

Draft
BEREC Guidelines
to foster the consistent application of
the **conditions and** criteria for assessing

~~12 June~~ 4 September 2020

**co-investments in new very high capacity
network elements
(Article 76(1) EECC and Annex IV)**

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1. INTRODUCTION

- (1) —BEREC is required under Article 76(4) of Directive (EU) 2018/1972¹ ~~(referred to as establishing~~ the European Electronic Communications Code ~~—² (hereafter “EECC”) to publish guidelines (hereafter “Guidelines”) to foster the consistent application by National Regulatory Authorities (NRAs) of the conditions to be met when assessing co-investment offers ~~(paragraph 1 of, as these are set out in~~ Article 76(1) and Annex IV)³.~~
- (2) —Article 76 of the EECC addresses the regulatory treatment of new very high capacity network (VHCN) elements. According to this Article, undertakings designated as having significant market power (hereafter “SMP”) in one or several relevant markets in accordance with Article 67 of the EECC may offer commitments to open to co-investment the deployment of new VHCN that consist of optical fibre elements up to the end-user premises or base station. Co-investment may take the form of co-ownership or long-term risk sharing through co-financing or through purchase agreements giving rise to specific rights of a structural character by other providers of electronic communications networks and/or services.
- ~~(2)~~(3) If the NRA concludes that the co-investment commitment offered complies with the conditions set out in ~~paragraph 1 of Article 76~~ the provision and its associated Annex IV, then it shall make the proposed commitments binding and not impose any additional obligations pursuant to Article 68 as regards the elements of the new VHCN that are subject to the commitments.
- ~~(3)~~(4) —The rationale for issuing the Guidelines is to contribute to the consistent application by NRAs of the conditions and criteria with which co-investment offers must comply when commitments associated with those offers are being assessed by the NRAs in the context of Article 76 of the EECC. Therefore, the envisaged Guidelines are to facilitate the consistent application of the minimum criteria for assessing the relevant co-investment project, as set out in Article 76, paragraph 1 and Annex IV of the EECC.
- (4)(5) —In developing the Guidelines, BEREC has considered the requirements of Article 76, as well as Annex IV and the relevant recitals in the EECC that pertain to co-investment, namely recitals 181, 198, 199, 200 and 201.
- (5)(6) —Recitals 198-201 explain the relevance and benefits of co-investment agreements to facilitate the roll-out of VHCN and the regulatory treatment the EECC foresees in this regard. The criteria set out in Annex IV are also an integral part of the conditions (a) through (de)

¹ ~~DIRECTIVE (EU) 2018/1972 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 December 2018 establishing the European Electronic Communications Code (EECC) (Recast)~~

~~<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1972&from=EN>~~

² ~~DIRECTIVE (EU) 2018/1972 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 December 2018 establishing the European Electronic Communications Code (EECC) (Recast)~~

~~<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1972&from=EN>~~

³ According to Article 76(4): “BEREC, after consulting stakeholders and in close cooperation with the Commission, shall publish guidelines to foster the consistent application by national regulatory authorities of the conditions set out in paragraph 1, and the criteria set out in Annex IV”

of Article 76. Both have been therefore taken into account in the assessment of such these conditions in order to produce the Guidelines.

~~(6)~~(7) — The present guidelines are organised following the ~~epigraphs in the regulation (subparagraphs of Article 76, paragraph (1))~~, showing in grey boxes the relevant text in the EECC and providing ~~clarifications~~guidance below each box. Literal ~~text~~citation from the EECC is always in *italics*.

~~2. GENERAL ISSUES AND TERMINOLOGY INPUT FROM STAKEHOLDERS~~

~~(7) — BERC would like to thank stakeholders' associations for the valuable input obtained in the workshops that took place in the process of preparation of the present guidelines.~~

~~(8) — The first preparatory workshop took place on 7th March, 2019⁴ with the objective of collecting views on the main topics that stakeholders considered that should be addressed in the present guidelines. Once the discussion in BERC was more advanced, a second workshop took also place on 31st January 2020⁵ with the aim of gathering their views on how NRAs should interpret the provisions contained in the EECC when assessing co-investment agreements.~~

~~(9) — The present draft guidelines are opened for public consultation from 16th June 2020 to 4th September 2020. All stakeholders are invited to submit their inputs on the draft Guidelines to Art76EECC_Guidelines@berc.europa.eu. Contributions should preferably be submitted in English and include reference to relevant paragraphs or sections of the Guidelines in order to facilitate their processing.~~

~~(10) — In accordance with the BERC policy on public consultations, BERC will publish a summary of all contributions received. All contributions will be published on the BERC website, taking into account requests for confidentiality. Any such requests should clearly indicate which information is considered as confidential. It is also possible to send both a confidential and a public version. Once the public consultation is finished, BERC will update the present draft guidelines based on feedback received and the definitive version will be approved in the 4th BERC Plenary meeting and will enter into force right after, in December 2020.~~

3.2. GUIDELINES ON ARTICLE 76

3.1.2.1. Guidelines on the first subparagraph of Article 76-Par (1-)

Article 76, Paragraph (1), subparagraph 1

⁴The associations attending to this workshop were Cable Europe, ECTA, ETNO, FTTH Council Europe, and the GSMA.

⁵The associations attending to this workshop were ECTA, ELFA, ETNO, Cable Europe, the FTTH Council Europe and Digital Europe.

“Undertakings which have been designated as having significant market power in one or several relevant markets in accordance with Article 67 may offer commitments, in accordance with the procedure set out in Article 79 and subject to the second subparagraph of this paragraph, to open the deployment of a new very high capacity network that consists of optical fibre elements up to the end-user premises or base station to co-investment, for example by offering co-ownership or long-term risk sharing through co-financing or through purchase agreements giving rise to specific rights of a structural character by other providers of electronic communications networks or services.”

(11)(8) According to the first ~~paragraph~~subparagraph of Article 76, ~~(1)~~ operators that have been designated as having SMP (hereafter ‘SMP operators’) may offer commitments to open the deployment of a “new very high capacity network that consists of optical fibre elements up to the end-user premises or base station” to co-investment.

(12)(9) Article 76 deals with the co-investment offers of undertakings that have been designated – at the time the offer is made – as having SMP: in any relevant market. Operators not holding SMP status are thus not covered by this provision⁶.

(10) SMP operators obtain regulatory forbearance when the competent NRA decides to make the offered commitments binding in accordance with the requirements of Article 76(2) EECC. Withdrawal of the SMP designation does not allow these operators to unilaterally abolish or change the commitments made. NRAs will have to ensure that the commitments continue to be applied for the entire period during which they have been made binding, which, according to the second subparagraph of Article 79(3) EECC, shall amount to no less than seven years.

(11) Where an SMP designation is withdrawn in the course of ongoing negotiations over an offer for which the SMP operator concerned has already offered, or indicated its intent to offer,⁷ commitments, it shall conclude those negotiations in good faith.

(13)(12) The elements contained in this definition are discussed below. In particular, the following issues are addressed:

1. Which VHCN fall in the scope of Article 76;
2. What is a new VHCN for the purposes of Article 76;
~~a. Timing for making an offer to co-invest;~~
3. Type of investments which may be covered by Article 76; and,
4. Co-investment models which may be covered by Article 76.

(13) Where an NRA determines ex post that a qualifying co-investment for which commitments have been made binding requires the imposition of remedies to address significant competition problems, these should be imposed subject to a finding of significant market power.

⁶On the other hand, it will always be up to the SMP operator to decide whether to engage in the procedure contemplated under Article 76 of the EECC by voluntarily offering commitments under Article 79 to be deregulated regarding the new network deployment, or wait for the conclusion of the traditional SMP assessment process that NRAs carry out periodically (and that may lead to deregulation of the relevant market if SMP is no longer found).

⁷ See paragraph (22) below.

3.1.1.2.1.1. Which VHCN fall in the scope of Article 76

- (14) The technical elements ~~that are referred to in the first subparagraph of~~ Article 76(1) limit the scope of the ~~application of this provision/article~~ to a specific category of VHCN compared to the definition of ~~very high capacity networks as~~ contained in Article 2(2) of the EECC⁸. In particular, Article 76 makes an explicit technological choice, and specifies that only a VHCN that consists of optical fibre elements up to the end-user premises or base station⁹ will qualify for the specific regulatory treatment foreseen in the Article. Thus only particular types of VHCN are subject to Article 76 EECC and to the present Guidelines.
- (15) Electronic communications networks which do not consist of optical fibre elements up to the end-user premises or base station, will not be eligible for the regulatory treatment accorded under the remit of Article 76 of the EECC, even if they may qualify as a VHCN according to Article ~~82(2) (in conjunction with Article 82)~~ of the EECC¹⁰.
- (16) As indicated in ~~Recital/recital~~ (199) of the EECC, in exceptional circumstances the specific regulatory treatment afforded to co-investments may also apply to optical fibre elements that are deployed up to the immediate proximity (meaning just outside) of the end-user's premises, when the SMP operator demonstrates that it is technically impracticable to deploy optical fibre elements up to the premises. It is worth noting that the exception foreseen in ~~Recital/recital~~ (199) refers to technical issues that make the deployment up to the end-user premises or base station impracticable, and thus ~~in principle~~ does not apply in cases where ~~such choice a decision not to deploy up to the premises~~ has been made ~~primarily~~ due ~~exclusively~~ to economic considerations. In applying this exception, NRAs should aim for consistency of their administrative practice, especially with regard to relevant BEREC guidance on the notion of practical impracticability in other contexts.¹¹

3.1.2.2.1.2. What is a new VHCN for the purposes of Article 76

- (17) Regarding what should be deemed a "new" VHCN, Recital/Deployments that SMP operators may open to co-investment under the first subparagraph of Article 76(1) EECC by offering

⁸ According to Article 2(2) of the EECC, a very high capacity network "means either an electronic communications network which consists wholly of optical fibre elements at least up to the distribution point at the serving location, or an electronic communications network which is capable of delivering, under usual peak-time conditions, similar network performance in terms of available downlink and uplink bandwidth, resilience, error-related parameters, and latency and its variation; network performance can be considered similar regardless of whether the end-user experience varies due to the inherently different characteristics of the medium by which the network ultimately connects with the network termination point".

⁹ In accordance with the draft BEREC Guidelines on Very High Capacity Networks (section 5.2), an access point in the case of WLAN (WiFi) networks can also be considered a base station.

¹⁰ ~~It is worth recalling that Guidance provided by the BEREC shall issue Guidelines on the criteria that a network is to fulfil in order to be considered a Very High Capacity Networks on the qualification of other networks as VHCN according to Article 82 of the EECC. As noted, is thus not every VHCN which meets these criteria will be relevant for the purposes of Article 76 of the EECC and its stricter definition the present guidelines.~~

¹¹ Notably the BEREC Guidelines on the Criteria for a Consistent Application of Article 61(3) EECC.

commitments do not exist at the time of an offer being made. In this sense, the notion of newness here differs materially from that in other provisions of the Code.¹²

~~(17)~~(18) As recital (198) of the EECC refers to the underlines, co-investment agreements can present various benefits that co-investments may bring, in an economic environment that currently is characterized characterised by “current uncertainty” regarding as to the rate of materialisation of demand for very high capacity broadband services, as well as general by allowing costs and risks to be pooled and economies of scale and density to be realised.

~~(19)~~ The purpose of Article 76 is thus to overcome such existing uncertainty, by affording a specific regulatory treatment to new VHCN that meet certain requirements, and that are deployed on the basis of co-investment agreements¹³. As noted in Recital (198), it is assumed that co-investments offer significant benefits in terms of pooling of costs and risks, enabling smaller-scale undertakings to invest on economically reasonable terms and thus promoting sustainable, long-term competition. SMP operators seeking to deploy new networks can enter into such agreements without recourse to Article 76 EECC. Already today, examples of deployments based on such agreements exist.

~~(18)~~ Therefore, the special
~~(19)~~(20) The specific regulatory treatment foreseen in by Article 76 should(2) has to be exclusively granted limited to VHCN deployments that are “new”, in the sense of paragraph (17). When Article 76 seeks to induce investments in new VHCN elements, it does not seek to the roll-out of VHCN create windfall effects¹⁴ for investments that were publicly announced before predate the EECC entered into force in December 2018 (as detailed further below in para. (22)). In those cases, the SMP operator already decided to undertake the investment, without considering the additional regulatory incentives that the EECC provides for¹⁵.

~~(20)~~ The goal BEREC understands that the possibility of special regulatory treatment under Article 76 is thus may have prompted SMP operators to induce investments in new VHCN elements, not to create windfall effects¹⁶ for investments that were publicly announced before the EECC entered into force.

3.1.3. Timing for making an offer to co-invest

(21) BEREC understands that Article 76 covers announce co-investment offers in a new VHCN that might have been publicly announced after the EECC provisions entered into force (December 2018), but before the measures contained in the EECC are these provisions

¹² Notably point (b) of the third subparagraph of Article 61(3) EECC.

¹³ It should be noted that the concept of “new” under Article 76 of the EECC does not have the same meaning as the concept of “new” under Article 61(3) of the EECC (referring to existing infrastructure).

¹⁴ Windfall effects refer to effects (in this case, profits or gains) that are sudden and/or unexpected, and as such were not anticipated when making the investment.

¹⁵ The situation may however be different in case substantial changes are made after December 2018 to an investment project that was publicly announced before that date. In such a scenario, the NRA may assess to what extent the changes are significant enough for the project to qualify as an investment in a new VHCN according to Article 76 and do not create windfall effects according to guideline (20).

¹⁶ With windfall effects, we refer to effects (in this case, profits or gains) that are sudden and/or unexpected, and as such were not anticipated when making the investment.

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~~become applicable and have to be~~ transposed into national law (21st December 2020). For the sake of clarity, what is being discussed is whether the offer to co-invest in a new VHCN made by the SMP operator at that point in time might qualify for the specific regulatory treatment foreseen for new VHCN under Articles 76 and 79 of the EECC. The formal review by the NRA of the co-investment offer ~~Even if made in good faith and in widest possible compliance with the applicable conditions and criteria, such offers will be unable to benefit from special regulatory treatment under the commitments procedure would in any event only be undertaken once the EECC has been transposed into national law as of December 2020~~ Code in retrospect.

(22) ~~In this regard, if the~~ Where an SMP operator decides to publish a co-investment offer in the period between December 2018 and December 2020, and is planning to subject the new VHCN open to co-investment to the procedure of Article 79, it will have to publicly provide a clear indication of ~~had clearly indicated~~ its intention in the publication of the initial offer¹⁷. ~~In order to offer commitments and adhere by the procedure of Article 79 EECC, NRAs might, at their discretion, consider to offer privileged access to the market test process if the operator notifies the offer and their commitments within two months of adoption following publication of the present Guidelines and republicizes the offer according to the requirements of the Code¹⁸ alongside a copy of the initial publication. If no deployment has yet occurred under that offer, the NRA should then proceed to assessment under Article 79. If the deployment has partially been completed, the NRA may consider the offer as to prevent the asymmetry of information between the remainder of the deployment. If the deployment has been fully completed or if the SMP operator and potential participants to the co-investment, any co-investment offer that has been made without an express indication of the SMP operator's~~ has not expressed its intention to submit it to the specific regulatory treatment of Article 76 will not qualify for ~~to~~ the commitments procedure foreseen in the EECC. ~~The same principles would apply mutatis mutandis upon initial publication, the NRA shall abstain from assessment.~~

~~(22)~~(23) Assessments pursuant to paragraph (22) shall be carried out as soon as the Code has become applicable and fully transposed and ensure that all relevant conditions and criteria have been complied with. In their assessment, NRAs shall have particular regard to co-investment offers for the opening of a VHCN that are made after the 21st December 2020, in Member States where by that date the EECC has still not been effectively transposed into national legislation¹⁹. ~~the continued openness of the offer to participation by other electronic communications providers.~~²⁰

¹⁷ See also in this regard the section in ~~the~~these Guidelines dealing with Article 76.1.c) ~~(the condition of timely publication in advance)~~, at paragraphs (49) to (73).

