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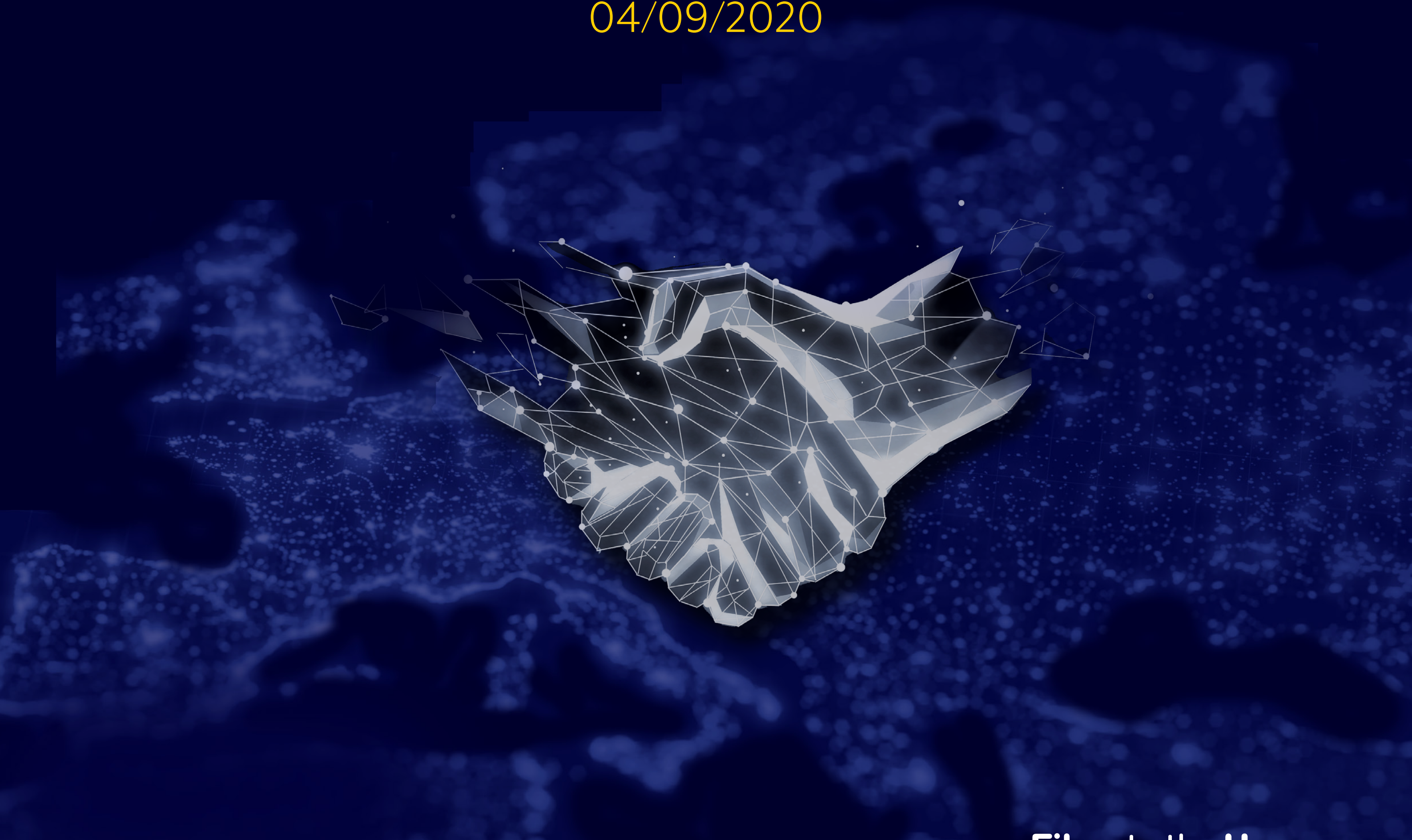
FTTH COUNCIL EUROPE

RESPONSE 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).

