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Body of European Regulators for Electronic Communications (BEREC)

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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)

VATM Opinion (without any trade or business secrets)

Dear Mr. Sjöblom,

Dear Sir or Madam,

during the public debriefing of the 43rd BEREC plenary meeting, BEREC announced and published a 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 Association of the Providers of Telecommunication- and Value-Added-Services (VATM) is grateful for the opportunity and hereby makes the following overall statement on the consultation for its members:

General Considerations

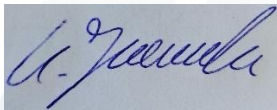
Article 76 (1) sets out the first central conditions that must be met by a co-investment offer from a market-dominant company, which - if all other conditions are met and the market situation does not demand otherwise - can lead to a modification of regulation. According to Art. 76 (1), the co-investment offer must explicitly refer to a VHC network (fibre optic network) which extends to the buildings of the end users or the base stations. It is also important to note that regulatory modifications can only be considered if they involve real cooperation on an equal bases. High standards must be set for the quality of co-investment offers that meet the requirements of Article 76. Other important conditions which must be cumulatively fulfilled are listed in Article 76(1), second subparagraph. For example, the co-investment offer must be open to all requests for the entire duration of the relevant VHC network, it must enable all co-investors to compete on the downstream markets with the SMP company. The offer must be based on fair, reasonable and non-discriminatory access conditions, flexibility in terms of the value and timing of the investment and the possibility to increase the investment at a later stage. Care must be taken to ensure that the offer contains appropriate conditions for all competing companies of different sizes and with different business models.

One of the most important requirements of the VATM in connection with cooperation models is that the NRA retains comprehensive supervisory options and can intervene if contracts are not adhered to or if a disadvantageous development of the competitive situation on the market makes this necessary. Specifically, Art. 76 (1) sentence 2 first stipulates that the NRAs have the task of reviewing the co-investment offers as to whether they are genuine co-operative agreements "on as equals" and whether they cumulatively fulfil all the conditions of Art. 76 (1) sentence 2 no. a) - e). If the national regulator comes to the conclusion that the concrete co-investment offer meets all requirements, Art. 76 (2) contains the further important condition that at least one potential co-investor actually concludes the contract. A central role is also played by the provision in Art. 76 (2), third subparagraph, according to which the NRA is empowered, despite a co-investment under Art. 76 (1), to impose, maintain or adjust certain regulatory measures as an exception in order to remedy significant competition problems which cannot be solved otherwise. This entails the obligation to continuously monitor the compliance with all legal and contractual provisions of Art. 76 para. 3.

We consider the formulation in the key points that VHC networks should be uniformly re-regulated regardless of the time of their establishment to be problematic or at least misleading. In our view, there has to be a clarification that this can only apply to companies with significant market power.

Please note the aspects mentioned above and take them into consideration. If there are any further questions, please do not hesitate to contact us. We will be happy to answer them.

Kind regards,



Kathrin Jaenecke
Head of Brussels Office