¹⁸ Ibid.

¹⁹ Regardless of the fact that the commitments procedure would only formally be triggered once the EECC is finally transposed into national law.

²⁰ See section XXX, paragraphs (78) to (94) below.

3.1.4.2.1.3. Type of Investments investments which may be covered by Article 76

~~(23)~~(24) In BEREC's view, investments in existing physical infrastructure²¹, as well as the mere construction of physical infrastructure on a stand-alone basis, should not be covered by Article 76. This conclusion applies in particular to the upgrade or renovation of existing physical infrastructure (even when such upgrade or renovation is undertaken for the specific purposes of deploying a VHCN). This is because such upgrade or renovation would still pertain to infrastructure that already exists, and that was built before the entry into force of the EECC provisions.

~~(24)~~(25) The conclusion is however likely to be different in the case of completely new physical infrastructure that is built for the specific purposes of deploying a new VHCN. In those instances, the building of the infrastructure for the purposes of hosting VHCN elements will normally be a critical component of the co-investment ~~scheme designed~~offer made by the SMP operator. NRAs ~~should thus need to~~ be able to assess whether the newly-built physical infrastructure is an integral part of the co-investment scheme, and therefore falls under the remit of Article 76. SMP operators should provide all relevant information to that end and commit not to include infrastructure under paragraph (24) in any co-investment offer.

~~(25)~~—Regarding the optical fibre elements, ~~the question arises as to the level of investment at which this condition should be assessed. In this regard,~~ an investment consisting of the deployment of an optical fibre from the ODF to the end-user premises (that is, an FTTH or FTTB deployment) is clearly an investment in “the deployment of a new very high capacity network” for the purposes of Article 76.

~~(26)~~ ~~By the same token, an investment pertaining~~Similarly, a deployment of optical elements exclusively to ~~in~~ the terminating segment or the sub-loop of the network ~~(in order to turn an existing network into an optical fibre-only network up to the end-user premises or the home) is can~~ also likely be opened to qualify co-investment under Article ~~76~~ of the EECC, ~~as it would be deemed~~ (as a deployment that contributes to the transition towards a VHCN-).

~~(27)~~—When applying the provision of Article 76, NRAs have to take account of the scope of the project to avoid regulatory complexity. For instance, if the network is deployed from the ODF, all the downstream lines may have to be submitted to the same regulatory regime.

~~(27)~~ When determining whether individual co-investment offers concerning new network elements according to the above standards should be assessed with regard to the conditions and criteria of Article 76 and Annex IV, and qualify for special regulatory treatment on that basis, NRAs should first assure themselves that the deployment of these elements will make a significant contribution to the deployment of very high capacity networks, in accordance with point (d) of Annex IV.

~~(28)~~ Especially in cases where the number and scope of elements in a deployment is per se limited, such as when only the subloop is being converted into a full fibre architecture, NRAs

²¹ As set in Directive 2014/61/EU on measures to reduce the cost of deploying high-speed electronic communications networks, physical infrastructure means “any element of a network which is intended to host other elements of a network without becoming itself an active element of the network, such as pipes, masts, ducts, inspection chambers, manholes, cabinets, buildings or entries to buildings, antenna installations, towers and poles”.

will have to satisfy themselves that the significance of the deployment in competitive terms is relatively more pronounced and supported through adequate safeguards before proceeding to initiate a market test. SMP operators should furnish all relevant information to support this assessment, including details on the design of the proposed safeguard mechanisms.

3.1.5.2.1.4. Co-investment models which may be covered by Article 76

~~(28)~~(29) The Article 76 EECC further characterizes the establishes a framework by which to assess co-investment agreements commitments and offers that may be subject to the provisions contained in Article 76 fall within its scope. According to the EECC, SMP operators may offer commitments to open the deployment of VHCN to co-investment as the basis for co-investment agreements. The first subparagraph of Article 76(1) names co-ownership and long-term risk sharing as possible examples thereof. The latter might take the form of co-financing or purchase agreements giving rise to specific rights of a structural character by other providers of electronic communications networks or services.

(30) The EECC thus does not identify any particular business model or legal form for co-investment model, but makes a more generic reference opens the door to —among other possible scenarios— a cooperative structure based a potentially unlimited range of ways in which SMP operators can render new deployments accessible to co-investment by third parties. It follows from the systematic placement of the provision in the context of the rules on either access remedies, its purpose as well as from the wording of Article 76(1) that these third parties are limited to providers of electronic communications networks and services.

~~(29)~~(31) As the examples of co-ownership or long-term risk sharing— as possible offer forms illustrate, the ways chosen to achieve this have to ensure co-investors material rights to co-determination with regard to the co-invested network elements.

~~(30)~~(32) As to the latter, the The EECC refers to the structural nature of such rights in the context of purchase agreements by stating in Recital recital (198) that “[...] purchase agreements which constitute co-investments entail the acquisition of specific rights to capacity of a structural character, involving a degree of co-determination and enabling co-investors to compete effectively and sustainably in the long term in downstream markets in which the undertaking designated as having significant market power is active. By contrast, commercial access agreements that are limited to the rental of capacity do not give rise to such rights and therefore should not be considered to be co-investments.”

(33) Despite not providing for a comprehensive delineation of the structural nature of the rights concerned, BEREC understands the recital to clarify that the level of co-determination must not be such as to be effectively insignificant. Agreements limited to mere capacity rental, not leaving to the contracting party any say about the network’s operation and the products provided, therefore manifestly cannot qualify as co-investment agreements covered by Article 76(1) EECC, and NRAs should not proceed to assess them in further detail.

~~(31)~~(34) While acknowledging that the EECC only explicitly refers to structural rights only in the context of purchase agreements, BEREC considers that the this structural nature would constitute constitutes an important underlying consideration when assessing any co-investment agreement under Article 76.

~~(32)~~(35) The requirement for the rights granted under an agreement to be of a structural nature of the agreement is compatible with various business models for co-investment. In view of this, BEREC considers that at least the following co-investment models as well as possible combinations of these may be able to qualify as co-investments under Article 76: ~~1) joint-venture, 2) reciprocal access and 3) one-way access. These are described as follows:~~

1. Under the joint-venture model, the SMP operator would offer co-ownership of the co-invested deployment to other providers of electronic communications networks and/or services. The SMP operator and the other co-investor(s) ~~would be co-owners~~may organise ownership through the creation of a new entity/company (co-investment vehicle). ~~The resulting company would~~, which could be responsible for rolling out the VHCN.
2. Under the reciprocal access model, the SMP operator and the co-investor(s) would reach a long-term risk sharing agreement whereby they would be responsible for deploying and operating their respective own VHCN in geographically separate areas. Each co-investor has access to all other VHCN.
3. Under the one-way access model, the SMP operator and the co-investor(s) would reach a long-term risk sharing agreement whereby the former would build up the VHCN and grant access to this network to the other co-investor(s)²².

~~(33)~~(36) This list is not exhaustive and the providers of electronic communications networks and/or services might conclude other types of co-investment agreements that may also fall under Article 76. For instance, they could combine features of the abovementioned co-investment models.

(37) The structural nature of the rights under co-investment agreements underimplementing the joint-venture and reciprocal access models will in general be relatively straightforward. ~~This is particularly to ascertain.~~

~~(34)~~(38) In the case of the reciprocal access model ~~where~~, each party owns its own network and grants access to other co-investors, in exchange for an equivalent equal treatment. ~~when accessing their networks. The structural nature of the access right awarded will be present if the co-investor has the opportunity to materially co-determine the access conditions subject to which the SMP operator grants, and receives, access.~~

~~(35)~~(39) Regarding joint-ventures, the implementation and the details of any given joint-venture may differ from one agreement to another. These potential differences, however, would not change the structural nature of this type of agreements as such. In particular, regardless of the concrete details of the ownership arrangements, a common characteristic in the joint-venture model will normally be that depends on the co-investors own, in addition to owning a relative stake of the new company and thus are, also being entitled to participate in the decision-making process concerning new investments, upgrades of the network, entry of a new partner, etc. Thus, while the specific implementation and the details of the joint venture

²² In this regard it is worth recalling that the EEC states that long term risk sharing can be either in the form of co-financing or purchase agreements. For the latter, it is made clear that the agreement needs to entail the acquisition of specific rights to capacity of a structural character in order for the offer to constitute a co-investment. Furthermore, mere rental of capacity does not constitute a co-investment.

will vary, NRAs need to ensure that real co-decision making exists for the co-investment to comprise an adequate degree of co-determination.

~~(36)~~(40) *Finally, determining the structural nature of the one-way access model requires a case-by-case analysis. Such agreements could be implemented via long-term co-financing schemes that foresee minimum buying commitments and volume discounts or take the form of purchase agreements through Indefeasible Rights of Use (hereafter “IRUs”).

~~(37)~~(41) The one-way access model based on purchase agreements provides the IRUs’ holders with some of the characteristics that are associated with ownership such as the right to exclusive use over long-term periods, although it may grant the holders with a limited/lesser degree of co-determination and/or the right to make decisions on new investments, upgrades, etc. ~~Alongside the ownership structure, other factors such as the governance structure provided for in the agreement may in this regard become relevant~~²³.

~~(42)~~ Next to the ownership structure, the governance structure provided for in the agreement will constitute a second key element in assessing the level of co-determination that a given co-investment agreement achieves.²⁴

~~(38)~~(43) In that context, providing the co-investors with sufficient capacity to take relevant strategic decisions as to, for instance (and depending on the specific type of agreement and business model), the roll-out, maintenance of the VHCN, the service provision and the adaptation/evolution of the agreement may in many cases be an important element to take into consideration in the assessment of the agreement, as highlighted in ~~Recital (198)~~Recital (198). Mere co-ownership without appropriate participation in decision-making related to the co-invested network elements will not generally suffice to ensure co-investors a level of involvement that is commensurate with Article 76(1).

3.2.2.2. GuidelinesIntroductory considerations on the second subparagraph of Article 76 Par (1-Point A) EECC (‘the provision’)

Article 76, Paragraph (1), subparagraph 2

“When the national regulatory authority assesses those commitments, it shall determine, in particular, whether the offer to co-invest complies with all of the following conditions”:

~~(44)~~ The second subparagraph of Article 76(1) delineates a number of conditions according to which NRAs shall evaluate co-investment offers when assessing the commitments proposed by the SMP operator pursuant to the first subparagraph.

²³ ~~The governance structure also contributes to the way co-investment projects are managed. In particular, it determines how decisions are made with respect to the development and operation of the network and provides the mechanism for monitoring and enforcing compliance with the terms of the agreement (for example, via service level agreements – “SLAs”).~~

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- (45) Co-investment offers must meet all of these conditions. This implies that failure to meet any one condition will render the offer non-compliant in its entirety. BEREC therefore believes that NRAs should assess these conditions in a sequential order so as to quickly identify obvious cases of non-compliance while limiting administrative efforts, to reinforce consistent application of the co-investment rules and to avoid detrimental consequences of protracted proceedings both on SMP operators and potential co-investors.
- (46) Prior to applying the specific conditions of subparagraph 2, NRAs should, in a first step, determine that the co-investment offer does not solely entail an agreement on the rental of capacity. Where it finds that the agreement is substantively limited to capacity rental, the NRA can abstain from assessing the conditions and should immediately declare the offer as non-compliant.
- (47) If the NRA finds the co-investment agreement to go beyond mere capacity rental and to ensure an adequate degree of co-determination in view of the agreement at issue, the NRA should then proceed to assess the conditions of the second subparagraph in the following order:
- i. Offer having been publicized in a timely manner (point (c))
 - ii. Offer having been made in good faith (point (e))
 - iii. Openness of the offer over the entire lifetime of the network (point (a))
 - iv. Offer guarantees appropriate conditions and adaptation mechanism for access seekers (point (d))
 - v. Offer guarantees co-investors' ability to compete effectively and sustainably downstream (point (b))
- (48) The following sections discuss the conditions of subparagraph 2 in the above order. This discussion is without prejudice to the possibility for NRAs to apply other relevant conditions or to go beyond the criteria set out as minimum requirements in Annex IV²⁵.

2.3. Guidelines on point (c) of the provision

Point (c)

"it is made public by the undertaking in a timely manner and, if the undertaking does not have the characteristics listed in Article 80(1), at least six months before the start of the deployment of the new network; that period may be prolonged based on national circumstances;"

2.3.1. Timeliness of making the offer public

- (49) According to point (c) of the second subparagraph of Article 76(1), when NRAs assess – following the procedure set in Article 79 – the commitments on co-investment offered by the SMP operator, they should assess, among other conditions, whether the publication of the offer to co-invest is done in a timely manner.

²⁵ Cf. the first limb of point (e) of the second subparagraph; the second limb is discussed below in section 2.4.

- (50) The aim of this provision is to allow the potentially interested providers of electronic communications networks and/or services to participate in the planning and, where appropriate, also the execution of the project, having at their disposal enough time to evaluate all the elements needed to take the most appropriate decision before the deployment starts.
- (51) It is important to clarify how to assess whether the offer to co-invest is made public “in a timely manner”, also considering that this offer will be presented in the context of the complex commitment procedure according to Article 79.
- (52) In cases in which the SMP operator is not a wholesale only operator,²⁶ the EECC requires that all providers of electronic communications dispose of a period of at least six months to carry out all the internal steps needed to signal interest in, and potentially negotiate about, their participation in the co-investment project. Based on the national circumstances, NRAs may choose to extend that period further under justified reasons in the context of the commitment procedure.²⁷
- (53) According to the text of the Directive, the relevant period of at least six months starts from the date of the publication of the co-investment offer and ends when the deployment of the new network starts. For this period to be appropriately effective, this means that deployment can start no earlier than six months after the date of publication.
- (54) The Code requires co-investment offers to be transparent, and the requirement for timely publication of the co-investment offer has to be construed in this light, as its most direct articulation. Therefore, in order to guarantee the highest level of transparency to third parties, an SMP operator publishing a co-investment offer should clearly indicate in the publication the intention to propose commitments under Article 79 of the EECC or that the offer is linked to an ongoing or prior commitments procedure.
- (55) For publication to satisfy the requirements of point (c) of the provision, it is not strictly necessary for the commitments to already have been rendered binding by the NRA, but the SMP operator always needs to ensure compliance with the minimum set of information requirements in Annex IV (see section 3.5.2. below) if he wants to rely on the commitments procedure. Similarly, the commitments need to be sufficiently clear and precise so that NRAs can verify the compliance with Article 76 and Annex IV, and stakeholders are able to participate in the market test with their comments.
- (56) The SMP operator may offer commitments under Article 79 of the EECC in relation to a specific co-investment offer in order to obtain regulatory forbearance, in accordance with Article 76(2), with regard to the new network elements to which the offer applies. The publication of the co-investment offer can be done at a different time from the offer for commitments to the NRA (before/during/after the commitments procedure).
- (57) Where the SMP operator chooses to publish the co-investment offer ahead of the commitments procedure, it assumes any risks associated with the NRA choosing not to make the commitments binding or requiring amendments to the commitments that impact

²⁶ On offers by wholesale only operators, see paragraph (59) below.

