OPINION

Position Paper 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)

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I. Background

The digital transformation is one of the most important current social, political and economic challenges. Local public utilities, as pivotal infrastructure service providers, contribute substantially to the success of the digital transformation by providing services and infrastructure that are indispensable in the digital age, not only for the individual citizen but also for economic value creation. They already make significant contributions by encouraging the deployment of full-fibre networks, often beyond metropolitan areas. Especially in sparsely populated, rural regions with low customer density, the high civil engineering costs of such projects and the resulting long payback periods tend to considerably reduce their attractiveness for exclusively profit-oriented operators. Local public utilities, on the other hand, take responsibility for their respective region as modern public service providers – within a competitive framework, but striving for more than economic advantage. In VKU's membership alone, more than one in ten local public utilities is active in broadband roll-out, even more are planning to enter the market.

VKU welcomes that already in its Communication *Connectivity for a Competitive Digital Single Market - Towards a European Gigabit Society*, the European Commission aimed at equipping all private households in Europe with connectivity of at least 100 Mbit/second by 2025 and providing the most important points of economic and social life with gigabit speeds. The European Electronic Communications Code (EECC) rightfully aims at 'promot[ing] connectivity and access to, and take-up of, very high capacity networks'. VKU agrees that this has to be at the core of the EU's ambition towards a gigabit society. To reach this goal, it is indispensable to provide clear provisions regarding the application of regulatory relief schemes, which have rightfully been limited to cases where a substantial co-investment agreement has indeed been reached. To prevent abusive use of the proposed co-investment schemes, a framework with precisely defined criteria for a consistent application is highly important. Unfortunately, the draft guidelines by the Body of European Regulators for Electronic Communications (BEREC) to establish the consistent application of the criteria for assessing co-investments in new very high capacity network still leave room for a precise guidance. This gives leeway to national regulatory authorities (NRAs), which could jeopardise a consistent application of the Code's provisions on co-investments. The remaining unanswered questions regarding the assessment criteria could result in legal uncertainty if not addressed when finalising the guidelines. Therefore, we would like to take the opportunity to comment on specific provisions of the draft guidelines in the following to foster the consistent application of the criteria for assessing co-investments in new very high capacity network elements.

To 3.1.1. Which VHCN fall in the scope of Article 76

VKU welcomes and supports the strict definition of very high capacity networks in the context of co-investment models. Regulatory exemptions should only be granted for co-investments in full-fibre networks. We welcome the restrictive formulation of recital 16 of the draft guidelines, which is necessary in order to prevent the usage of co-investment models for the roll-out of less-future proof technologies. However, we would like to again draw attention to the need to ensure that only FTTB and FTTH qualify for the specific regulatory treatment foreseen in Article 76 of the Code.

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

Regarding the definition of what a new VHCN is for the purposes of Article 76, from VKU's point of view, the draft guidelines leave some important questions unanswered, for example whether upgrades from FTTB to FTTH fall under investments in existing physical infrastructure not covered. In addition, new networks also have to be connected to the "old" networks, which requires a clear technical definition.

To 3.1.4 Type of investments which may be covered by Article 76

Concerning the type of investments which may be covered by Article 76, the negotiations on the Code resulted in a rather complex design of provisions on co-investments and the types covered. This makes it even more important for BEREC to develop clear criteria for the different types of investments covered in light of the on-going national transposition. In this context, it is insufficient to list examples of qualified models while not defining criteria for types which are not qualified. When adding such criteria, the priority of ensuring fair, reasonable and non-discriminatory terms for co-investments has to be the guiding principle. In addition, the applicability of the draft guidelines to urban areas where FTTC and FTTB are almost area-wide available has to be kept in mind.

To 3.2.1 Open Offer

The requirement to keep a co-investment offer open over its whole lifetime may repel co-investors to enter into agreement in the first place. Therefore, there is a necessity for guiding criteria. As outlined in recital 47-50 of the draft guidelines, certain models of co-investments do not allow for alterations after the initial deployment of a joint venture or the networks in a reciprocal access model. The prospect of having to re-allocate shares among shareholders is unattractive for all participants of the co-investment. It seems much more tenable to grant subsequent co-investors indefeasible rights of use (IRU) via whole buy purchase agreements. As outlined in recital 48 and 50, it should be possible for the investors to set an early cut-off date and take out the lifetime-long openness requirement, if other co-Investors receive access on the basis of purchase agreements.

To 3.3.3. Guidelines on Article 76 Par 1 Point B) (III)

In extension of 3.2.1. retaining flexibility in a co-investments agreement in terms of participation is viewed critically among VKU members. Reallocation of shares and the associated dilution of shares is a contentious issue among shareholders.

To 3.5. Guidelines on Article 76 Par 1 Point D)

With regard to the adaption mechanism of third party access seekers that are not co-investors, access should be granted to seekers only to the new infrastructure from the onset of its operation in order to incentivise co-investments schemes and, therefore, a high degree of co-investments into fibre optic networks in the first place. If the monopolist's old (copper) network is kept operating, the co-investment network is very likely to experience an inefficient rate of utilization. As a consequence, the amortization of the new investment will take longer to the detriment of the other co-investors. However, the incentives of both the monopolist and the co-investors should be to utilize the new network efficiently – since the margins of access fees will be larger for the new infrastructure.

In addition, the duration of adapting access seekers to the new infrastructure, even in the context of incentives to do so from the start, can take more than five years, especially in urban areas.