to a longer period than the pay-back period?
- Does it refer to the contractual clauses?
- What is the relationship with the duration of the binding co-investment commitments approved by the NRA according to article 79(3), 2nd subparagraph EECC?

ETNO believes that to ensure legal certainty, the "commercial or economic relevant lifetime" of the network will not be defined as such in the co-investment offer, but the commitment on the duration of the right of use of the network will be in the agreement that will be endorsed and made binding by the NRA following the procedure referred to in Art. 79 EECC. Due to the complexity for the SMP operator of assessing in advance the level of risk and the corresponding conditions for joining the co-investment after the initial period of commitments (i.e. at least 7 years), the initial co-investment offer should only include the conditions for joining the co-investment up to the initial duration of the commitment defined by the NRA according to Article 79 procedure or at least a revision clause should be possible. In any case, there is thus no need for BEREC to include general statements or terminology that is open to interpretation in the Guidelines. For that purpose, we propose the paragraphs 54 and 55 to be removed and to be replaced by an explanation in line with the above.

5. "Fair, reasonable and non-discriminatory terms"

We note a few elements in relation to the opening to co-investors at fair, reasonable and non-discriminatory terms.

First, we noted BEREC suggesting that in the JV Model or Reciprocal Access Model,

> *"it might be reasonable for the co-investment offer to include* ***specific cut-off dates*** *after which a late entry into the joint-venture itself does not need to be guaranteed" (§48, 50).*

We agree with this statement. It is in fact highly recommendable that the possible difference in treatment of different categories, i.e.

- co-investors entering at the beginning of the investment,

- those entering at a later stage
- and those not entering the co-investment at all

is set in a clear and predictable way.

There should indeed

- not only be a clear hierarchy between the different moments in which an operator decides to enter into the co-investment agreement,
- but more specifically a clear incentive to an early engagement through more favourable conditions. A late engagement or no engagement at all should be discouraged.

Therefore, specific cut-off dates, after which a late entry into the joint venture itself does not need to be guaranteed, is in line with this goal. This will also potentially boost the investments. As a consequence, transparent terms in that respect will need to be available in the proposal for co-investment.

Second, we agree with BEREC confirming that

> *(62) "Most importantly, it could be justified to differentiate the terms of the co-investment offer **depending on the level of risk** or the share of the total risk carried by different potential co-investors. That means that co-investors committing for different levels of participation or deciding to co-invest at different points in time could justifiably be offered different terms."*

It is however not yet clear how the different regulators will approach this reflection of risk in the pricing for those co-investors entering at a later stage.

ETNO favours an approach based on economic principles. Generally, ETNO is of the opinion that the Guidelines should be principle based and not seeking to define all the details.

Terms could also reflect the extent of commitment made at any time i.e. the level of risk which a co-investor is offering to share. Early and significant investment will then provide better terms than later and more limited investment and risk sharing.

Third, the terms of the co-investment offer also relate to the fair, reasonable and non-discriminatory terms allowing access to the *full capacity of the network* to the extent that it is subject to co-investment

The term "full capacity" should be properly explained: each co-investor may use the network in which it has co-invested up to the proportion of capacity or the number of accesses to the network for which it has co-invested. However, it does not seem appropriate that a co-investor may not be able to use the part of the network corresponding to the co-investment done according to the agreement due to another co-investor exceeding the use of the network corresponding to its co-investment.

We state that such "full capacity" is to be understood in relation to (i) either the geographical scope or (ii) the exclusion of any technical limitation in the use of the network subject to co-investment.

This likely requires amendments to section 3.3.1.2. of the draft Guidelines.

6. Publication period of 6 months for offers to co-invest

As regards to the publication period of 6 months for offers to co-invest as per Art. 76 (1 lit. c), six months would allow enough time

- for potential co-investors to evaluate the offer and
- for the NRA to carry out and conclude the market test.

While ETNO acknowledges the importance of a defined publication period for reasons of transparency, the due market tests or any changes to the offer should not delay the start of deployment.