²⁷ On such extensions, see paragraph (60) below.

the offer. In the interest of regulatory predictability for the co-invested deployment and legal certainty for potential co-investors, SMP operators should therefore notify their commitments before issuing the associated offer for public consideration.

(58) Regarding the six months period, BEREC identifies three possible scenarios depending on when the co-investment offer is published:

1. Publication of co-investment offer *after* the commitments procedure ends.

In this scenario, the SMP operator decides first to offer commitments on co-investment before the publication of the offer. Consequently, the NRA – taking into account the results and the representativeness of the market test – can make them binding and declare to not impose any additional remedies in relation to the new network elements, subject to any conditions that it has set out in conjunction with its preliminary conclusions having been fulfilled and at least one company having entered into a co-investment agreement. Then, the SMP operator publishes the co-investment offer and after (at least) six months the deployment of the network starts.

2. Publication of co-investment offer *before or during* the commitments procedure and NRA requirements for *relevant changes* during the procedure.

In case the SMP operator publishes the offer of co-investment before or during the commitment procedure and then the NRA requires the offer to change during this procedure to ensure compliance with the conditions of Article 76, the criteria of Annex IV or further conditions and criteria laid down by the NRA, the counting of the six-month period has to restart from the date of the re-publication by the SMP operator of an amended offer that accommodates the NRA's conditions pursuant to Article 79(2) with a view to being made binding. SMP operators choosing to publish an offer under these circumstances have to clearly indicate upon publication whether and when the commitments procedure has been or will be launched and by what point in time that procedure is expected to close according to national procedural rules.

3. Publication of the co-investment offer *before or during* the commitments procedure and *no* NRA requirements for relevant changes during the procedure.

In case the SMP operator publishes the offer of co-investment before or during the commitment procedure and then the NRA does not require the offer to change during this procedure to ensure compliance with the conditions of Article 76, the criteria of Annex IV or further conditions and criteria laid down by the NRA, the counting of the six-month period will start from the initial date of the publication. However, where the SMP operator has not clearly indicated in the publication the intention to propose commitments under Article 79 of the EECC, the publication of the offer cannot count towards the six-month period.

(59) In the case of an offer being made by an SMP wholesale only operator, which places all co-investors in the same position regarding the launch of retail offers, the Code allows for this period to be shorter still. NRAs should here pay utmost attention to publication occurring in such timely a manner that potential co-investors can realistically enjoy the widest possible range of options for participation, as set out in paragraph (35), and that the requirement of openness to all providers of electronic communications is not jeopardised.

(60) In relation to the possibility to extend the six-month period based on national circumstances, it is reasonable that NRAs evaluate such extensions in the context of the commitments procedure at the request of either the SMP operator or alternative providers of electronic communications networks and/or services. This prolongation under national circumstances can mostly be related to the need for other co-investors to prepare for the start of marketing activity, so that the SMP operator does not get a first mover advantage. In some cases, a period longer than six months may be needed in case of complex co-investment schemes or products, or the need to implement new interfaces. NRAs may also require the period to be longer in case of circumstances rendering the offer inaccessible or exceptional circumstances limiting possibilities for effective participation.

2.3.2. Minimum set of information under Annex IV

(61) Annex IV sets out the criteria that the co-investment offer must meet at a minimum, in order to allow NRAs to accept commitments and make them binding.

- (62) Annex IV, point (b), indicates different type of transparency requirements for a co-investment offer:
- a. *Publicity requirements: At a minimum, the offer must be released on the website of the SMP operator in a manner that enables easy retrieval for interested parties (“shall be available and easily identified on the website of the undertaking”);*
 - b. *Availability requirements for complete terms: Where the SMP operator chooses not to immediately publicize the full detailed terms of the offer, it is to make these available on demand without unreasonable postponement (“full detailed terms shall be made available without undue delay to any potential bidder that has expressed an interest”);*
 - c. *Availability requirements for process information: The SMP operator is to ensure that the process defining and expounding the co-investment subject to an offer has been established when the latter is made public; is made intelligibly available in writing to all providers of electronic communications; and all major steps of the process are disclosed in strictly non-discriminatory manner to those providers (“must be set in advance, shall be clearly explained in writing to any potential co-investor, and all significant milestones shall be clearly communicated to all undertakings without any discrimination”).*
- (63) For all of the above requirements, BEREC considers it important that the information should be available on a non-discriminatory basis. In particular, SMP operators should be able to document, when choosing not to immediately release information on their website, that disclosure of such information to any potential co-investor has occurred without discrimination and that processing time for the treatment of requests for information does not lead to the exclusion of interested parties.
- (64) Publication of the offer on the website (point a. listed above) of the SMP undertaking needs to allow all potential co-investors to easily identify and access the offer. As a default rule, BEREC considers that SMP operators should make the offer available in the same context where they publish wholesale offers, e.g. adjacent to reference offer information, or in a more prominent location. The location should remain consistent, be separately publicized and notified to the NRA, and, where changes are introduced for legitimate reasons, appropriate means should be implemented to guarantee continued access for users previously having accessed offer(s) via the website. Where the SMP operator’s website offers a search functionality, a search for the term ‘co-investment’ should display the offer page among the first three search results.
- (65) The offer made available in this way should include all information that is essential to allow potential co-investors to judge whether they might have a substantial interest in taking up the offer, and notably process information regarding the definition and development of the network elements that are offered for co-investment. This information will be particularly relevant for potential co-investors in assessing the possibilities for co-shaping the deployment and evaluating their possibilities for continuing to do so in function of the type of participation engaged in. NRAs should take account of such information when assessing

the governance structure of the co-invested network elements.²⁸ Generally, the following points should be considered as being essential for potential co-investors:

- Process information, including significant project milestones;
- Description of the network elements subject to co-investment, including technical characteristics;
- Geographical area(s) involved;
- Description of opportunities and means for co-determination, including governance structure;
- Description of business model(s) and indications as to the availability of different legal forms;
- Financial conditions of participation;
- Conditions for late entry;
- Conditions for rights transfers;
- Conditions for access seekers, including form and differentiation between mass and niche operators;²⁹
- Adaptation mechanism for access seekers, including relevant details³⁰.

(66) The offer made available should thus allow potential co-investors to reach a reasoned assessment of the deployment's scope and features as well as the options for involvement, financing options and access. To enhance consistency with the condition of openness to all electronic communications providers and to effectively advance the promotion of connectivity and access to VHCN, the offer should be intelligible in its own right and not subject to any access restrictions. NRAs should assess these characteristics taking the perspective of smaller operators and their transaction costs into account.

(67) BEREC considers that the possibility for SMP operators to make full detailed terms subject to an expression of interest (point b. listed above) does not relieve SMP operators of making the essential information elements outlined above generally available. While the reference to completeness and detail allows for a differentiation between the public offer and its granular specification, including operational details (e.g. subcontracting, payment details and administrative arrangements) and their contractual framing, the offer should allow diverse types of electronic communications providers to make a determination whether to pursue co-investment or access strategies, in awareness of available alternatives.

(68) The mention of specific examples under the second indent of point (b) of Annex IV should thus not be understood as a requirement to withhold relevant information, especially as regards the business model to be implemented (see paragraph (37)), but to allow limiting universally disclosed information to its essential elements. Potential co-investors, notably of a smaller kind, should be able on that basis to assess whether to incur the necessary investment in negotiations of a co-investment agreement.

²⁸ Cf. paragraph (42) above.

²⁹ Cf. also paragraphs (100) and (102) below.

³⁰ As set out at paragraph (107) below.

- (69) BEREC further observes that the reference under that indent to the making available of information “to any potential bidder” having expressed an interest suggests a restriction in the number of possible recipients of that information. In this regard, BEREC considers that the purpose of this formulation, when read in relation to the condition of transparency as well as to the condition of offer openness towards all electronic communications providers, the freedom for SMP operators to organise the process of accession to the co-investment and the objective of promoting connectivity and access to VHCN, is not to prescribe a single manner in which SMP operators have to organise the selection of interested parties for participation.³¹ Instead, the requirements to the making available of full detailed terms must be effective vis-à-vis all electronic communications providers, and BEREC therefore expects for such information to be made available without undue delay to all such providers having announced their interest in participation to the SMP operator.
- (70) As regards the making public of relevant process information (point c. listed above), SMP operators should ensure the same level and conditions of availability as for the offer. Where elements of that information, for well justified reasons, are not made available in this way, SMP operators have to ensure that details for contact persons from whom to obtain such information in writing without delay are prominently placed next to the offer. Furthermore, SMP operators need to be able to document that disclosure of such information to any potential co-investor has occurred in a non-discriminatory manner.
- (71) Compliance with the publicity and availability requirements under Annex IV linked to the condition of transparency is without prejudice to the protection of confidential and commercially sensitive information as protected by applicable law.
- (72) NRAs must take into account the rights and obligations of undertakings and potential co-investors with regards to commercially sensitive/confidential information and without prejudice to any affected party and/or stakeholder. Where any of the relevant undertaking(s) consider(s) certain aspects of information included in the co-investment offer to be of a confidential and/or commercially sensitive nature, and thus only to be shared with interested bidders upon request and subject to confidentiality provisions, the relevant undertaking(s) should provide in any case the NRA with complete details of such information along with objective reasons justifying why it considers the information to be confidential and/or commercially sensitive. The NRA should then consider the classification of the information as “confidential” in accordance with its own criteria for dealing with confidential information and decide accordingly.
- (73) Any actions regarding the exchange of information and level of transparency in the context of Articles 76 and 79 of the EECC are without prejudice to competition law.

³¹ Indeed, as exclusive reliance on bidding mechanisms towards that end may prove administratively complex, costly to implement and inefficient in terms of attracting the best potential co-investors, BEREC considers that a narrow literal interpretation of this formulation would run counter to the objective that Article 76 pursues.

2.4. Guidelines on point (e) of the provision

Point (e)

"it complies at a minimum with the criteria set out in Annex IV and is made in good faith."

- (74) As set out above,³² the criteria in Annex IV are an integral part of the assessment that NRAs have to conduct pursuant to the second subparagraph of Article 76(1), and as such enter into the commitments procedure.
- (75) The requirement for a co-investment offer to be made in good faith necessarily entails that SMP operators do not propose terms that effectively limit the co-investment agreement to mere capacity rental. NRAs shall consider offers including such terms not to be made in good faith and proceed to treat them according to the second subparagraph of Article 76(2).
- (76) Similarly, NRAs should consider offers as failing to meet the standard of good faith where an SMP operator publishes the offer prior to the commitments procedure without clear mention of the intention to invoke that procedure. The same should apply where SMP operators change terms for amending the offer without appropriate publicity and continue negotiations with different operators on the basis of different versions of those terms.³³
- (77) Finally, the explicit requirement for SMP operators to make offers in good faith creates duties for these operators to negotiate with care and not to lead potential co-investors to act to their detriment before concluding a co-investment agreement. In addition to potential co-investors seeking judicial remedy, NRAs may choose to intervene where a breach of those duties does not manifest itself clearly prior to the launch of the market test process.

2.5. Guidelines on point (a) of the provision

Point (a)

"it is open at any moment during the lifetime of the network to any provider of electronic communications networks or services"

3.2.1-2.5.1. Open offer

(39)(78) BEREC understands that the requirement for an open offer, in the context of Article 76 (1), refers to the terms offered to potential co-investors to enter the agreement.

(40)(79) First and foremost, the offer has to be open during the entire lifetime of the network. That means that there needs to be a possibility for ~~potential and different types~~any type of electronic communications providers to join the co-investment at any moment during the lifetime of the network, i.e. with no cut-off date ~~set by the SMP operator for~~for participation in the co-investment.

³² Cf. paragraph (6).

³³ Cf. paragraph (125).

~~(41)(80)~~ Thus, in order to assess whether an offer is open during the lifetime of a network, an NRA should check that no cut-off date ~~during the lifetime~~ is set by the SMP operator, ~~in terms of validity of or otherwise, for taking up~~ the offer ~~to co-invest~~.

~~(42)(81)~~ Furthermore, the offer shall not be exclusive to particular electronic communications networks and/or services (ECN/ECS) providers or types of ECN/ECS providers³⁴. This means that the SMP operator must credibly commit to give any potential entrants entrant—~~including parties seeking to enter the market through co-investment—~~effective access to the offer to co-invest and thus also to the network in question under clear conditions, on a fair, reasonable and non-discriminatory terms and on a transparent basis. ~~These conditions are addressed³⁵ Where the envisaged deployment replaces existing network elements hosting existing wholesale relationships with other providers of electronic communications, the SMP operator should ensure that its offer addresses all of these and clearly describes to them the advantages of co-investment, while accommodating relevant differences in more detail in the following sections~~business models and preconditions for participation, notably vis-à-vis B2B operators.

~~(43)(82)~~ The offer should also have sufficiently clear and precise terms and conditions and be possible to join under clear and specific rules, which should be communicated when publicizing the offer.³⁵

~~(44)(83)~~ Generally, two different ~~access situations~~scenarios should be distinguished when assessing the openness of the co-investment offer to participation: 1) ~~access~~participation by entering the co-investment agreement at the ~~beginning~~first possible round following publication of the offer; in accordance with the requirements of point (c) of the second subparagraph of Article 76(1) EECC³⁷ and 2) ~~access~~participation by entering the co-investment agreement at a later stage.

~~(45)(84)~~ ~~It is important that the offer fulfils the aforementioned~~The offer has to fulfil the requirements in paragraphs (79) to (82) in both situations.

~~(46)~~— In the second case however, depending on the type of co-investment agreement, the implementation of safeguards to ensure the offer's openness might differ when it comes to undertakings willing to join the co-investment at a later stage. Thus, any existing limitations of openness need to be considered in the context of joint venture models, reciprocal access models, one-way access models and mixed form models specifically. In the following, the requirements for the openness and limitations that might possibly exist are presented for the different co-investment types.

³⁴ The requirement for openness is not fulfilled if the co-investors are not able to compete effectively and sustainably in the long term in downstream markets in which the undertaking designated as having significant market power is active. This aspect is closely linked to Article 76(1) point (b)-(i) of the provision and should particularly be examined when assessing the fairness, reasonableness and non-discrimination of the co-investment offer's terms.

³⁵ These conditions are addressed in more detail in sections 2.7.1.1 and 2.3.

³⁶ On the requirements for which, see paragraphs (64) to (66).

³⁷ On which, see section 2.3 above.

3.2.1.1. — Joint-venture models

(47) — As a plausible scenario, two or more undertakings enter into arrangements for creating a joint-venture. In order to become part of the joint-venture and participate in the co-investment, undertakings acquire a stake in the joint-venture³⁹.

