Draft BEREC Guidelines to foster the consistent application of the criteria for assessing co-investments in new VHCN elements (Article 76 EECC)

TIM's response to BEREC public consultation

Introduction

TIM welcomes the possibility to provide its comments on the draft BEREC Guidelines on the criteria for assessing co-investments pursuant to Article 76 EECC.

The co-investment is recognized by the EECC as an important model to promote investments in the roll-out of very high capacity networks (VHCN), consistently with the general objectives laid down in Article 3 EECC.

TIM intends to apply this model as a mean to reduce deployment costs and accelerate the deployment of fixed fibre networks, promoting competition through the participation of several players. For this reason, TIM welcomes BEREC Guidelines which support the application of Article 76.

In the present contribution TIM focuses only on the elements which should be improved in the final version of the Guidelines in order to be fully in line with the spirit of the EECC and promote its objectives.

As a first remark, TIM considers of the utmost importance that the implementation of the co-investment model envisaged in Article 76 is not hampered by delays in the transposition of the EECC or by a complex application of the procedure set out in Article 79 EECC.

Any delay in the transposition should not prevent the NRA from applying the Article 79 procedure in the transitional period between 21st December 2020 and the effective date of transposition. This is paramount for the achievement of the objectives of Article 3 EECC and of the Gigabit Society EC Communication.

For the same reason, the Guidelines should avoid any unjustified extension of the 6-month prior publication period by the NRA and delays in the market test, which should be concluded within the 6-month period.

Finally, TIM deems that BEREC Guidelines should not introduce additional requirements not provided for in the EECC and be limited to the scope indicated at Article 76(4), which covers only the conditions set out in paragraph 1 and the criteria set out in Annex IV and not the entire Article 76.

The document includes TIM's comments on:

1. The prompt implementation of the co-investment provision and the definition of new VHCN
2. The type of investments that may be covered by Article 76

3. The openness during the lifetime of the network (Article 76 Par 1 Point A)
4. The rights for co-investors (Article 76 Par 1 Point B)
5. The publication of the co-investment offer (Article 76 Par 1 Point C)
6. The conditions for access seekers (Article 76 Par 1 Point D)

TIM

1. The prompt implementation of the co-investment provision and the definition of new VHCN

1.1. Transposition and timing for the formal review by NRAs

According to TIM, BEREC's interpretation on the timing for the formal review by NRAs of the co-investment offer, risks to delay VHCNs deployment, in contrast with the spirit of Article 76.

In particular, BEREC states at point 21 that "*The formal review by the NRA of the co-investment offer under the commitments procedure would in any event only be undertaken once the EECC has been transposed into national law as of December 2020*."

As known, Directive (EU) 2018/1972 should be transposed into national law by 21st December 2020, which is also the date of application of the relevant measures. TIM believes that any delay in the transposition should not prevent NRAs from applying the Article 79 procedure in the transitional period between 21st December 2020 and the effective date of transposition. This is paramount for the achievement of the objectives of Article 3 EECC and of the Gigabit Society EC Communication.

This is also supported by the fact that the criteria listed in Article 76 and Annex IV are precise and prescriptive 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 law.

The interpretation is in line with the Court of Justice case-law which recognises that a Directive has direct effect when its provisions are unconditional and sufficiently clear and precise and when the EU country has not transposed the Directive by the deadline[1]. This is especially true with regards of their "vertical effect", i.e., EU countries – including all EU administrative bodies (albeit independent) - are obliged to implement a Directive with those features.

On a more general point, TIM encourages BEREC to provide NRAs with guidance that pursues the utmost coherence with the overall objectives of Article 3 EECC. There can be no doubt that preventing any unnecessary delay in investment to provide connectivity to European citizens is paramount to support these objectives.

1.2. Definition of new VHCN co-investment

BEREC Guidelines also address, among other things, what VHCN investments should be considered "new" and could thereby benefit from the regulatory treatment foreseen by Article 76.

TIM believes the interpretation BEREC provides in the proposed Guidelines ends up being at odds with the spirit and the very objectives of Article 76. In particular, BEREC interprets VHCNs to be "new" if their rollout has not been "*publicly announced before the EECC entered into force in December 2018*" (point 19 of the Guidelines). This reference point to define "new" is never mentioned in Article 76 or elsewhere in the EECC. BEREC deducts it from a reading of Recital 198 that implies that taking an alternative point of reference would generate "windfall effects", i.e., would allow the SMP operator to accrue benefits without a corresponding change in incentives. According to BEREC, this depends on the fact that the "*current uncertainty*" referred to in Recital 198 as a rationale for providing the

[1] See Judgement of 4 December 1974, Van Duyn.

specific regulatory treatment foreseen by Article 76 is allegedly resolved after the public announcement of an investment. This is, however, a misguided conclusion.