BEREC however, includes in the proposed Guidelines various scenarios in which to allow a recommenced counting of this six-month period or an extension of this six-month period, e.g.

- If the offer would be published before/during commitment procedure, and would significantly change, indeed, the proposal suggests the six-month to <u>restart from re-publication of definitive offer</u>.
- Also, the six-month period would be <u>extended</u>
  - If this is required for co-to investors "to prepare for the start of marketing activity"
  - If this is needed because of "complex co-investment schemes or products, or the need to implement new interfaces".

We disagree with the inclusion of such vague and possible far-reaching possibilities for re-counting or extensions. Referring to equivocal concepts as "preparation of marketing activity" or "complexity" … risks to extend the six month uncontrollably long.

Moreover, setting out the concrete elements to the possibility for extension of the 6-month period, is not in line with the *ratio legis* of the relevant provision of the EECC.

Indeed, Article 76.1 (c) EECC explains that the period may be prolonged "based on <u>*national*</u> circumstances".

"National circumstances" are per definition specific to the case at hand in a specific Member State. These can thus not be addressed beforehand, at this stage, in a generic way in the proposed Guidelines. The generic references to e.g. the start of marketing activity, complex co-investment schemes or products, or the need to implement new interfaces … should thus be deleted.

These indeed introduce artificial constraints, that

- would introduce significant uncertainty to the business plans of the co-investors

- and risk discouraging network operators from making use of the co-investment provision as laid down in Art. 76.

Six months should therefore be the rule. Any prolongation based on national circumstances must be duly justified by the NRA; first on the basis of a clear specificity of the national situation by comparison with situations occurring in other Member States; second by explicitly proving that such specificity does require a longer delay. We indeed accept that there may be exceptional circumstances to extend such a period, but NRAs should not use the required assessment as a reason to delay the start of deployment without exceptional reasons (we would expect that NRAs already have a good view of their national market and so the competition assessments would not need to gather large volumes of new information). The burden of proof on those points should be on the NRA.

Unduly prolonging the delay would definitively not help render applicable Article 76 and would also miss the opportunity to promote the deployment of VHCN and the objectives of Article 3 EECC.

Therefore, it is desirable that the BEREC Guidelines incentivise a fast deployment of VHCN in co-investment by providing NRAs a strict deadline to evaluate the co-investment commitment. The Article 79 procedure should be concluded before the end of the six-month period. In case of delays in the conclusion, co-investors should in any case be allowed to start the deployment. Indeed, Article 76(2) requires that the NRA shall make the commitment binding and shall not impose any additional obligations after the conclusion of the market test, but does not exclude that, in the meanwhile, co-investors can start the deployment.

In the case of existing co-investment agreements to be taken into consideration by NRA during the first market analysis following the implementation of the EECC, the condition of 6 months' prior notice should be viewed in a flexible way in order not to disadvantage an efficient agreement in respect of the objective of the EECC and the Art.76, for example, if a different period is defined in symmetrical regulation following Art.61 (2).

Finally, generally speaking, it is important that "the start of the deployment of the new network" is understood in an extensive way in order to allow for making changes to the offer or to take into account existing offers, for instance that had been already imposed earlier through symmetrical regulation – for example following Art.61 (2).

7. Access rights for access seekers not participating in the co-investment

BEREC points out the delicate balance between

- on the one hand allowing access seekers to enter the market and/or remain a relevant competitive force,
- and on the other hand, maintaining the incentives to participate in the co-investment (to give the co-investors advantages compared to access seekers).

In this respect, the Guidelines should make sure there is no reward/advantage for not joining the co-investment.

Article 76 Par 1 Point d) EECC, explains that

> *"access seekers not participating in the co-investment can benefit from the outset from the same quality, speed, conditions and end-user reach as were available before the deployment*

It is in this respect not correct to state in the proposed Guidelines that the term "conditions" includes not only ordering and repair process, but also "prices" (§133).