(48) — At a later stage, however, joining the joint-venture or increasing the respective stake a co-investor already owns can potentially be complex³⁹. Because of the extensive negotiations that are needed between potential co-investors before the conclusion of a joint-venture contract, it might be reasonable for the co-investment offer to include specific cut-off dates after which a late entry into the joint-venture itself does not need to be guaranteed. However, in such a case, it is necessary to put an additional mechanism in place to ensure the effective openness of the co-investment offer, e.g. by combining the joint-venture model with a one-way access model.

3.2.1.2. — Reciprocal access models

(49) — In a reciprocal access model, each co-investor deploys an independent network in an exclusive region and grants all other co-investors access to its network.

(50) — Similarly to joint-venture models, the possibility to join the reciprocal access co-investment model at later stages might be complex, e.g. because no area (that the already participating co-investors are interested in) may be left where a potential late co-investor can deploy its independent network. Therefore, the terms of the co-investment offer might include specific cut-off dates after which a late entry into the reciprocal access model itself does not need to be guaranteed. However, as stated in the context of joint-venture models, it would be necessary to put a different mechanism in place to ensure the effective openness of the co-investment offer, e.g. by combining the reciprocal access model with a one-way access model.

3.2.1.3. — One-way access models

(51) — Compared to joint-venture and reciprocal access models, one-way access models — in which only one single operator⁴⁰ deploys the network infrastructure and offers all co-investors access to its network — are in general more flexible regarding the potential for late entry of additional co-investors and regarding the potential to increase the participation of an existing co-investor. Therefore, there should be no need to limit the requirements regarding the openness of the offer.

3.2.1.4. — Mixed-form models

(52) — As previously stated, co-investment vehicles might also be designed as a mix of the above-mentioned types of co-investments. As an example, in joint-venture and reciprocal access models, guaranteeing that the offer to co-invest is open at any moment during the

³⁹ In general, a stake can be acquired by bringing capital into the joint venture or in some cases by (also) bringing in other assets (e.g. civil infrastructure already deployed in some areas of the planned network).

³⁹ This does not apply to the same extent to the acquisition of a stake from co-investors that are willing to sell parts of or their whole share.

⁴⁰ In the context of Article 76 this operator has SMP.

lifetime of the network might only be possible by offering additional one-way access to potential late co-investors.

- (85) To this end, the NRA must ensure that the offer includes appropriate openness safeguards at any stage of the co-investment process. To ensure that other electronic communications providers can make an informed decision about their participation in the offer and the timing thereof, the SMP operator should provide clarity as to the business model(s) in which the co-investment is to be organised, as set out in paragraph (35) above, as well as all other essential information as specified in paragraph (65).
- (86) NRA should not approve offers, and SMP operators cannot benefit from forbearance under Article 76(2) EECC, if offers fail to specify with requisite clarity and precision in accordance with paragraph (82) the form of participation that co-investment takes. Non-compliance with this requirement can only be attributed to the SMP operator in its role as offeror.
- (87) Where an NRA determines that the terms and conditions and rules of participation of a given offer, despite being sufficiently transparent, cannot reasonably be met by more than a very limited number or even only one offeree, BEREC considers that the NRA should invite the SMP operator to revise and resubmit the offer prior to initiating a market test.
- (88) Whereas SMP operators may choose to make offers allowing different types of participation, NRAs need to ensure that such offers do not selectively preclude certain such types of participation for specific electronic communications providers or types of such providers. Where such exclusionary effects become evident, in law or in fact, upon submission of the offer, the NRA should invite the SMP operator to revise and resubmit the offer prior to initiating a market test. If they become apparent as a result of the market test, the NRA should clearly indicate this in its preliminary conclusions and require these effects to be fully addressed as a precondition for considering whether to make the offered commitments binding.

3.2.2.2.5.2. Lifetime of the network

- (53) ~~BEREC notes that as each network is unique (in terms of geographic scope and coverage, in terms of usage of parts/components and in terms of offered services), it is impossible to provide precise parameters that apply universally to the span of time of a network.~~
- (89) There areBEREC understands that openness over the lifetime of the deployed network elements notably serves to provide other electronic communications operators than those joining the co-investment in its initial round with an opportunity to gain access to the very high capacity these elements offer.
- (90) Notwithstanding different possible approaches to the concept of "lifetime of the network": for example, there is a difference between technical and commercial lifetime of the network. BEREC", BEREC thus considers that, for the purposes of Article 76, the lifetime of the network cannot not be reduced to a commercial perspective only be understoodconsidering initial viability of the deployment business case. This would unduly limit subsequent opportunities for participation and at the same time disregard the perspective adopted by the SMP operator and co-investors when closing the initial co-investment agreement.

~~(54)~~(91) A more appropriate approach therefore in BEREC's view consists of understanding the lifetime of the network with reference to the expected economic life of the commercial co-investment scheme co-invested network elements during which the network is ~~latter~~ are effectively deployed and fully operative, rather than the technical. This approach strikes a balance between the technically possible maximum operating lifetime of any of the network components (that is likely longer than the commercial lifetime), and a commercial perspective focussed on amortisation by focussing on the expected in-service period of the optical fibre network elements, which is generally estimated at 25 years at least.

~~(55)~~(92) BEREC considers that the SMP operator should clearly specify the expected economic lifetime of the co-investment scheme ~~should be included in the proposal made by the SMP operator~~ its offer as well as part of ~~in~~ the submission commitments offered in exchange for regulatory exemptions ~~forbearance~~ under Article 76. This ~~expected lifetime would then inform decisions on the exemption and the NRA assessment of the suitability of the offer in terms of factors such~~ NRAs should consider failure to do so as the openness of the co-investment scheme ~~clear non-fulfilment of the condition set out in point (a) of the second subparagraph of Article 76(1) EECC, and must therefore not proceed to market test the commitments offer.~~

(93) Where the market test raises significant doubts about the economic lifetime that the SMP operator has suggested, or that lifetime is significantly dissimilar to that of other comparable offers, the NRA should require the SMP operator to adduce adequate justification for the proposed irregularity. If that justification remains insufficient, the NRA should preclude consideration of whether to make the commitments binding unless the lifetime duration is appropriately adjusted.

(94) NRAs should further require SMP operators to maintain their commitments for the entire economic lifetime of the network elements concerned irrespective of whether or not their SMP status changes during that period.

3.3-2.6. Guidelines on Article 76 Par 1 Point B) point (d) of the provision

Point d)

“access seekers not participating in the co-investment can benefit from the outset from the same quality, speed, conditions and end-user reach as were available before the deployment, accompanied by a mechanism of adaptation over time confirmed by the national regulatory authority in light of developments on the related retail markets, that maintains the incentives to participate in the co-investment; such mechanism shall ensure that access seekers have access to the very high capacity elements of the network at a time, and on the basis of transparent and non-discriminatory terms, which reflect appropriately the degrees of risk incurred by the respective co-investors at different stages of the deployment and take into account the competitive situation in retail markets;”

(95) The main goal of this condition is to maintain the “competitiveness of markets” (see recital 200) by safeguarding the rights of third parties that are not part of the co-investment. Therefore, access seekers already present should be able to remain a relevant competitive force and new parties should be able to enter the market. Any offer or adaptation mechanism which is likely to prevent this is not in line with point (d) of Article 76(1)(2) EEC.

(96) On the other hand, the adaptation mechanism has to maintain the incentives to participate in the co-investment, i.e. it has to give the co-investors advantages compared to access seekers with respect to the access to the new very high capacity elements of the network.

(97) The requirements associated with this condition, as developed below, have to be viewed as minimum requirements in order to maintain the competitiveness of markets. Therefore, co-investors may also decide to grant access to the very high capacity elements of their network from the outset. In any case, the obligation to foresee such access under point (d) of the provision extends only to SMP operators as offerors.⁴¹

2.6.1. Access as before the deployment

(98) According to point (d) of the provision, existing and potential new access seekers have to benefit from the outset (i.e. the activation of the VHCN) from the same quality, speed, conditions, and end-user reach that were available before the deployment.

⁴¹ Other co-investors should be free to decide on giving access to their part/share of the co-invested network elements.

(99) Access of this form can be provided either using the new VHCN elements or, if it is still in place, via previous legacy infrastructure. In the former case, NRAs should impose access products with at least comparable functionality and quality.⁴² SMP operators should, in any case, outline a migration pathway as part of the co-investment offer and will need to ensure that replacement of legacy infrastructure complies with the requirements of Article 81 EEC.

(100) The achievable download and upload speeds have to be the same as before the deployment. Other relevant quality parameters that may be considered are, for example, delay, jitter, packet loss, and availability. However, speed is likely to be the most important parameter. The term "conditions" includes prices, processes for ordering and repair, provision of information, etc. End-users addressable before the deployment should also be addressable thereafter. If business grade quality characteristics were available before the deployment, they should also be available at least at the same level after the deployment.

(101) BEREC considers it important to highlight that the requirement of equivalent access as specified in the preceding paragraphs also applies where a deployment is entirely new, i.e. the new network elements do not replace legacy infrastructure. In those circumstances, the relevant reference product(s) defining the minimum requirements from which access seekers must benefit through the imposition of new access products should be based on the highest available specifications for regulated legacy products offered by the SMP operator. Where these products lack commercial relevance, the NRA may call for equivalent access to be granted in terms of the characteristics of the most used commercial access product exceeding those minimum requirements.

(102) Irrespective of the specific deployment context, access products delivered post-deployment need to reflect pre-existing differences in regulated access product specifications between residential and business use.

2.6.2. Access to very high capacity network elements

(103) Access to the very high capacity network elements could be either in the form of active access (e.g. virtual unbundling) or passive access (e.g. fibre unbundling). In the form of active access, it would mainly refer to access to markedly higher bandwidths (markedly higher than before the new very high capacity network deployment). In case of passive access, the access seeker in principle can offer to its customers any bandwidth that would be technically possible.

(104) The form (active, passive or both) and conditions of access to third parties should be part of the co-investment offer, which is subject to the scrutiny of the NRA and to a market test.⁴³

(105) Furthermore, the condition stipulates that access seekers are to be provided with access to the very high capacity network elements at a time, and on the basis of transparent and non-discriminatory terms, which appropriately reflects co-investors' risks at different stages of the deployment, taking into account the competitive situation at the retail level. Therefore,

⁴² Recital 200 EEC, 6th sentence.

⁴³ Cf. paragraph (65).

the terms of access should be published by the co-investors. Non-discrimination applies among access seekers, but not necessarily between co-investors and access seekers.

(106) As has been pointed out above,⁴⁴ this does not imply that access seekers are barred from accessing the elements in an absolute sense, but only that their access will not be identical to that of co-investors and will evolve over time in function of retail developments and in a way reflecting pertinent risk differentials. This evolution is to be captured through an adaptation mechanism that integrates these elements and considers them in relation to the different related retail markets.

(107) Accordingly, different types of adaptation scenarios and applications of the mechanism are possible. The offer therefore should also describe the adaptation mechanism, by specifying the timing, form and nature of the possible adaptations as well as the triggers giving rise to them.⁴⁵ The adaptation of quality characteristics should reflect evolving quality needs for access seekers providing services to business users from a forward-looking perspective.

(108) Timing, pricing, quality and speed are the main factors of the adaptation mechanism. The adaptation mechanism set out in the offer should always provide sufficient detail at least on the first of these.

(109) Timing: The offer needs to foresee that access seekers get access to the very high capacity network elements at a higher level than what is equivalent to pre-deployment access. In order to maintain incentives to participate in the co-investment, co-investors may be allowed to benefit from a first-mover advantage with regard to the selling of higher bandwidths, which usually have the highest margins. The appropriate length of this period depends on the degree of risk incurred by the co-investors as well as on retail market developments. In delineating the adaptation mechanism, the offer should therefore explain how these developments are to be monitored and assessed with regard to relevant triggers for an adaptation of access conditions. The timing of adaptations should be continuously reviewed, and at least twice a year, to ensure that spikes in take-up can appropriately be accounted for. NRAs may require relevant data to be provided as part of SMP operators' annual compliance reports. Since it is unlikely that access seekers can remain competitive during extended periods without access to higher bandwidths on the very high capacity network elements, multi-annual exclusion periods that are not subject to such review are incompatible with the adaptation mechanism requirements of point (d) of the provision.

(110) Pricing: The prices for adapted access to very high capacity network elements may vary over time. For example, prices may remain comparatively high in the beginning reflecting higher retail prices of the co-investors and/or demand uncertainty and could then be reduced over time. While differences in effective wholesale price levels between access seekers and co-investors are an important tool to maintain incentives for the former to participate in the co-investment and recognise risks that the latter take, they must not be grossly disproportionate to the potential competitive impact they afford access seekers as VHC take-up increases. In any case, price adjustments should be limited by the condition

⁴⁴ Cf. paragraph (99).

⁴⁵ Cf. paragraph (65).

that they should allow access seekers already present in the market to remain a relevant competitive force, considering the adapted access conditions.

(111) Quality and speed: Upon adaptation, the quality of access and the speed for non-co-investors may remain restricted compared to the quality and speed available to co-investors. The resulting quality and speed differentials should be assessed along the same lines as set out in respect of pricing, notably as regards the sustained relevance they enable access seekers to have in view of the adapted access conditions. Nevertheless, co-investors must provide access seekers from the outset the same quality as available before the deployment of the new VHCN.

(112) The timing of adaptations and the associated triggers initiating them (e.g. co-investors' increase in retail bandwidths) should be set out in a way which provides sufficient predictability for access seekers and co-investors as part of the adaptation mechanism in the offer. Adaptations should be notified to access seekers and to the NRA, describing how these implement the adaptation mechanism, with due advance notice. Where different adaptation triggers or adaptations are foreseen, the adaptation mechanism may foresee different corresponding notice periods. SMP operators must ensure that the notification modalities under the adaptation mechanism enable access seekers to appropriately evaluate whether they want to accept or contest the announced adaptation, or change to a role of active participation in the co-invested deployment.

(113) NRAs have to confirm the adaptation mechanism as precondition for their assessment of whether a co-investment offer fulfils the conditions of Article 76(1)(2) EECC, and monitor or enforce its application over a commitments period of at least seven years, if appropriate.⁴⁶ NRAs need to assess the adaptation mechanism against the background of national market characteristics to decide whether it allows access seekers that constitute a competitive force to remain relevant or to emerge, and thus meet the requirements of the condition set out in point (d) of that provision.

(114) The NRA should review the application of the adaptation mechanism and the conditions for access seekers regularly as part of its work to promote access to very high capacity networks and connectivity more generally. BEREC considers that complaints by access seekers about inadequate access conditions or lacking adaptation thereof should be given particular attention during the initial stages of co-investment offer implementation.

2.7. Guidelines on point (b) of the provision

Point b)

"it would allow other co-investors which are providers of electronic communications networks or services to compete effectively and sustainably in the long term in downstream markets in which the undertaking designated as having significant market power is active, on terms which include: [...]"

⁴⁶ Cf. paragraph (10).

(115) The conditions mentioned in Article 76 (1) point (b) of the provision are solely related to “other co-investors” and do not concern access seekers – electronic communications providers not participating in the co-investment⁴⁷ –, to which the rules for access seekers apply⁴⁸.