04/09/2020



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Fibre to the Home Council Europe

Introduction

The FTTH Council Europe welcomes the opportunity to comment on the 'BEREC 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)'.

The FTTH Council Europe is an industry organisation with a mission to accelerate ubiquitous full fibre-based connectivity empowering a leading Digital Society throughout Europe.

Fibre is a future-proof infrastructure which enables an unparalleled fixed and wireless experience as well as new innovative digital technologies and services, the prerequisites for Europe's global competitiveness and sustainability.

The FTTH Council Europe's vision is that fibre connectivity will transform and enhance the way we live, do business and interact, connecting everyone and everything, everywhere.

The FTTH Council Europe consists of more than 160 member companies. www.ftthcouncil.eu

The FTTH Council Europe has participated at every stage in the process, presenting its views and experiences both in the preparatory workshop which took place on 7th March, 2019 where the emphasis from the Council was on what constitutes a 'VHCN' under this provision and the challenge in giving commitments into the future with imperfect knowledge. The FTTH Council also participated in the second workshop that took place on 31st January 2020 where the emphasis was on the objectives (increasing encouraging investment in FTTH) and on the threats to competition in the market. The FTTH Council is pleased to see that these positions have been taken on board.

One of the principal objectives of the EECC is to stimulate investments in VHCN which is defined as FTTH/FTTB and its equivalent. It has been set as a primary objective for NRAs in Article 3 of the Code. Amongst the tools given to NRAs to promote VHCN are provisions around co-investment which can even grant regulatory relief to dominant (SMP) network operators in certain instances. The FTTH Council believes that it is important that such a tool be used with care. Where a market that exhibits market failure (such as economic dominance) and where regulatory controls have been necessary to protect consumers and competitors, NRAs should take care before relaxing those controls in order to promote investment in VHCN.

The first issue concerns what might be covered by such exemptions, the FTTH Council believes that Article 76(1) limits the scope of the Article to full fibre ('to the end-user premises') so regulatory exemptions are not available for network increments. The FTTH Council believes BEREC's position on this is clear and correct. It is important that upgrades to existing networks are not considered under the Article 76 provisions.

VHCN investments are long term by their nature - to implement the aim of the Code which seeks to give more transparency and certainty to investors requires setting out the rules in more detail and setting out those rules in advance. This can prove difficult in certain instances where it can be difficult to legislate for every possible co-investment form and the possibilities are very extensive and very complex. BEREC are correct to identify the most important possibilities in joint ventures, reciprocal access and one-way access models. Nevertheless, it may be that other forms will emerge.

While the objective is clearly to promote competitive and timely VHCN investments: the presence of an SMP operator that is vertically integrated means that NRAs should remain extremely vigilant against forms of co-investment that could restrict or slow investments in VHCN. In particular the FTTH Council would note that there is nothing in Article 76 and /or Annex 4 that in itself reduces the risks of non-discrimination.

The FTTH Council is glad to see that the Guidelines should contain specific guidance for NRAs on when and where the exemptions could apply. Investors need certainty ahead of investments – therefore the FTTH Council would argue that the guidance should seek to reference concrete examples, such as existing co-investment schemes that could be used to illustrate what would be possible in specific circumstances. The French co-investment model and experiences with its implementation could be one such reference.

In particular the FTTH Council notes that examples of market outcomes that should be foreseen and addressed by the Guidelines could include types of co-investment schemes. One such type could be one which attracts the largest retail operators and could therefore risk foreclosing other network entry if those retail operators had a large share of the market. Another co-investment schemes might not include such a large share of the market but might broaden the geographic scope of investment (e.g. into rural areas) and therefore could be less likely to foreclose others. Such examples could indicate where schemes might be more or less favoured.

Specific comments

3.1.1 Which VHCN fall in the scope of Article 76:

Agree that this provision only refers to fibre to the premises with limited tech exclusions. Other potential forms of VHCN are excluded.