> *§ 133 (…)The term **"conditions" includes prices**, processes for ordering and repair, provision of information, etc. End-users addressable before the deployment should also be addressable thereafter.*

This is not in line with recital (200) EECC that refers, as regards these conditions only to

> *"at least comparable functionality and quality to those previously available on legacy infrastructure …".*

It does not refer to "prices". Including prices under the "former conditions" is thus not in line with the underlying ratio of the provision.

There should be a distinct advantage for the operators choosing to join the co-investment. If access seekers not participating in the co-investment can benefit from the outset from the prices as were available before the deployment of the co-invested VHCN, in some circumstances, this might allow "copper-based prices" for fibre access products. This is economically not sustainable when considering the difference in cost of depreciated legacy networks and newly invested VHCN. In fact, this would a first and foremost disincentive to investment in VHCN both for the SMP operator and for potential co-investors. Moreover, depending on the profiles the VHCN products are typically not priced similarly as legacy copper products.

On the other hand, the same quality, speed, condition and end user reach available before the deployment could be still offered on the legacy network in the case where it is still active. It is thus important to offer flexibility to the SMP operator in order to provide an appropriate offer.

Finally, BEREC should bear in mind that too strong a regulation in favour of non-co-investors undermines the business potential for both the SMP operator and the co-investors.

8. Adaptation mechanisms for access at a certain time if not participating in the co-investment

It is important that the period before adaptation mechanisms are set in place should not be short, and adaptation should not strive towards short term levelling of the conditions between co-investors and non-co-investors.

In fact, otherwise, this would disincentivise co-investing and thus risk-taking, both at the early stages of investment and later on given that:

1) the commitment taken and rights obtained by the co-investors are valid for the longer term, and thus there should also be a mechanism that offers them a long-term period over which to recoup their investment they were willing to commit.

2) the adaptation mechanism levels conditions in a relatively short term and there might be no-one interested to step into the investment as co-investor until a later stage when risk has diminished because sufficient volume has been reached. As a consequence, the SMP operator would also be deprived of the incentive to open up the investment, as he would have diminished or no outlook to any relief given the slim chances to sign a co-investment agreement and thus slim chances that the conditions of Art. 76 par. 2 (in particular "if at least one potential co-investor has entered into a co-investment agreement") are met.

BEREC refers to a period of 5 years as adaptation timing. Clearly, this is in general rather short, especially given the time it takes for a project in roll-out to get started and get to full speed. Moreover, we do not agree where BEREC makes the transition period of five years conditional on the need for existence of retail competition "from other infrastructures".

> *§138 (…) The appropriate length of this period depends on the degree of risk incurred by the co-investors. A longer period may be justified, if the risk is high, e.g. where the rollout cost per customer is particularly high and there is significant uncertainty about future demand and willingness to pay for high bandwidths. However, a very long period (e.g. beyond five years), especially in the absence of **retail competition from other infrastructures**, may not meet the criteria of Article 76 (1) (d) since it is unlikely that access seekers remain competitive during such a long period without access to the very high capacity network elements/higher bandwidths.*

To the contrary, the presence of "other infrastructures" might even justify longer transition period. Indeed, in the presence of various other network operators, the take-up, the profitability and the pay-back period of a newly (co-)invested network will be even more challenging for the co-investing operators.

Moreover, BEREC's unbalanced emphasis on retail competition from "other infrastructures" does not take into account of the effect of the enhanced retail competition resulting by those that co-invest.

The very existence of a co-investor will in itself already result in additional retail/infrastructure competition, which is the exact aim of inciting to co-invest: the ultimate goal of Article 76 is the promotion of development of Very High Capacity Networks (VHCN) through co-investment and enhanced competition. This is explicitly confirmed in the recitals to Article 76 EECC

> *(198) (…) co-investment agreements offer significant benefits in terms of pooling of costs and risks, enabling smaller-scale undertakings to invest on economically rational terms and thus promoting* ***sustainable, long-term competition, including in areas where infrastructure-based competition*** *might not be efficient.*

In these circumstances, the importance BEREC gives for retail competition to come from "other infrastructures" is not correct.

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