(56)(116) NRAs may have to assess the co-investment offer also at a preliminary stage when no provider of electronic communications networks and/or services has entered into the co-investment agreement yet. In this context, therefore, the reference to “other co-investors” has to be understood as a reference to potential co-investors.⁴⁹ Some of these potential co-investors can typically be identified while the market test is run, through the public consultation in accordance with Article 79(2), whereas others may also enter the market at a later stage (i.e. after the market test was run) and join the co-investment scheme as further detailed in Section 3.32.7.2.

(117) When assessing the commitments proposed by an SMP operator, NRAs should consider – if applicable – all of the sub-detailed conditions detailed set out in point (b) (i) to (iv)⁵⁰. Under specific and justified circumstances⁵¹, and insofar as –. In the application of the above-mentioned sub-conditions does not allow potential co-investors “to compete effectively and sustainably in the long term in downstream markets in which the undertaking designated as having significant market power is active”, NRAs interest of administrative efficiency it may define additional sub-conditions pursuant to be appropriate to consider condition (b)(iv) first, as explained below.⁵²

3.3.1.2.7.1. Guidelines on point (b) in order to meet this objective. These additional conditions would take full account of the principle of proportionality. (i) of the provision

(57) — Such an approach would allow for a more effective application of the relevant provision(s) of the Article.

3.3.2. Guidelines on Article 76 Par 1 Point B) (I)

Point (b) (i): “fair, reasonable and non-discriminatory terms allowing access to the full capacity of the network to the extent that it is subject to co-investment;”

(58)(118) This sub-condition is – together with sub-conditions (b) (ii) through (iv) – one of the key aspects in ensuring that co-investors can “compete effectively and sustainably in the long term in downstream markets in which the undertaking designated as having significant

⁴⁷ Access seekers benefit from other guarantees and conditions, which are detailed in point (d).

⁴⁸ Access seekers benefit from other guarantees and conditions, which are detailed in point (d), discussed at paragraphs (95) to (114) above.

⁴⁹ Cf. also Annex IV (c) and recital 199 EECC.

⁵⁰ According to Article 76, par. 1 point b), commitments should allow other co-investors to compete effectively and sustainably in the long term “on terms which include” sub-conditions (i) to (iv).

⁵¹ In some cases, the four criteria may prove insufficient to ensure effective and sustainable long-term competition. For instance, an SMP operator and a potential co-investor could act strategically to design a co-investment offer that meets the four criteria of (b) (i)–(iv), resulting in a duopoly outcome.

⁵² Cf. section 2.7.4, and especially paragraph (178).

market power is active". Implementing fair, reasonable and non-discriminatory terms is essential to ~~safeguardsafeguarding~~ the interests of ~~the otherpotential future~~ co-investors after NRAs decide not to impose further obligations on the SMP operator according to ~~ArticlesArticle~~ 76 and 79.(2).

3.3.2.1.2.7.1.1. "Fair, reasonable and non-discriminatory terms"

~~(59)(119)~~ The terms of the co-investment offer have to be fair, reasonable and non-discriminatory. According to the first indent of Annex IV (c), these terms include amongst others:

- ~~Terms regarding the conditions for joining and potentially terminating the co-investment agreement;~~
- Terms regarding the financial consideration required for the acquisition of specific rights (in the following called "financial terms");
- Terms regarding the protection awarded to the co-investors by those specific rights both, during both the building phase and during the exploitation/operational and any expansion phases;
- ~~Terms regarding~~ While the conditionsterms for joining and potentially terminating the co-investment agreement.

~~(60)(120)~~ Adhering participation are to be fair, reasonable and non-discriminatory terms⁵³ ensures that other co-investors can compete effectively and sustainably in the long term, especially with the SMP operator. This implies that at all co-investors, including the SMP operator, should have similar commercialization chances and investment risks within the co-investment offer given their respective investment share/commitment and times, fulfilment of these criteria is to be seen relative to the time they at which providers join. In particular, these depend on the quality level of access granted. Therefore, in case the co-investors themselves exercise command over (some of) the new network elements, all co-investors should grant each other reciprocal rights on fair and reasonable the co-investment agreement. This implies that the terms and conditions to access in paragraph (119) and all other terms might vary across the lifetime of the co-invested infrastructure. Furthermore, a co-investment vehicle must provide for access to all co-investors on an equivalence of input basis network elements. When assessing whether such variations are appropriate, NRAs as well as the conditions of fairness and reasonableness according to Annex IV (c) co-investors should be able to rely on the process information related to the co-investment offer⁵⁴ and any subsequent relevant communications.

⁵³ Fair, reasonable and non-discriminatory terms (FRAND terms) are usually seen as a regulatory market-based solution in cases where a company owns/holds an asset/product and other companies need to access/use this asset/product to be able to compete in a given market. These terms should therefore represent a balance of interests between the company that owns/holds an asset/product (in this case the SMP operator) and those companies that need to access/use this asset/product (the other co-investors). Frequent applications of the FRAND principle — outside the regulation of network industries — can be found in patent and competition law.

⁵⁴ See paragraphs (65) and (70) above.

~~(61)~~(121) VariationsThe importance of the moment of joining the co-investment is evident when considering another important source of possible variation in the terms offered can be justified, and in some cases are even necessary, for aof the co-investment offer or one of / more of its terms to be deemed fair, reasonable and non-discriminatory, but should always be based on the same objective, transparent, non-discriminatory and predictable criteria.⁵⁵ Most importantly, 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 coCo-investors committing for different types or levels of participation or deciding to co-invest at different points in time could justifiably be offered different terms.

(122) To ensure that the relevant terms at the time of joining the co-investment are non-discriminatory does not require the terms to be identical for all potential co-investors, but that they be based on the same objective, transparent, non-discriminatory and predictable criteria.⁵⁶

(123) In general, co-investment offers should be designed to last over the economic lifetime of the network⁵⁷ as the general intention of co-investment agreements is to pool and share costs and risks of investments in very high capacity networks in the long term. In exceptional cases, however, specific circumstances (as, for example, bankruptcy of one of the co-investors) can make it necessary to terminate the co-investment agreement under fair, reasonable and non-discriminatory conditions. The conditions for such a termination of the co-investment agreement might also reflect the necessity to share given investment and failure risks. In this respect, all co-investors potentially bear a burden relative to their investment share even in case of a termination of the co-investment.

(124) Next to terms regarding the conditions for joining and terminating the co-investment agreement, the co-investment offer could potentially also include terms that allow for changes and adaptations to the offer's conditions. Such changes could become necessary due to general competitive conditions which the co-investors cannot influence or anticipate in advance. The relevant terms would equally have to abide by the standards of fairness, reasonableness and non-discrimination. Given the fundamental importance that such terms will have for the stability, continuity and especially the properly non-discriminatory character of the offer, and its ability to effectively realise long-term risk sharing and sustainable competition inside and outside of the agreement, their application must attract particular regulatory attention.⁵⁸ Where that application entails a significant change to the terms and conditions of participation, it may be appropriate for the terms to foresee the possibility for termination by the affected co-investors.

⁵⁵ *“Non-discriminatory terms in this context do not entail that all potential co-investors shall be offered exactly the same terms, including financial terms, but that all variations of the terms offered shall be justified on the basis of the same objective, transparent, non-discriminatory and predictable criteria [...]”*, (Annex IV (c), first bullet point).

⁵⁶ Annex IV (c), first indent.

⁵⁷ See section 2.5.2, paragraphs (89) to (94).

⁵⁸ Relevant changes to the co-investment, whether brought about by application of such terms or other rules of the offer (such as, e.g., the adaptation mechanism), should generally be notified in advance so that the affected parties would be in a position to appropriately assess them before their planned implementation date.

(125) Where the SMP operator seeks to unilaterally modify these terms prior to a co-investment agreement having been entered into, the amended offer will have to be submitted to a separate market test. Due to their transversal importance, failure by the SMP operator to promptly notify changes of those terms to all potential co-investors by making the revised offer available⁵⁹ and continuing to negotiate on different versions of the terms with different operators should be considered by the NRA as a breach of the duty to make the offer in good faith.⁶⁰

(126) Where the SMP operator, by way of the offer, reserves the right to unilaterally modify these (or any other) terms after a co-investment agreement having been entered into, the NRA should consider the terms as failing to offer adequate co-determination to potential co-investors as well as suitable protection of their rights⁶¹ and therefore should abstain from allowing the terms to be market-tested.

(127) Of particular importance for the ability of other co-investors to compete effectively and sustainably in the long term are the co-investment offer's terms and conditions regarding:

- o pricing for access to the co-investment;
- o its corresponding pricing structure;
- o granted rights regarding network access (in particular, type, speed and quality of wholesale access) for co-investors.

(62)(128) As a general rule, potential pricing differences between co-investors should be based on the level of risk that is linked to the investment, in a way that there are no incentives for an efficient provider of electronic communications networks and/or services to postpone the decision to enter into the co-investment agreement to a later stage for the sole reason of better terms and conditions. While a premium for co-investor commitments undertaken at later stages of the deployment is consistent with this rule,⁶² it should be noted that the relationship between the timing of commitments and the corresponding risk associated with this decision is not always linear. Thus, later investment decisions do not always imply lower levels of risk of the co-investment as a very high degree of market saturation can significantly lower the commercialisation chances of potential co-investors.

(63)(129) Other differentials on pricing may also be justified in certain circumstances. For example, the offer to co-invest should provide undertakings of different sizes and financial capacity with an opportunity to become infrastructure co-investors.⁶³ This condition ensures that smaller undertakings or undertakings with less financial capacity are not discriminated against, nor excluded from participating in the co-investment. However, and with due regard

⁵⁹ Such making available should occur following general offer publicity requirements, cf. paragraph (64); where justified, specific aspects may be reserved to full detailed terms.

⁶⁰ Cf. paragraph (76).

⁶¹ Cf. paragraph (119).

⁶² Annex IV (c), 3rd indent.

⁶³ "Where an undertaking designated as having significant market power makes an offer for co-investment on fair, reasonable and non-discriminatory terms in very high capacity networks that consist of optical fibre elements up to the end-user premises or the base station, providing an opportunity to undertakings of different sizes and financial capacity to become infrastructure co-investors [...].", Recital 199.

to the principle of non-discrimination, the SMP operator may include certain *reasonable* conditions regarding the ability of smaller undertakings to fulfil their commitments.⁶⁴ Of particular relevance in the context of different undertakings' financial capacity could be potential terms regarding the level of a minimum share for initial commitment.⁶⁵

~~(64) — The co-investment offer could potentially also include terms that allow for changes and adaptations to the offer's conditions. Such changes could be necessary due to general competitive conditions which the co-investors cannot influence or anticipate in advance. However, these changes would need to be based on the same conditions that the co-investment offer has to comply with, namely fairness, reasonableness and non-discrimination. If the SMP operator and/or other co-investors see the need for such changes, NRAs, alongside all participants in the co-investment project, should be notified in advance so that they would be in a position to appropriately assess the proposed changes before their planned implementation date.~~

~~(130) In general, co-investment offers should be designed to last over the commercial lifetime of the network as the general intention of co-investment agreements is to pool and share costs and risks of investments in very high capacity networks in the long term. In exceptional cases, however, specific circumstances (as for example Adhering to fair, reasonable and non-discriminatory terms ensures that other co-investors can compete effectively and sustainably in the long term, especially with the SMP operator. This implies that all potential co-investors should have similar commercialization chances and investment risks within the co-investment offer given their respective investment share/commitment and relative to the time they join. In particular, these chances and risks depend on the extent to which they enjoy access to the full capacity of the network.⁶⁶ The obligation for all co-investors to grant each other reciprocal rights on fair and reasonable terms and conditions to access the co-invested infrastructure is of particular importance in this regard.⁶⁷~~

~~(131) Irrespective of the type of the co-investment model, when evaluating whether the co-investment offer's terms and conditions are fair, reasonable and non-discriminatory, NRAs in particular have to assess the potential variations that might be included in the offer's terms as described above. In this respect, NRAs should evaluate whether proposed differences in the terms offered are based on reasonable economic grounds and where applicable, whether these differences are based on the level of risk associated with different levels or timings of commitments. This aspect is of particular importance to ensure that the~~

⁶⁴ ~~"The undertaking designated as having significant market power may include in the offer reasonable conditions regarding the financial capacity of any undertaking, so that for instance potential co-investors need to demonstrate their ability to deliver phased payments on the basis of which the deployment is planned, the acceptance of a strategic plan on the basis of which medium-term deployment plans are prepared, and so on."~~ Annex IV (a), Annex IV (a).

⁶⁵ The aspect of undertakings of different sizes and financial capacity is also linked to condition (a) of Article 76(1)(2), which states that the co-investment offer has to be open to any provider of electronic communications networks or services and also to ~~sub-condition point (b)-(i)ii) of Article 76(1), that provision~~, which states that the co-investment offer should give flexibility in terms of the value and the timing of the participation. For more detail on the ~~discussion notion~~ of minimum ~~levels~~ shares, see ~~(section 3-32.7.2), below, especially paragraph (164).~~

⁶⁶ See section 2.7.1.2 below.

⁶⁷ On this obligation, see section 2.7.4 below.

offer's terms allow co-investors to compete effectively and sustainably in the long term in markets in which the SMP operator is active.

(132) For the assessment of the financial terms, NRAs could make use in particular of information that forms the basis for the network deployment's business case. For example, information about anticipated costs, expected evolution of demand and revenues, as well as the resulting economic risk associated with the deployment might be of interest to the NRAs and could be evaluated.

(133) If possible, NRAs could also use information gathered from benchmarks of comparable co-investment agreements that are already in place or other agreements between market participants. However, the amount of agreements already in place as well as the comparability between different existing agreements and thus different deployment projects might be very limited. This especially seems relevant for the comparison of projects across different countries.

(134) Furthermore, NRAs should look at undertakings actually operating in the market and their ability to compete effectively and sustainably in the long term based on the given terms and conditions. This assessment should take into particular consideration the results of the market test conducted in accordance with Article 79(2) and their representativeness.

(135) In case the NRA concludes that an efficient undertaking cannot compete effectively and sustainably when accepting the proposed terms of the co-investment offer, these terms cannot be considered being fair, reasonable and non-discriminatory and thus do not comply with the conditions of point (b)(i) of the provision. If there are different business models present in the market, NRAs could also make use of several different hypothetical providers of electronic communications networks and/or services for this type of assessment.

~~(65)(1) — The key terms identified above for the ability of potential co-investors to compete effectively and sustainably in the long term,⁶⁸ bankruptcy of one of the co-investors) can make it necessary to terminate the co-investment agreement under fair, reasonable and non-discriminatory conditions. The conditions for such a termination of the co-investment agreement might also reflect the necessity to share given investment and failure risks. In this respect, all co-investors potentially bear a burden relative to their investment share even in case of a termination of the co-investment.~~

~~(66)(1) — Of particular importance for the ability of other co-investors to compete effectively and sustainably in the long term are the co-investment offer's terms and conditions regarding:~~

- ~~○ pricing for access to the co-investment;~~
- ~~○ its corresponding pricing structure;~~
- ~~○ granted rights regarding network access (in particular, type and quality of wholesale access) for co-investors.~~

~~(67)(136) However, these terms, alongside other relevant terms of the co-investment offer, might differ in form and relative importance depending on the specific type of co-investment that the SMP operator offers for others to take part in.⁶⁹ In the following paragraphs (69)137)~~

⁶⁸ Cf. paragraph (127) above.