3.1.2 What is a new VHCN for the purposes of Article 76

Agree that it should only refer to investments made or planned post Dec 2020 (or with the publication of these guidelines)

3.1.3 Timing for making an offer to co-invest

Offers made for co-investment should not apply retroactively and only once the code is transposed and the final guidelines are adopted can co-investors make a full assessment of the co-investment opportunity.

3.1.4 Type of Investments which may be covered by Article 76

It is not clear whether investments in projects that move from being FTTC or FTTB deployments to FTTH can qualify for assessment under Article 76 either in part or in whole (Paragraphs 26 and 27). The FTTH Council does not believe previous investments ought to qualify for concessions under Article 76.

3.1.5 Co-investment models which may be covered by Article 76

The non-exhaustive list of possible schemes from a joint-venture to a reciprocal access model to a one-way access model is generic and any of them can be implemented in a way that might potentially give rise to concern. The FTTH Council believes that a detailed case by case examination of every co-investment scheme will be necessary.

3.2.1 Open offer

The FTTH Council agrees with BEREC's view that the ability for co-investment participation must be available throughout the lifetime of the network .

3.2.2 Lifetime of the network

The difference between the commercial lifetime of the project (a subjective decision largely under the control of the initial co-investors) and the technical lifetime of the co-investment could have important consequences. There should be some qualification of this provision – what happens if the initial co-investors agree a 5-year commercial agreement for a network whose technical lifespan is 30 years?

3.3.1.1 "Fair, reasonable and non-discriminatory terms"

BEREC's interpretation of risk sharing in this section opens up a number of possibilities for discriminatory pricing behaviour that will require a lot of interpretation. Option-pricing and other forms of pricing that seek to incorporate risk as a means to send appropriate build/buy signals have a very poor history in regulatory economics and most models would require NRAs to have perfect market information. There should be no presumption that appropriate option prices can be set to correctly compensate for risk and any price discrimination ought to be fully justified on a case by case basis.

3.3.1.2 "Access to the full capacity of the network to the extent that it is subject to co-investment"

The FTTH Council Europe sees a concern that a partial co-investment (for instance upgrading a vDSL network to FTTP) which would only cover the final segment could not be guaranteed equivalent access from the exchange to the street cabinet. While the operator in question is SMP and a separate action could be expected to support such an outcome, it would be more logical and give more certainty for such an event to be covered under the terms of the co-investment procedure.

3.3.2 Guidelines on Article 76 Par 1 Point B) (II)

BEREC should ensure that the provisions of 3.3.1 on the availability of the open offer are not undermined in practice by the introduction of limitations on the terms (e.g. on pricing) that will apply depending on the moment of investment.

Allowing SMP operators to set minimum shares for participation and grading the level of fees determined by size (and implied risk) opens the co-investment procedure to misuse. There is nothing inherent in Article 76 or Annex IV which undermines the incentive for the economically dominant firms in the co-investment model to discriminate against rivals operating in the downstream market.

Conclusion

The objective of the treatment of co-investors is correct and laudable – encourage co-investment in VHCN as a means to promote these investments and widen the scope of investment (by lowering cost/risk).

However, at least one of the parties under the Article 76/Annex 4 regulatory reliefs is economically dominant. Competitive investments should not be restricted or undermined by co-investment schemes and therefore the guidelines could be detailed and concrete on when and where Article 76 would apply and where it would not. There are a number of existing schemes, which clearly cannot have Article 76 applied retrospectively, that could usefully provide concrete examples of what aspects BEREC would most weight on and what kinds of exemptions could be appropriate.

BEREC's guidelines can have an important function to limit investor uncertainties for co-investors and other investors alike (particularly where investors are not limited to one Member State).

The FTTH Council believes that Article 76 can be useful but notes that there are risks associated with its application, which could result in limits on SMP controls.

Without such very specific guidance and clarifications Article 76 risks to be either unused or misused.