Open Fiber's input 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)"

Open Fiber welcomes the opportunity to provide its input 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)" ("Draft") in order to highlight some concerns and share our views with respect to the findings of BEREC.

From a general point of view, the co-investment models are suitable for vertically-integrated operators, and do not represent a sustainable and attractive investment model for a wholesale-only operator, like Open Fiber.

In fact, a vertically-integrated operator that has significant market power (SMP) may take advantage of a co-investment agreement, because NRAs shall not impose any additional obligation pursuant to article 68 (access remedies imposed on undertakings with a SMP).

Not less importantly, while vertically-integrated operators are able to manage investment risks by counting on their own retail divisions, a wholesale-only operator guarantees, by definition, equal and fair access to its network by third parties without counting on any retail income.

This is even truer when a vertically-integrated operator has a SMP, which means that it can already count on a very large customer base, which reduces its investment risks significantly.

Besides the consideration that the co-investment model is not suitable for a wholesale-only operator, we would like to underline further issues arising from the Draft guidelines.

First of all, Open Fiber appreciates that BEREC has described in great detail the entry conditions that co-investment models should guarantee to all operators, while avoiding any kind of discrimination. Nevertheless, the Draft does not contain any mandatory requirements in case the co-investment agreement allows the acquisition of rights to be assigned by co-investors to other co-investors. On the contrary, Open Fiber believes that BEREC should define the way in which co-investors can acquire rights from other participants in order to guarantee an adequate and non-discriminatory level of competition in the market.

According to Open Fiber, BEREC should ensure that the provisions on paragraph 3.3.1 on the availability of the open offer are not undermined in practice by the introduction of limitations on the terms (i.e. pricing). In particular, it is important to ensure that SMP operators do not set minimum entry requirements as a condition to be part of the co-investment. In fact, as stated in the EECC, the co-investment offer should be open for the entire lifetime of the network to any provider of electronic communication networks or services. This means that all operators in the market must be able to participate without any discrimination, also in terms of size. On the contrary, if the co-investment agreement sets excessively high entry requirements (i.e. holding of a minimum number of shares of the joint venture, a high number of lines or GPON branches to be bought on a long term basis, a high coverage to be achieved, etc..), it means that it would only be open to big operators, excluding the small ones.

In addition, the SMP operator, who is part of the co-investment, will likely have the incentive to discriminate against rivals operating in the downstream market.

Furthermore, all co-investors should have similar commercialization chances and investment risks. For this reason, it is crucial that BEREC clarifies the way in which the investment risks will be calculated (i.e. by market tests or any other tools). We strongly believe that this issue must be clarified in the BEREC Guidelines.

Moreover, in paragraphs 3.1.2 and 3.1.4, BEREC has addressed the definition of "new" VHCN and physical infrastructures for the application of article 76. However, BEREC did not provide an explanation on how to treat, from a regulatory point of view, the existing infrastructure being re-used by the co-investors. Due to the fact that a VHCN is typically made up of both new and existing networks and infrastructures, BEREC should clarify how such existing elements should be appraised in the co-investment agreements and the conditions under which other co-investors can use such existing networks.

In our view, the definition of the rules to use existing networks is essential. In their absence, the SMP operator would have an advantage over the other co-investors, because it would own most of the existing network (as much as up to 80%), while other co-investors would need to build it or have to request access from the SMP operator.

In particular, in case of co-investment agreements related to FTTH roll-out, the SMP operator that has developed FTTC networks typically contributes to the investments by bringing its existing assets, such as fibre-optic cables and the relevant existing civil infrastructure, from the main distribution frame (MDF) to the street cabinet. The appraisal of these assets belonging to the SMP operator is crucial for the definition of rights and duties of the co-investment agreements among the co-investors. For these reasons, BEREC should define how the assessment of existing assets will be performed in order to consider the co-investment agreements as fair, reasonable and not discriminatory to the existing and potential new participants.

Finally, Open Fiber would like to express some concerns about the reciprocal access model.

In particular, the reciprocal access model could easily generate a market sharing in which the whole territory is divided between at least two large operators (typically, vertically integrated ones) that guarantee mutual access in their respective areas under stringent conditions (i.e. pricing), excluding the other operators on the market. Therefore, once the territory has been divided by the co-investors, any other operators cannot participate with equal and fair access conditions. In other words, the reciprocal access model could encourage collusive agreements between co-investors, suppressing competition in the downstream market.

For these reasons, BEREC should clarify the main conditions applicable to reciprocal access. For example, the access price shall not guarantee an excessive return on the investments. In fact, high prices are able to discourage the reciprocal access to the covered areas and thereby suppress competition on the downstream market. By setting high access prices, each of the co-investors would maintain the control of its own area (market sharing).

In other words, it is essential that the reciprocal access model does not allow co-investors to exclude each other in the areas to be covered.