⁶⁹ See (section 32.1.54) for more detail on the general typology of different co-investment types by business model.

~~to (89) to (152)~~, some of the terms of a co-investment offer are considered more closely in the context of the different co-investment types on the basis of possible shapes each of these co-investment types could present itself. However, the scenarios that are described for the different types are only illustrative examples. As such, they do not exclude the possibility that co-investment models are set up differently and nevertheless potentially fulfil the ~~conditions for Article 76 in general or the principle requirement~~ of fair, reasonable and non-discriminatory terms and the conditions of Article 76 more ~~specifically~~generally.

3.3.2.1.1.2.7.1.1.1. Joint-venture models⁷⁰

~~(68)~~(137) As a co-investment vehicle, a joint venture should grant all co-investors access to the network on an equivalence of input basis.⁷¹ Thus, with their participation, all co-investors have access to the joint venture's infrastructure and can supply users on the basis of the same (or similar) wholesale conditions. For this reason and due to the fact that the joint venture's profits (e.g. generated by wholesale revenue) are usually distributed to the co-investors according to their respective stakes, the risk that the SMP operator can discriminate against other co-investors based on the level of the access conditions included in the offer is rather low.

~~(69)~~(138) As all co-investors are directly involved in the joint venture by holding shares and thus in most cases also participate in the decision-making process, such agreements generally have a relatively high degree of in-built structural character. Therefore, rights awarded to other co-investors will usually be the same or will be very similar to the corresponding rights the SMP operator holds in relation to the joint venture.⁷² This bargaining power that co-investors enjoy due to the certain degree of ownership further reduces the scope for unfair, unreasonable or discriminatory conditions implemented by the SMP operator.

~~(70)~~(139) In case co-investors enter the co-investment at the same time and bear the same level of risk, they should enjoy the same terms. However, co-investors in a joint venture may commit for different levels of participation or may decide to co-invest at different points in time. To this effect, if the terms differ between co-investors, NRAs should evaluate the rationale for these differences which could be justifiable.

~~(74)~~(140) As discussed in section ~~3.2.1.4~~**Error! Reference source not found.**, it might be reasonable for the co-investment offer not to guarantee a late entry into the joint-venture after a certain time. Thus, any such condition in the offer may well be fair, reasonable and non-discriminatory. However, in such a case, an additional mechanism has to be put in place which ensures the effective openness of the co-investment offer as a whole, e.g. by additionally granting access to the co-investment based on the one-way access model.

⁷⁰ *Paragraphs (137) to (152) have not been included in this redraft.*

⁷¹ See Annex IV (c), fifth bullet point.

⁷² However, the extent to which co-investors can make use of these rights might be limited by the respective shares of the joint-venture that they hold.

~~3.3.2.1.2.2.7.1.1.2.~~ Reciprocal access models

~~(72)~~(141) As already set out, co-investors, to a certain degree, own (parts of) the network. As all co-investors are supposed to offer each other reciprocal access on reasonable terms and conditions, such agreements imply a high degree of structural character. Rights awarded to co-investors will be the same or will be similar to the rights of the SMP operator.⁷³ Accordingly, the degree of co-determination (e.g. regarding wholesale products, their pricing and their characteristics) should be relatively high.

~~(73)~~(142) Regarding reciprocal access models, two cases can be distinguished: Either, the level of risk that each co-investor bears differs or the level of risk that each co-investor bears is – less likely however – identical. In both cases, when assessing whether the terms of the offer are fair, reasonable and non-discriminatory NRAs should evaluate if the rationale for possible differences in access conditions is based on economic grounds.

~~(74)~~(143) In the first case, the level of risk co-investors bear differs, e.g. because some co-investors face higher deployment costs per household in less densely populated areas, they are connecting more households or they face greater uncertainty when entering the co-investment at earlier stages than others. In such a scenario, it might be fair, reasonable and non-discriminatory, if the co-investment offer includes differing conditions to be able to compensate co-investors bearing more risk. A compensation can relate to all aspects of the agreement including its financial terms or the awarded rights. Most likely, compensation will either be upfront or recurring payments, as well as higher wholesale prices for access. In such cases, the assessment of the rationale for the compensation is likely to be a central aspect when determining whether the terms are fair, reasonable and non-discriminatory.

~~(75)~~(144) In a perfectly symmetric setting, where all co-investors face the same deployment costs per household, connect the same number of households, enter the co-investment at the same time and thus bear the same level of risk, access conditions are less likely to differ. In such a case, co-investors will usually grant each other access on the *same* terms, in particular regarding granted rights, type and quality of wholesale access and its pricing.⁷⁴ However, if the terms and conditions differ between co-investors, NRAs should evaluate the rationale for these differences, as is the case, as previously described, in a non-symmetrical setup.

~~(76)~~(145) As discussed in section ~~3.2.1.2~~~~Error! Reference source not found.~~, it might be reasonable for the co-investment offer not to guarantee a late entry in a reciprocal access model after a certain time. Thus, any such condition in the offer may well be fair, reasonable and non-discriminatory. However, in such a case, an additional mechanism has to be put in

⁷³ Nevertheless, rights granted to co-investors could be reciprocal but not necessarily identical to the ones granted to the undertaking leading the deployment in a particular area. E.g., reciprocal access could be offered by all co-investors to each other on the basis of an active product, while co-investors might (implicitly) enjoy a different kind of access to the network they deployed themselves respectively.

⁷⁴ As stated in the previous footnote, this does not exclude the possibility that the type of access that co-investors grant each other differs from the implicit access co-investors grant themselves for the area where they deployed the network themselves.

place which ensures the effective openness of the co-investment offer as a whole, e.g. by additionally granting access to the co-investment based on the one-way access model.

~~3.3.2.1.3.2.7.1.1.3.~~ One-way access models

~~(77)~~(146) Compared to joint-venture and reciprocal access models, which by themselves involve a certain degree of co-ownership, the level of structural rights co-investors enjoy in one-way access models might be lower.⁷⁵ Therefore, in some cases there might be a higher risk that the SMP operator can use this potential imbalance to include terms in the co-investment offer that are unfair, unreasonable or discriminatory. However, by implementing specific provisions (e.g. access based on IRUs) one-way access models can generally fulfil the requirement of fair, reasonable and non-discriminatory terms. In this regard, the following paragraphs go into more detail on potential requirements for the co-investment offer's terms.

~~(78)~~(147) The assessment of the co-investment offer's financial terms is of particular importance in the case of one-way access models in order to ensure that co-investors are able to compete effectively and sustainably in the long term. The financial terms are mainly determined by the effective wholesale prices that co-investors have to pay to supply end users using the SMP operator's network. These prices usually consist of recurring payments per end user connected, but regularly also include upfront payments that are linked to the level of the respective commitment a co-investor is making.

~~(79)~~(148) Compared to joint-venture and reciprocal access models, one-way access models are more flexible regarding the potential for late entry of additional co-investors or regarding the potential to increase the participation of an existing co-investor. Those variations usually imply differences in the level of risk borne by the respective co-investor. Therefore, the co-investment offer might include conditions that differentiate wholesale prices depending e.g. at which point in time co-investors make a commitment or on the level of commitment co-investors make.⁷⁶

~~(80)~~(149) Especially in one-way access models, the type of wholesale access to the network that is being granted to other co-investors as well as the quality of the wholesale access are of particular importance. There can be circumstances where potential co-investors would need a specific type of wholesale access (e.g. passive access products like unbundled fibre access) to compete effectively and sustainably in the long term in downstream markets in

⁷⁵ One-way access models are defined in section ~~3.2.1.3~~~~Error! Reference source not found.~~ As stated before, in case of purchase agreements, these need to entail the acquisition of specific rights to capacity of a structural character in order for the offer to constitute a co-investment. Even though the level of structural rights co-investors enjoy might be lower in one-way access models, per definition they cannot contain the mere rental of capacity.

⁷⁶ *"The determination of the financial consideration to be provided by each co-investor needs to reflect the fact that early investors accept greater risks and engage capital sooner."*, Annex IV (c), second bullet point. *"A premium increasing over time shall be considered to be justified for commitments made at later stages and for new co-investors entering the co-investment after the commencement of the project, to reflect diminishing risks and to counteract any incentive to withhold capital in the earlier stages."*, Annex IV (c), third bullet point. ~~It should be noted that the relationship between the timing of entering into the co-investment agreement and the corresponding risk associated with this decision is not always linear. Thus, later investment decisions do not always imply lower levels of risk of the co-investment as a very high degree of market saturation can significantly lower the commercialisation chances of potential co-investors.~~

which the SMP operator is active. Therefore, if the set of access products is limited by the SMP operator, NRAs have to assess whether additional wholesale products need to be included in the co-investment offer or whether changes to the quality of access are necessary.⁷⁷

~~(81)~~(150) In this context, different wholesale or participation prices could be justified for different forms of wholesale access to the network (e.g. active and passive access products). In general, wholesale products higher up the value chain – meaning products where the SMP operator creates more value added (e.g. Layer 3 bitstream access products) – will generally bear higher prices because of the higher value added.

3.3.2.1.4.2.7.1.1.4. Mixed-form models

~~(82)~~(151) Relevant factors for the assessment of the NRA that have been mentioned for each of the co-investment types separately will usually also be of relevance in cases where a co-investment agreement consists of a mix of more than one of these types. However, there might also be specific factors that become relevant when combining such co-investment types. Most likely, these will be case-specific and, as such, subject to scrutiny by NRAs according to the principles of fair, reasonable and non-discriminatory terms.

~~(83)~~(152) In case different types of co-investment alternatives are implemented within a given co-investment offer, it might be justified that the offer's terms (including the financial terms) differ across the different types of co-investors. In this regard, various sets of rights and protection granted to co-investors could justify different financial terms as these different types might be linked to differences in the level of risk that the varying types of co-investors bear.

3.3.2.1.5. Considerations for all types of co-investment models

~~(84)~~(1) Irrespective of the type of the co-investment model, when evaluating whether the co-investment offer's terms and conditions are fair, reasonable and non-discriminatory, NRAs in particular have to assess the potential variations that might be included in the offer's terms as described above. In this respect, NRAs might evaluate whether proposed differences in the terms offered are based on reasonable economic grounds and where applicable, whether these differences are based on the level of risk associated with different levels or timings of commitments⁷⁸. This aspect is of particular importance to ensure that the offer's terms allow co-investors to compete effectively and sustainably in the long term in markets in which the SMP operator is active.

⁷⁷ For this evaluation, past decisions on imposed access remedies could potentially be used as assessment material. However, in many cases, the assessment of the co-investment offers' terms regarding wholesale access cannot directly be compared to past regulatory decisions such that an independent assessment based on all relevant (case-specific) factors needs to be performed.

⁷⁸ It is important to note that different undertakings participating in a co-investment potentially evaluate the level of risk associated with a given commitment differently. This could especially be the case when comparing the SMP operator with other co-investors, which are often smaller and thus cannot achieve as great efficiency as the SMP operator through economies of scale.

~~(85)(1) For the assessment of the financial terms, NRAs could make use in particular of information that forms the basis for the network deployment's business case. For example, information about anticipated costs, expected evolution of demand and revenues, as well as the resulting economic risk associated with the deployment might be of interest to the NRAs and could be evaluated.~~

~~(86)(1) If possible, NRAs could also use information gathered from benchmarks of comparable co-investment agreements that are already in place or other agreements between market participants. However, the amount of agreements already in place as well as the comparability between different existing agreements and thus different deployment projects might be very limited. This especially seems relevant for the comparison of projects across different countries.~~

~~(87) Furthermore, NRAs should look at undertakings actually operating in the market and their ability to compete effectively and sustainably in the long term based on the given terms and conditions. This assessment should take into particular consideration the results of the market test conducted in accordance with Article 79 (2).~~

~~(88)(1) In case the NRA concludes that an efficient undertaking cannot compete effectively and sustainably when accepting the proposed terms of the co-investment offer, these terms usually cannot be considered being fair, reasonable and non-discriminatory and thus do not comply with the conditions of Article 76 (1) (b) (i). Alternatively, NRAs could potentially evaluate the terms of the co-investment offer by assuming a hypothetical efficient provider of electronic communications networks and/or services. If there are different business models present in the market, NRAs could also make use of several different hypothetical providers of electronic communications networks and/or services for this type of assessment.~~

3.3.2.2.2.7.1.2. “Access to the full capacity of the network to the extent that it is subject to co-investment”

~~(89)(153) “Access to the full capacity of the network” implies that the co-investment offer's terms should allow other co-investors to have access to the full potential of the new very high capacity network and that the granted access can – if at all – only be limited by given (technical) circumstances that equally affect all co-investors, including the SMP operator, and not be restricted otherwise.~~

~~(90)(154) The condition implies that co-investors must be allowed to have access to the full capacity of the network, including the possibility to provide services (i.e. wholesale and retail services) without undue restriction/unrestricted by the SMP operator for other than duly justified technical reasons, so as to compete in downstream markets.~~

~~(91)(155) This requirement holds irrespective of what the SMP operator offers to its own retail arm and applies to all kinds of co-investments addressed by this Article.⁷⁹~~

⁷⁹ Cf. paragraph (30) et seqq.

~~(92)~~(156) However, this does not imply that the SMP operator is required to offer the co-investors better conditions than it would be able to offer itself. Rather, the offer's terms should ensure that the SMP operator provides unrestricted access to the technical capacity of the network. This capacity can especially be influenced by any limitations given by the network's architecture or other technical conditions. ~~In certain cases, access~~Access to the full capacity may have to be ensured by providing the possibility for passive access (e.g. access to dark fibre).

~~(93)~~(157) However, the previously described – in a technical sense unrestricted – access to the network⁸⁰ is limited by “*the extent that the network is subject to co-investment*”.

~~(94)~~(158) This implies that access only needs to be granted to new network elements that are subject to the co-investment. Other elements of the network – e.g. other parts of the SMP operator's network that are not part of the co-investment scheme and possibly already existed before – are generally not covered by this requirement and thus do not need to be accessible under the co-investment offer. Nonetheless, NRAs need to ensure that the co-invested elements are capable of making a significant contribution to VHCN deployment as part of their initial screening of the offered commitments pursuant to Article 79(2).⁸¹

~~(95)~~(159) Furthermore, access is also limited based on the commitment a co-investor invests into and thus also on the level of risk an individual co-investor bears with its commitment, independent of the specific type of ~~the co-investment vehicle~~business model.

2.7.2. Guidelines on Article 76 Par 1 point (b)(ii) of the provision

3.3.3. Point B) (II)

~~(96) — In general, it is recognised that the requirement for flexibility needs to be balanced against incentivising early and material commitment to the co-investment project, so that the benefits of co-investment in terms of pooling of costs and risks can be realised. However, additional⁸² co-investors may emerge at different stages of the network deployment project, including after the commencement of the project itself, with the financial conditions having to be set in a way that reflects the different levels of risk accepted by the individual co-investors.~~

Point (b) (ii): “flexibility in terms of the value and timing of the participation of each co-investor;”

~~(160) Flexibility~~The requirement for flexibility with regard to the value and the timing of each potential co-investor's participation implies the need for the offer to foresee a degree of choice for co-investors along both of these axes. Just as the offer needs to remain open

⁸⁰ Cf. paragraph (153).