Indeed, a straightforward reading of Article 76 immediately clarifies what the point of reference to establish the "newness" of a VHCN should be. Since the EECC provides that the SMP operators "*may offer commitments* ...[omissis]...*to open the deployment of a new very high capacity network",* there can be no doubt that the VHCN is new if it is deployed after the conclusion of a co-investment agreement fulfilling the conditions of Article 76.

It is important to stress that, if this straightforward interpretation were adopted, no "windfall effect" would be obtained by the SMP operator. This is because, contrary to what BEREC postulates, at the time any co-investment offer is formulated by the SMP operator, investment is still inherently subject to uncertainty concerning demand and economies of scale and scope. To assume otherwise would be at odds with the empirical evidence so far available on ultra-broadband investment. Article 76 (and Recital 198) are indeed meant to promote co-investment in order to *pool costs and risks,* precisely because these costs and risks raise hurdles to investment until an investment is actually *made* (not until it is *announced)*. It follows that no gain or loss deriving from application of the specific regulatory treatment of Article 76 to investments made after the SMP operator's publication of a co-investment offer can be qualified as a "windfall effect". Rather, all those gains or losses certainly do affect the SMP operator's incentives, and particularly incentives to make the co-investment offer.

More generally, by overlooking that investments need only to occur after a co-investment agreement is reached to be meaningfully considered "new" in the context of Article 76, BEREC appears to give too little weight to the generally favourable stance of the EECC towards co-investment. Indeed, even in an hypothetical (and unrealistic) scenario in which the investment risk borne by the SMP operator was very limited, the specific regulatory treatment foreseen by Article 76 would be justified by the benefits associated to the adoption of the co-investment model (such as, for instance, the fact that co-investment enables "*smaller-scale undertakings to invest on economically rational terms*", thus promoting long-term competition – see Recital 198). These benefits would not be produced if the SMP operator had no incentives to make the co-investment offer. The favourable regulatory treatment is there to provide these incentives.

1.3. Application of Article 76 to early co-investment

TIM welcomes BEREC recognises that also co-investments in VHCNs deployed before the EECC entered into force on 21st December 2018 can be included in the scope of Article 76 as long as they satisfy the conditions provided therein or are modified accordingly (see footnote 10 of the Guidelines).

By applying the regulatory treatment foreseen by Article 76 to previous co-investments, at least two important objectives can be pursued. First, the reach of the co-investment model can be extended and, with it, the associated benefits for smaller operators. Second, the complexities involved by having heterogeneous forms of regulation across the national territory can be minimized by ensuring that the same regulatory treatment is applied to infrastructures having similar features. Otherwise there might be an unreasonable and inefficient discrimination between undertakings and their investments, granting a worse regulatory treatment to investments which are bearing a higher risk (against the principle enshrined in the Code), including the investments drawing on the Commission's initial legislative proposal dating back to September 2016.

2. The type of investments that may be covered by Article 76

Even if out of the scope of the Guidelines, at section 3.1.4. BEREC seeks to provide clarification on the type of investments that may be considered covered by Article 76.

TIM welcomes the draft Guidelines recognise at point 26 that an investment in the terminating segment of the sub-loop of the network (in order to turn an existing network into an optical fiber-only network up to the end-users premises or the home) is included in the scope of Article 76. However, rather contradictorily, at point 23, BEREC proposes the view that "*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*.". The (unconvincing) rationale provided for this view is that, even if upgrade or renovation of existing infrastructure is undertaken "*for the specific purpose of deploying a VHCN*", it still pertains to "*infrastructures that already exist*".

The restriction to the scope of application of Article 76 identified in the Guidelines has unclear boundaries and it is not coherent with other prominent areas of regulation. In addition, it is also at odds with the legitimate objective of avoiding regulatory complexity that BEREC itself recalls at point 27.

The restriction is unclear because it is difficult to pinpoint what the "*mere construction of physical infrastructure on a stand-alone basis*" would be and because the very examples provided in the proposed Guidelines by way of clarification muddle the meaning of "*investments in existing physical infrastructure*".

