Vodafone response 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)

We appreciate the opportunity to comment on this consultation and trust that our comments are helpful to BEREC and National Regulatory Authorities (NRAs) as well as to other stakeholders. We remain at your disposal to discuss our submission to the consultation, or any other aspect relevant in the context of the latter.

To inquire about our response please contact:

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We are supportive of BEREC's work in the development of Guidelines to foster the consistent application of the criteria for assessing co-investments in new very high capacity network elements Article 76 EECC.

Preserving incentives to co-invest

Digital connectivity and networks are critical infrastructure providing essential services for the functioning of European economies and societies. The COVID19 crisis has brought the importance of investments in modernising digital networks into sharp focus. The ability to invest, enhance capacity and expand the reach of connectivity services ought to be the key objectives of ensuring greater societal resilience and economic recovery from the turmoil of the current pandemic.

The EECC is a key instrument through which the EU is set to incentivise appropriate investments in order to achieve these policy goals. It is therefore of paramount importance that all relevant aspects of the framework act in harmony towards achieving its purpose.

It should be noted that in general co-investment leads to wider coverage, higher quality, lower costs and prices and more intense competition according to the academic findings[1]. Therefore, all stakeholders should in general hold a supportive view of co-investment. We believe that co-investment in new Very High Capacity Networks (VHCN) can act as a transformative force in the electronic communications markets and getting the conditions right to set up new co-investments is the key to unlock future investments.

We believe that co-investment initiatives should be assessed on case-by-case basis and

[1] Implementing Co-investment and Network Sharing. CERRE. M. Bourreau, S. Hoernig and W. Maxwell. May 2020. (CERRE 2020)

prescribing the models in too granular detail in advance would be counterproductive to the objective of incentivising new investments in new VHCN. Against this background, the examples provided in paragraph 32 of the guidelines should be regarded as mere examples as rightly mentioned in paragraph 33 and not as an exhaustive list. Network operators should keep flexibility to develop new forms of cooperation that may fall under the regulatory regime of article 76 of the EECC.

Sufficient protection of co-investors in one-way access model

We believe that one-way access model is the most likely co-investment scheme where an alternative, non-SMP investor would not enjoy sufficient level of protection. We are supportive of the Guidelines finding that "mere rental of capacity does not constitute a co-investment". We have severe concerns on the Guidelines stating in paragraph 36 that a simple risk sharing model with only "minimum buying commitments and volume discounts" could qualify as a co-investment. At the minimum, these two qualities should be complemented with a requirement on the duration of the scheme so that any alternative co-investor would enjoy investment protection for the economic lifetime of the network. A co-investment model under the Article 76 EECC must include clear rights of participation for co-investors about geographical sequence of investments of the planned build out as well as on the temporal sequence of the investments. Moreover, product features should be developed and defined jointly with co-investors.

Thus we believe it would also be useful that BEREC would define, at least as an example, the precise meaning of Indefeasible Right of Use ('IRU'). In our view, IRU for instance would make unilateral termination or altering of the contract impossible.

Interplay of co-investment and access to civil engineering assets

In paragraph 24, the Guidelines are not entirely clear if access to civil engineering assets constructed for the purpose of deploying new VHCN would quality for the specific regulatory treatment foreseen in the Article 76. It should be noted that the EECC foresees the most upstream access product, namely access to civil engineering assets, as a priority remedy which should be assessed before any other remedies are imposed.

The Guidelines should specify that in general access to civil engineering should remain even if the physical infrastructure is the result of a new investment. This would ensure that the market remains open to newcomers who might be willing to invest into their own VHCN, e.g. in the case the capacity of the co-investment has been used fully. In addition, this would serve as a basic remedy for to prevent future or potential market foreclosure.

Governance and control – Breaking the sustained market power

As mentioned earlier in our contribution, co-investment in VHCN can be transformative of the fixed access markets resulting in sustainable competition in long-term. One aspect that should be explored further in the Guidelines is that co-investment should result in breaking the SMP. Key aspects of this is that there are sufficient number of co-investors participating in the co-investment from the outset resulting in diminished control by the SMP operator.

Diminished control of the market by the SMP operator should, in principle, lead to a situation of competitive wholesale markets downstream and finding of no Significant Market Power in the downstream markets. This hinges on sufficient number of access seekers of becoming co-investors and moving upstream and becoming wholesale providers.

In our view, any co-investment where the SMP operator continues to maintain its control over the co-investment, e.g. through majority ownership and governance rights, should not qualify as a co-investment under article 76. E.g. a model where SMP operator co-invests with a smaller co-investment party resulting in asymmetric co-investment should not qualify the co-investment for deregulation.