⁸¹ However, in some cases compliance with this condition could be complex. E.g. in the case of network upgrades (see Section 3.1.4), the network elements subject to the co-investment agreement might only form a small part of the VHCN as a whole. In such cases, it might not be possible or reasonable to grant access solely to the network elements subject to the co-investment. In such cases, it could be necessary to also grant access to some parts of the network that are not subject to the co-investment in order to make sure that the co-investors have access pursuant to this Article. Cf. also paragraph (27).

⁸² Paragraph 2 of Article 76 requires that at least one potential co-investor has entered into a co-investment agreement with the undertaking designated as having significant market power.

across the economic lifetime of the deployment,⁸³ choices in these dimensions are necessary to maximise long-term risk sharing opportunities, enable providers' participation according to their evolving means and promote the emergence of durable and effective competition through and on the co-invested network elements. This implies that offers foreseeing only one option on either of these dimensions will not be compliant with the requirements of the provision, and the NRA cannot proceed to declare the associated commitments binding.

~~(97)~~(161) The SMP operator can achieve flexibility in terms of the value of the participation of each co-investor ~~could be achieved in its co-investment offer~~ in various ways, depending on the specifics of the ~~co-investment arrangement~~. For example, ~~offering co-investors the option to commit more or less capital for a larger or smaller share of the project or options to purchase an IRU to different amounts of capacity~~proposed terms.

~~(98) — Under this flexibility, variations in financial terms may be possible, subject to these being justified on the basis of the same objective(s), such as the financial commitment of the co-investor, transparency, non-discrimination and predictability⁸⁴.~~

~~(99) — In determining whether the flexibility provided in the offer meets the requirements of Article 76, NRAs need to be cognisant of the considerations to safeguard the economic viability of the co-investment project.~~

~~(100) — In principle, small providers of electronic communications networks and/or services should not be prevented from participating in the co-investment. Nevertheless, it may be reasonable for the SMP operator to set a minimum share of participation to ensure the effective management and governance of the project and to manage the level of its own risks. Undertakings that only commit to a very small share do not bear much of the investment's relevant risks and thus are more comparable to access seekers (addressed in point (d)); they should not get the same treatment as co-investors which bear material risk associated with the investment (otherwise this would undermine incentives to participate in the first place). In determining whether any minimum share specified by the SMP operator meets the requirements of Article 76, the NRA should assess whether it achieves this purpose, and ensure it goes no further than this. The minimum share should not be specified in such a way that it prevents the participation of undertakings that would otherwise make a material positive contribution to promoting effective and sustainable long-term competition in any downstream markets in which the undertaking designated as having significant market power is active.~~

~~(101) — Concerning the flexibility in terms of the timing of participation, the co-investment offer may allow potential co-investors and third party undertakings to join the project (i.e. potential participants that are not in the initial list of co-investors) at different stages regardless of the~~

⁸³ Cf. section 2.5.2.

⁸⁴ For example, provided the overall financial expenditure for the same services is the same, the fact that in a scenario where one co-investor pays a large part of the cost in the form of an up-front investment and lower ongoing costs, and another co-investor pays a smaller part of that the cost in the form of an upfront investment but pays higher ongoing costs totalling the same, the different payment mechanisms could be considered as being non-discriminatory, provided that the possibility of investing is open to everyone equally up front such that they each have equality of opportunity.

~~stages of the co-investment project. Flexibility for existing co-investors to change the level and/or share of their participation is considered below, under point b (iii).~~

~~(162) Terms allowing for different forms of participation will generally be more suitable to giving potential co-investors flexibility to choose and possibly adapt their participation as their situation evolves. For example, a provider initially selecting a type of one-way access can thus be enabled to upgrade its participation to investing in a joint venture. Such opportunities will be of particular importance for smaller operators who dispose of relatively fewer financial means and less flexibility in assigning them to new deployments,⁸⁵ especially where several offers compete for their attention.~~

~~(163) Participation flexibility in value terms can thus be achieved by offering potential co-investors to commit more or less capital in exchange for greater or lesser involvement in the deployment, reflecting the mode of participation they select. A more restricted form of flexibility can be achieved by proposing different value commitments within a single mode of participation, such as a larger or smaller stake in a joint venture operation or options to purchase IRUs to different amounts of capacity.~~

~~(164) For different forms of participation, SMP operators may opt to set different minimum shares of participation to the extent that these can be justified as being necessary to ensure the viability of the deployment, are transparently accessible on a non-discriminatory basis and do not produce exclusionary effects. NRAs also need to carefully scrutinise the setting of such minimum shares with regard to the openness condition.⁸⁶ Definition of such shares is without prejudice to the possibility for SMP operators to reasonably require potential co-investors to evidence their financial capacity to make good on their participation commitments.⁸⁷~~

~~(165) For a given value of participation at a given moment, SMP operators may facilitate differences in payment modalities for as long as these are transparently accessible on a non-discriminatory basis, do not produce exclusionary effects and guarantee the same structural rights of co-determination, subject to variation proportionate to the resultant changes in risk distribution between participants. Complying with these conditions, an SMP operator could thus, for example, allow different capital and operational expenditure levels for different participants across the same period. Allowance of such flexibility in payment terms must not negatively prejudice other co-investors' opportunities for participation and notably not prevent acquisition of the same structural rights for the same commitment at the same moment in time.~~

~~(166) Flexibility in terms of the timing of participation for potential co-investors at base is closely related to the openness condition, i.e. the possibility for all providers of electronic communications to join the deployment as co-investors over its lifetime.⁸⁸~~

~~(167) This requires the offer notably to foresee appropriate options for joining the co-investment after an initial agreement has been reached between the SMP operator and the first round~~

⁸⁵ Cf. Annex IV (c), 2nd indent, 1st sentence.

⁸⁶ See section 2.5.1 above.

⁸⁷ Cf. Annex IV (a).

⁸⁸ Cf. note 86.

of participants.⁸⁹ Subsequent entry options should not be limited by the stage of the co-investment project. Flexibility for existing co-investors to increase their participation over the lifecycle of the co-invested elements is considered below, under point (b)(iii). Moreover, the offer should also foresee the possibility for existing co-investors to transfer their rights to other co-investors or new entrants, if the receiving party/ies commit/s to take on all of the associated obligations.⁹⁰

(102)(168) The terms faced by co-investors participating/joining at different points in time need to satisfy the requirement under point (b)-(i)-such that, discussed above,⁹¹ for the terms of the co-investment offer are to be fair, reasonable and non-discriminatory (discussed above).

3.3.4.2.7.3. Guidelines on Article 76 Par 1 Point B) (III) point (b)(iii) of the provision

Point (b)-(iii): "the possibility to increase such participation in the future;"

(103)(169) The co-investment offer shall confer flexibility for existing grant co-investors the possibility to increase the level and/or share of their participation.⁹² In principle, the offer could also As discussed above in relation to the flexibility of the timing of participation for potential co-investors,⁹³ the offer also needs to allow existing co-investors to decrease their participation, divestiture of rights by reassignment, subject to the existence of another co-investor willing to buy their share or right of recipient taking on all related obligations, thus allowing for a decrease in participation.

(104)(170) In some cases, the level of participation will not place any limit on a co-investor's ability to compete at the retail level. For example, under a joint venture model, co-investors may contribute a share of the financial outlay required to fund the network deployment, in exchange for a share of ownership of the company responsible for rolling out the VHCN. It is then possible that the co-investors would be free to utilise any amount of capacity on the network, subject to their downstream business paying the per line access charges.

(171) However, it is recognised that under some forms of co-investment the level of participation offer may be specified in such a way that it relates limit access to a share of the full capacity of the network under fair, reasonable and non-discriminatory conditions to

⁸⁹ Cf. paragraph (83).

⁹⁰ Cf. Annex IV (c), 4th indent.

⁹¹ See section 2.7.1.1 above.

⁹² An example of the form this could take is set out in Annex IV, point (c): "The offer shall allow flexibility ... for example by means of an agreed and potentially increasing percentage of the total end-user lines in a given area, to which co-investors have the possibility to commit gradually and which is set at a unit level enabling smaller co-investors with limited resources to enter the co-investment at a reasonably minimum scale and to gradually increase their participation while ensuring adequate levels of initial commitment."

⁹³ Cf. paragraph (167).

the extent it is subject to co-investment. For example, under a one-way access model, participants may purchase an IRU to a proportion of capacity on the network.

(105)(172) Where this is capacity access limitations apply in function of the ease degree of participation, the co-investment offer must ensure that once the co-investor reaches this level of capacity, it is not prevented from competing for customers at the retail level. The requirement for flexibility obligation to foresee a possibility to increase participation in the future could satisfy responds to this requisite requirement. Alternatively, the offer could set out arrangements for co-investors which have exhausted their own share of capacity to access other co-investors' share of capacity.

(106)(173) ~~It is recognised~~ BEREC recognises that the requirement for SMP operators to provide flexibility for the possibility to increase participation in their offer could raise issues once rights to the capacity of the new VHCN are fully allocated. ~~Participants seeking to join the co-investment offer or~~ After that point, both potential and existing co-investors can only increase their share at a later point in time can only do so by acquiring rights from those who already hold it, thus diluting other existing co-investors.⁹⁴ ~~While the rights of the latter co-investors. There are various~~ SMP operator might propose complementary approaches in the co-investment offer could adopt in to address such a scenario, including any such arrangements for the reallocation of capacity (the co-investment offer would then need will have to set out the mechanism, including how existing co-investors are to be compensated), and potentially extended to placing limits of the degree of flexibility offered simultaneously respect the requirements of condition (b)(i). In assessing whether the offer meets the requirements of Article 76, NRAs will thus need to consider whether the such a complementary approach adopted is appropriate appropriately balanced, bearing always in mind the aim of enabling effective and sustainable long-term competition downstream.

(107)(174) Finally, BEREC considers that the level of participation of a provider of electronic communications networks and/or services should not place a limit on the retail market share which they may compete for. This is because NRAs should therefore reject any terms creating such limits/limitations, which could result in an outcome where the retail market is being de facto shared between co-investors, and as such an outcome would run counter to the aim of promoting effective and sustainable long term competition at the downstream level.

2.7.4. Guidelines on Article 76 Par 1 point (b)(iv) of the provision

3.3.5. Point B) (IV)

Point (b) (iv): *"reciprocal rights awarded by the co-investors after the deployment of the co-invested infrastructure;"*

⁹⁴ Cf. Annex IV (c), 4th indent. BEREC underlines that 'third parties willing to enter into the co-investment agreement' in the sense of that indent extends only to providers of electronic communications networks or services.

~~(175) Reciprocal~~ The fourth item under condition (b) requires the offer to provide for co-investors to award each other reciprocal rights ~~are of particular importance~~ after the co-invested network elements have been deployed.

~~(176)~~ This requirement, while particularly important in the reciprocal access model. For example, where co-investors are individually,⁹⁵ stipulates a general obligation that is applicable to all co-investment scenarios and separately responsible for the ~~cannot be derogated from~~. Any offer foreseeing limitations or the possible abolition of such reciprocal award duties will thus manifestly fail to satisfy the necessary conditions for offers under the provision and cannot provide a valid basis for NRAs making the corresponding commitments binding.

~~(177)~~ BEREC furthermore underlines that the reference in point (b)(iv) to the period following completion of the deployment of specific parts of the network, does not imply any limitation with regard to the parties obligated. The duty among co-investors to grant each other reciprocal rights ~~is thus not limited to providers having joined the SMP operator's co-investment offer before the deployment was finalised, but extends to all potential co-investors opting to participate, before and after that point, whether by acquiring new rights or by agreeing to a transfer of rights from an established participant~~. NRAs should therefore also assess offers providing for restrictions of the obligation in time as non-compliant.

~~(178)~~ As per Annex IV, the conditions for the grant of reciprocal rights must both be transparent and be made transparent in the co-investment offer and subsequent agreement.⁹⁶ NRAs can therefore use this requirement as an initial screening criterion for establishing compliance of the SMP operator's offer with the conditions of point (b) in its entirety.

~~(108)~~ — Materially, co-investors, including the SMP operator, shall grant each other access to the co-invested infrastructure should be granted for the purposes of providing services downstream, including to end-users⁹⁷. However, reciprocal rights may also be relevant in other co-investment models.

~~(109)~~~~(179)~~ Annex IV requires that if on fair and reasonable terms and conditions.⁹⁸ Where a co-investment vehicle is created, it shall provide access to the network to all co-investors, whether directly or indirectly, on an equivalence of inputs basis and in accordance with fair and reasonable terms and conditions. This implies that the terms of access should be non-discriminatory between co-investors, irrespective of their value share.⁹⁹

~~(110)~~~~(180)~~ In principle, where reciprocal rights are granted between equal co-investors, the terms should be identical. Any differences should be objectively justified. For example, as

⁹⁵ Annex IV (c), 5th indent stipulates to that effect that "Co-investors shall grant each other reciprocal rights ..., in particular, where co-investors are individually and separately responsible for the deployment of specific parts of the network."

⁹⁶ Annex IV (c), 5th indent, 1st sentence.

⁹⁷ As per Annex IV, conditions are to be made transparent in the co-investment offer and subsequent agreement.

⁹⁸ Ibid.

⁹⁹ Annex IV, paragraph (c), first bullet 1st indent states: "Non-discriminatory terms in this context do not entail that all potential co-investors shall be offered exactly the same terms, including financial terms, but that all variations of the terms offered shall be justified on the basis of the same objective, transparent, non-discriminatory and predictable criteria".

discussed under point (b)(i), differences in terms may be justified to reflect differences in the level of risk accepted and agreed upon by the individual co-investors.

3.4. Guidelines on Article 76 Par 1 Point C)

Point c)

"it is made public by the undertaking in a timely manner and, if the undertaking does not have the characteristics listed in Article 80(1), at least six months before the start of the deployment of the new network; that period may be prolonged based on national circumstances;"

(111) — According to Article 76(1)(c), when NRAs assess — following the procedure set in Article 79 — the commitments on co-investment offered by the SMP operator, they should assess, among other conditions, that the publication of the offer to co-invest is done in a timely manner.

(112) — The aim of this provision is to allow the potentially interested providers of electronic communications networks and/or services to participate in the project from the beginning of the deployment (i.e. the rollout) of the new network, having at their disposal enough time to evaluate all the elements needed to take the most appropriate decision before the deployment starts and to allow them to compete from the beginning with the SMP operator. The EECC considers appropriate that a period of at least six months is allowed to companies, for these to carry out all the internal steps needed to participate in the co-investment project. Nevertheless, each NRA, based on the national circumstances, may extend that period under justified reasons in the context of the commitment procedure. The practical declination of the "timely manner" principle is therefore an announcement period for the co-investment offer not shorter than six months prior to the official start of deployment of the project.

(113) — The period limit of "at least six months" refers only to the case in which the SMP operator is not a wholesale only operator. In the case of an SMP wholesale only operator, this period could be shorter, absent the advantage of the vertically integrated SMP operator to start retail offers immediately after the deployment, in advance of competitors (all co-investors will be in the same position regarding the launch of retail offers).