TIM believes that a substantial revision of this section is needed. In clarifying this section, it is very important for BEREC to recognize that the EECC refers to the deployment of new VHC networks and not of new infrastructures. Indeed, a new network can comprise a mix of new elements and upgrades of existing infrastructures. The proposed Guidelines' implicit objective of preventing or, at least, avoiding to provide incentives for investment in "*infrastructures that already exist*" therefore does not find support in the EECC. To the contrary, if the costs and risks of co-investment can be minimized by investing in the upgrade of existing infrastructure, this solution is certainly coherent with the purpose of Article 76. More than that, it is clearly encouraged by Directive 2014/61/EU on measures to reduce the cost of deploying high speed electronic communication networks as well as by the provisions on ex ante symmetric access regulation.

BEREC has correctly identified the risk that the application of Article 76 may give rise to regulatory complexities that may undermine its very objectives. TIM certainly shares BEREC's concern and suggests that such complexities may be avoided, among other things, by refraining from introducing unjustified restrictions to the scope of application of Article 76.

3. The openness during the lifetime of the network

We welcome that BEREC recognises at points 48 (for joint-venture models and, similarly, at point 50 for reciprocal access models) the presence of limitations to the openness and the reasonability of including in the co-investment offer specific cut-off dates after which a late entry into the joint-venture/reciprocal access model itself does not need to be guaranteed.

Given that joining the joint-venture or increasing the respective stake a co-investor already owns at a later stage can potentially be complex, as highlighted by BEREC, later entries should be disincentivised. Therefore, the co-investment offer should include a cut-off date and not only "*might include*". In this sense points 48 and 50 should be revised as follows:

Point 48: "~~*it might be reasonable for*~~ *the co-investment offer* ***should*** ~~*to*~~ *include specific cut-off dates after which a late entry into the joint-venture itself does not need to be guaranteed*."

Point 50: "*the terms of the co-investment offer* ***should*** ~~***might***~~ *include specific cut-off dates after which a late entry into the reciprocal access model itself does not need to be guaranteed*."

At points 54-55 BEREC also tackles the issue regarding the identification of the lifetime of the network during which the co-investment offer should remain open. BEREC identifies the "*expected life of the commercial co-investment scheme during which the network is fully operative*" as the relevant period to be considered in the co-investment offer.

This would require in TIM's view a direct link with the SMP operator's commitment on the duration of the rights of use given to co-investors which will be endorsed by the NRA according to Article 79 procedure. Indeed, it is reasonable that the SMP operator is obliged to maintain open the offer in the period approved by the NRA and during which ex ante obligations are not imposed. In any case, it shall be given to the SMP operator the possibility to re-define, at the moment of the renovation of the commitments, the conditions for potential co-investors willing to join the co-investment later. The initial commitment period should be 7 years pursuant to the 2nd subparagraph of article 79(3), only in exceptional circumstances the NRA may set a longer timeframe. This would allow a sufficient legal certainty both for co-investors and access seekers. A longer timeframe would negatively affect the reliability of any business plan.

4. The rights for co-investors

First, TIM deems that the terms listed at points i-iv of Article 76 are exhaustive and the EECC does not give NRAs the flexibility to introduce other terms, therefore TIM believes that the statement at point 57 of the Guidelines ("*NRAs may define additional sub-conditions pursuant to point (b) in order to meet this objective*") should be deleted. An addition of sub-criteria by NRAs would undermine the harmonized application of the provisions and complicate the implementation of co-investment. Moreover, this would contrast with Article 79(2), where the EECC explicitly states that NRAs communicate "*under which conditions it may consider making the commitments binding. The undertaking may revise its initial offer to take account of the preliminary conclusions of the national regulatory authority*." So, there is no legal basis for a binding regulatory power to revise undertakings' commitments directly and unilaterally.

Second, in order to allow other co-investors to compete effectively and sustainably in the long term in downstream markets and in order to apply FRAND conditions to co-investors joining the co-investment at different stages, it is fundamental to rightly identify the corresponding different levels of risk and reflect them in the conditions for joining the co-investment.

BEREC recognises at point 62 that "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*.".

TIM believes that, in order to promote a consistent application by NRAs, BEREC could provide on this issue some principle-based guidelines on how different levels of risk could be reflected in the conditions for co-investors joining the co-investment later in the process.

Third, as regards the access to the full capacity of the network, it is important for BEREC Guidelines to clarify that the access is not limited only by technical constraints, but also by the shares of the different co-investors.

5. The publication of the co-investment offer

5.1. The prior publication period and the conclusion of the market test

In section 2.4 of the proposed Guidelines, BEREC puts forward its interpretation of the meaning of the statement that publication of the co-investment offer has to be done in a "*timely manner*". TIM agrees with the rationale for this provision identified by the Guidelines but would like to stress that the current version of the Guidelines appears to place too little weight on the concurrent need to ensure that the application of Article 76 does not unduly slow down investment.

In particular, it is important for BEREC to revise the guidance on the second and third scenarios it has identified at point 119, in which the market test does not take place before the publication of the co-investment offer. These are by far the most likely scenarios since the existence of a significant time lag between the offer of commitments and publication of the co-investment offer corresponding to the first scenario of point 119 points to a situation of delayed investment by the SMP operator, while the latter is normally interested in minimizing the time between the decision to co-invest and the actual deployment and activation of the network.

In the second and third scenarios, it is key to avoid that eventual delays in the conclusion of the market test induce corresponding delays in the deployment of VHCNs. To this effect, BEREC could usefully clarify that, whenever the market test procedure is not concluded within the 6-month period of prior publication, the deployment by the co-investors that have reached an agreement can start without undermining the applicability of Article 76. This solution does not jeopardize the transparency objective underlying the provision that publication should occur in a timely manner because it preserves the 6-month period of publication and because the very willingness of co-investors to implement the agreement demonstrate that the 6-month period was fully sufficient to reach an agreement. Moreover, 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.

Irrespective of the fact that the commitment procedure starts after, contextually or before the publication, it is in any case paramount that the Guidelines state a strict deadline of maximum 6 months to evaluate the co-investment project, in order to provide legal certainty.

5.2. The prolongation of the 6-month period

It is also worth noting that tying the possibility to extend the length of the prior publication period to factors such as the "*need for other co-investors to prepare for the start of marketing activity*" or the "*need to implement new interfaces*" mentioned by BEREC at point 120 risks opening up the application of Article 76 to strategic behaviours that may have

counterproductive effects, creating regulatory uncertainty for the SMP operator planning to co-invest. In particular, as far as concerns the need to implement new interfaces, it is worth noting that AGCom provides under Decision 348/19/CONS, Article 9(8) a prior publication period of 3 months for the introduction of new interfaces or new access profile.

BEREC also considers the possibility that the original co-investment offer is subject to significant changes, suggesting a default solution in which the 6-month period should restart from the date of publication of the amended co-investment offer, while conceding that this is a matter for case-by-case analysis. TIM agrees with the need for a case-by-case analysis but believes that the solution BEREC proposes as a default is unbalanced because, by creating an inflexible wedge of minimum one year between the decision to co-invest and the start of deployment, ultimately makes Article 76 inapplicable and thus jeopardizes its very objectives.

A more balanced solution may foresee an extension of maximum 1 month of the period during which initial co-investors may participate at more favourable conditions than co-investors participating at a later stage. This solution would not confer the SMP operator an undesirable first mover advantage to the extent that the activation of the new VHCN connections is not immediate and any additional co-investor would have the time to swift join the deployment.

Therefore, BEREC Guidelines should clearly state that NRAs should use their best effort to avoid setting a prior publication period longer than 6 months or a restart of the period. Any extension should be limited both in terms of timing (maximum 1 month) and scope (exceptional and grounded circumstances, objectively proven by the NRA for the specific case at hand).

6. The conditions for access seekers

The Guidelines foresee the imposition of stringent obligations on SMP operators going beyond what is set out in Article 76. In particular, BEREC states at point 133 that conditions include also prices. This would entail that:

- co-investors shall apply the same wholesale prices to access seekers as the ones applied before the deployment of the VHCN;
- the SMP operator is obliged to publish prices in the co-investment offer (see also point 135: “*The form (active, passive or both) and conditions of access to third parties should be part of the co-investment offer*”).

The EECC does not require the publication of prices in the co-investment offer, nor the application to the new VHCN deployed in co-investment of the same prices that were previously applied to the legacy networks.

This, besides not ensuring the correct incentives for co-investing, would contradict the very spirit of Article 76, which provides for the non-imposition of ex ante obligations, including the obligation to publish price in a reference offer and the price control obligation.

As long as the criteria for the formulation of access prices are clearly and transparently indicated, and non-discrimination across access seekers is respected, there is no need to publish the prices in the offer. Prices could be certainly agreed under commercial agreements, considering the need to keep the co-investment offer always more favourable than the general access conditions, as provided in the EECC.

Finally, BEREC draft Guidelines also impose at point 142 an obligation to notify 6 months in advance any adaptations, obligation which is not envisaged in the EECC and which should be therefore not included in the Guidelines.