~~(114)(1) — It is important to clarify how to assess whether the offer to co-invest is made public "in a timely manner", also considering that this offer will be presented in the context of the complex commitment procedure according to Article 79.~~

(115) — It is clear from the text that the relevant period of at least six months starts from the date of the publication of the co-investment offer and ends when the deployment of the new network starts.

(116) — BEREC's interpretation regarding the requirement for publication of the co-investment offer is that it mainly aims to ensure transparency. Therefore, for such publication to satisfy the requirements of Article 76 (1)(c), it should not be necessary for the offer to be already binding towards stakeholders.

(117) — The SMP operator may offer commitments under Article 79 of the EECC in relation to a specific co-investment offer in order to obtain the deregulation of the new network. The publication of the co-investment offer can be done at a different time from the offer for commitments to the NRA (before/during/after the commitment procedure). When the SMP

~~operator decides to publish the co-investment offer before the commitment procedure ends, the operator may clearly state that the offer is considered valid only in case the NRA will issue a deregulatory decision.~~

~~(118)(1) Regarding the six months period, BEREC identifies three possible scenarios depending on when the co-investment offer is published:~~

~~1. Publication of co-investment offer *after* the commitment's procedure ends.~~

~~In this scenario, the SMP operator decides first to offer commitments on co-investment before the publication of the offer. Consequently, the NRA — taking into account the results of the market test — can make them binding and declare to not impose any remedy in relation to the new network (declaring that the deregulation will apply from the moment when at least one company entered into the co-investment agreement). Then, the SMP operator publishes the co-investment offer and after (at least) six months the deployment of the network starts. The commitments need to be sufficiently clear and precise so that NRAs can verify the compliance with Article 76 and Annex IV, and stakeholders are able to participate at market test with their comments.~~

~~2. Publication of co-investment offer *before or during* the commitment's procedure and *relevant changes* at the end of the procedure.~~

~~In case the SMP operator publishes the offer of co-investment before or during the commitment procedure and then the offer changes *significantly* during this procedure, it is reasonable that the counting of the six-month period will restart from the date of the re-publication by the SMP operator of the definitive offer (the one that will be made binding). However, such a decision will usually be based on case-specific characteristics. BEREC thus proposes that NRAs apply a case-by-case approach in this respect.~~

~~3. Publication of the co-investment offer *before or during* the commitment's procedure and *no* relevant changes at the end of the procedure.~~

~~In case the SMP operator publishes the offer of co-investment before or during the commitment procedure and then the offer does not significantly change during this procedure and it is complete (includes the minimum set of information, see below), the counting of the six-month period will start from the initial date of the publication (the published offer will not be significantly different from the one that will be made binding). In order to guarantee the highest level of transparency to stakeholders, if SMP operator publishes the offer before the commitment procedure, BEREC suggests that the SMP operator should clearly indicate in the publication the intention to propose commitments under Article 79 of the EEC on the basis of that offer. This information is required for the publication of the offer to count towards the six-month period.~~

~~(119) — In relation to the possibility to extend the six-month period based on national circumstances, it is reasonable that NRAs evaluate such extensions in the context of the commitment procedure at the request of the SMP operator or alternative providers of electronic communications networks and/or services (during the market test). This prolongation under national circumstances can mostly be related to the need for other co-investors to prepare for the start of marketing activity, so that the SMP operator does not get a first-mover advantage.~~

~~In some cases, a period longer than six months may be needed in case of complex co-investment schemes or products, or the need to implement new interfaces.~~

~~(120) — Annex IV sets out the criteria that the co-investment offer must meet at a minimum, in order to allow NRAs to accept commitments and make them binding.~~

~~(121) — Annex IV, point b, indicates different levels of transparency for a co-investment offer:~~

~~a. — Necessary elements of the offer must be published on the website for interested undertakings to understand the offer (“shall be available and easily identified on the website of the undertaking”);~~

~~b. — Full detailed terms of the offer would not be made available immediately through the publication but only after a bidder expresses its interest (“full detailed terms shall be made available without undue delay to any potential bidder that has expressed an interest”);~~

~~c. — The process/road map for the establishment and development of the co-investment project “must be set in advance, shall be clearly explained in writing to any potential co-investor, and all significant milestones shall be clearly communicated to all undertakings without any discrimination”.~~

~~(122) — Concerning the information to be published on the website (point a. listed above) of the SMP undertaking, the published offer should include information that is essential to allow potential co-investors to judge whether they might have an interest in the co-investment proposal. This information should include a description of the co-investment project (content of the project, including technical characteristics and the geographical area/areas involved and “all significant milestones”).~~

~~(123) — Regarding the information to be made available without undue delay to any potential bidder that has expressed an interest (point b. listed above), Annex IV, point b refers to disclosure of the full detailed terms, which are to include, but not necessarily be limited to, the following terms:~~

~~1. the legal form of the co-investment agreement (e.g., (a) special purpose vehicle (e.g. Joint venture), (b) reciprocal access model (e.g. joint-build consortium (with terms regarding financial consideration required for the acquisition of specific rights, during the building phase and during the exploitation phase, for example infeasible rights of use contracts (“IRUs”)), (c) one-way access model managed by SMP operator);~~

~~2. financial conditions and conditions for late entry;~~

~~3. technical characteristics of potential wholesale products or more detailed information about the deployment areas (e.g. household-level data);~~

~~4. conditions and the adaption mechanism related to access seekers as per Article 76 (1) (d);~~

~~5. the heads of term of the governance rules of the co-investment vehicle (when relevant).~~

~~(124) — On the process/road map (point c. listed above), the milestones of the roadmap could also be published on the website and the detailed terms would then be communicated in writing to any potential co-investor afterwards, upon request, in a non-discriminatory manner.~~

~~(125) — As noted above, there are different levels of transparency required in terms of Annex IV with regards to the information included in the co-investment offer. While essential elements must be made publicly available on the website of the undertaking, full detailed terms would not be made available immediately through publication, but only after a potential bidder expresses interest. In any case, when the SMP operator presents commitments, they need to be complete and sufficiently clear and precise for NRAs to verify the compliance with Article 76 and Annex IV, and for stakeholders to be able to contribute to the market test with their comments.~~

~~(126)(1) — It is important that the information should be available on a transparent and non-discriminatory basis. NRAs must take into account the rights and obligations of undertakings and potential co-investors with regards to commercially sensitive/confidential information and without prejudice to any affected party and/or stakeholder. Where any of the relevant undertaking(s) consider(s) certain aspects of information included in the co-investment offer to be of a confidential and/or commercially sensitive nature, and thus only to be shared with interested bidders upon request and subject to confidentiality provisions, the relevant undertaking(s) should provide in any case the NRA with complete details of such information along with objective reasons justifying why it considers the information to be confidential and/or commercially sensitive. The NRA should then consider the classification of the information as “confidential” in accordance with its own criteria for dealing with confidential information and decide accordingly.~~

~~(127) — If and when any of the commercially sensitive and/or confidential information identified ceases to be commercially sensitive and/or confidential, it must be made available by the relevant undertaking on its publicly available website without undue delay.~~

~~(128)(1) — Any actions regarding the exchange of information and level of transparency in the context of Articles 76 and 79 of the EECG are without prejudice to competition law.~~

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

Point d)

~~“access seekers not participating in the co-investment can benefit from the outset from the same quality, speed, conditions and end-user reach as were available before the deployment, accompanied by a mechanism of adaptation over time confirmed by the national regulatory authority in light of developments on the related retail markets, that maintains the incentives to participate in the co-investment; such mechanism shall ensure that access seekers have access to the very high capacity elements of the network at a time, and on the basis of transparent and non-discriminatory terms, which reflect appropriately the degrees of risk incurred by the respective co-investors at different stages of the deployment and take into account the competitive situation in retail markets;”~~

~~(129) — The main goal of this provision is to maintain the “competitiveness of markets” (see Recital 200) by means of granting access to third parties, i.e. those that are not part of the co-investment. Therefore, efficient access seekers should be able to enter the market and/or~~

~~remain a relevant competitive force. Any offer or adaptation mechanism which is likely to prevent this is not in line with Article 76 (1) (d).~~

~~(130) — On the other hand, the adaptation mechanism has to maintain the incentives to participate in the co-investment, i.e. it has to give the co-investors advantages compared to access seekers (with respect to the access to the new very high capacity network or to elements of the network).~~

~~3.5.1.1.1.1. Access as before the deployment~~

~~(131) — According to Article 76 (1) (d) existing and potential new access seekers have to benefit from the outset (i.e. the activation of the VHCN) from the same quality, speed, conditions, and end-user reach that were available before the deployment. Access of this form can be provided either using the new VHCN elements or via the 'old' ones (i.e. legacy infrastructure, if it is still in place).~~

~~(132) — The achievable download and upload speeds have to be the same as before the deployment. Other relevant quality parameters that may be considered are, for example, delay, jitter, packet loss, and availability. However, speed is likely to be the most important parameter. The term "conditions" includes prices, processes for ordering and repair, provision of information, etc. End-users addressable before the deployment should also be addressable thereafter. If business grade quality characteristics were available before the deployment, they should also be available after the deployment.~~

~~3.5.2.1.1.1. Access to very high capacity network elements~~

~~(133) — Access to the very high capacity network elements could be either in the form of active access (e.g. virtual unbundling) or passive access (e.g. fibre unbundling). In the form of active access, it would mainly refer to access to higher bandwidths (higher than before the new very high capacity network deployment). In case of passive access, the access seeker in principle can offer to its customers any bandwidth that would be technically possible.~~

~~(134) — The form (active, passive or both) and conditions of access to third parties should be part of the co-investment offer, which is subject to the scrutiny of the NRA and to a market test. This part of the offer should also describe the adaptation mechanism, either by laying down the timing and nature of the adaptations or by describing the triggers which will lead to adaptations and the form of these adaptations. If relevant, quality characteristics should also reflect quality needs for access seekers providing services to business users.~~

~~(135) — According to Article 76 (1) (d), access to the very high capacity network elements has to be provided to access seekers at a time which appropriately reflects the degree of risk incurred by the co-investors at different stages of the deployment, taking into account the competitive situation at the retail level. Therefore, different types of adaptation mechanisms are possible depending on the risk incurred and the retail market developments, in particular the competitive situation in retail markets.~~

~~(136) — Timing, pricing, and quality (mainly speed) are the main factors of the adaptation mechanism.~~

~~(137) — Timing: The offer may determine a time at which access seekers (which are non-co-investors) get access to the very high capacity network elements (e.g. in form of higher bandwidths). In order to maintain incentives to participate in the co-investment, co-investors may be allowed to benefit from a first-mover advantage with regard to the selling of higher bandwidths, which usually have the highest margins. The appropriate length of this period depends on the degree of risk incurred by the co-investors. A longer period may be justified, if the risk is high, e.g. where the rollout cost per customer is particularly high and there is significant uncertainty about future demand and willingness to pay for high bandwidths. However, a very long period (e.g. beyond five years), especially in the absence of retail competition from other infrastructures, may not meet the criteria of Article 76 (1) (d) since it is unlikely that access seekers remain competitive during such a long period without access to the very high capacity network elements/higher bandwidths.~~

~~(138) — Pricing: The prices for access to very high capacity network elements may vary over time. For example, prices may be higher in the beginning reflecting higher retail prices of the co-investors and/or demand uncertainty and could then be reduced over time. Furthermore, effective wholesale price levels for access seekers could be higher than for co-investors to reflect the risk that co-investors incur, and to maintain the incentives to participate in the co-investment. The price differential would effectively be limited by the condition that efficient access seekers should be able to enter the market and/or remain a relevant competitive force.~~

~~(139)(1) — Quality: The quality of access for non-co-investors (in particular the speed) might be restricted compared to the quality available to co-investors. This would be similar to a first-mover advantage as discussed under 'Timing'. Nevertheless, co-investors must provide access seekers from the outset the same quality as available before the deployment of the new VHGN.~~

~~(140) — The offer can contain one or several of these factors when determining the terms of wholesale access to non-co-investors. NRAs need to assess the offer against the background of national market characteristics to decide whether it allows efficient access seekers to enter the market and/or remain a relevant competitive force and therefore meet the requirements of Article 76 (1) (d).~~

~~(141) — Adaptations may occur only once (e.g. when access to fibre unbundling is granted), or several times (e.g. when the network is upgraded repeatedly. Or — in case of active wholesale products — co-investors increase their retail bandwidths repeatedly, or there are changes in the competitive situation in retail markets). The timing of adaptations or the triggers leading to adaptations should be communicated from the outset in a way which provides sufficient predictability for access seekers and co-investors. In case of changes, the access seekers and the NRA should be informed with due notice (at least six months in advance). The NRA has to confirm the adaptation mechanism (and potential changes to it) in its assessment, and monitor or enforce its application over the period of the commitments.~~

~~(142) — The requirements of Article 76 (1) (d) have to be viewed as minimum requirements in order to maintain the competitiveness of markets. Therefore, co-investors may also decide to grant access to the very high capacity elements of their network from the outset.~~

~~(143)(1) — Once supplied, access to the very high capacity network elements has to be offered on the basis of transparent and non-discriminatory terms. Therefore, the terms of access~~

~~should be published by the co-investors. Non-discrimination applies among access seekers, but not necessarily between co-investors and access seekers.~~

~~(144) — The NRA should review the access conditions and the adaptation mechanism periodically, at least every five years (or a comparable timeframe as set for market analyses).~~

~~3.6. Guidelines on Article 76 Par 1 Point E)~~

~~Point (e)~~

~~“it complies at a minimum with the criteria set out in Annex IV and is made in good faith.”~~

~~(145) — The criteria set out in Annex IV are an integral part of the conditions (a) to (d) of Article 76 and have therefore also been assessed in the context of these Guidelines. BEREC may revisit its position on this aspect at a later stage.~~

~~(146) — No relevant issues regarding the condition of a co-investment being made in good faith have been identified for this point so far.~~

4.3. REVIEW CLAUSE

~~(181) BEREC intends to report on the practical application of these guidelines in accordance with point (j)(i) of Article 4(1) (j) of the BEREC regulation Regulation.¹⁰⁰~~

~~(182) A report to this end will include an assessment of NRA experiences with the supervision and monitoring of co-investment offers and agreements according to the conditions and criteria on which these guidelines set out guidance. This report will take account of the contribution made by SMP operators' annual compliance statements further to the first subparagraph of Article 76(3) EECC and provide input to an assessment of the need to revise the guidelines.~~

~~(183) This assessment will be undertaken within five in a timely manner to allow it to inform the Commission's evaluation of Articles 76 and 79 EECC,¹⁰¹ and shall be completed no later than four years after the adoption of the guidelines.~~

~~(147)(184) The report as well as the possible revision of the guidelines shall be without prejudice to an assessment of the effectiveness of dispute resolution proceedings relative to co-investment agreements, which BEREC will assess separately within the same timeframe.~~

¹⁰⁰ REGULATION (EU) 2018/1971 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support –for BEREC (BEREC Office), amending Regulation (EU) 2015/2120 and repealing Regulation (EC) No 1211/2009

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R1971&from=EN>

¹⁰¹ Cf. Article 122(1) EECC.