

## Article 74 EEC

*Technical contribution that does not represent a formal position of the European Commission and does not bind the European Commission*

1. A national regulatory authority shall, as an exception to Article 66, not impose obligations as regards new very high capacity networks elements that are part of the relevant market on which it intends to impose or maintain obligations in accordance with Articles 66 and Articles 67 to 72 and that the operator designated as having significant market power on that relevant market has deployed or is planning to deploy, if it determines that the following cumulative conditions are met:

(a) the deployment of the new networks is open to co-investment by way of an offer to conclude a co-investment agreement at any point during their lifetime with any operator, provided that the national regulatory authority concludes that the offer has a reasonable prospect of allowing co-investors to compete effectively and sustainably with the operator designated with significant market power in downstream markets, and provided that such co-investors are or intend to be service providers, or to host such providers, in the relevant retail markets. Such offer shall be made public by the operator in a timely manner and at least 6 months before the marketing of end-user services based on the new networks and on terms which ensure sustainable competition in the long term including inter alia fair, reasonable and non-discriminatory terms offered to potential co-investors; flexibility in terms of the value and timing of the commitment provided by each co-investor; possibility to increase such commitment in the future; reciprocal rights awarded by the co-investors after the deployment of the co-invested infrastructure;

(b) access seekers not participating in the co-investment can benefit from the same quality, speed, conditions and end-user reach as was available before the deployment, fair, reasonable and non-discriminatory access conditions, capable of ensuring sustainable competition on the related retail markets, taking appropriate account of and which reflect appropriately the degrees of risk incurred by the respective co-investors at different stages of the deployment, relative to operators that benefit from such access conditions either through commercial agreements based on fair and reasonable terms or by means of regulated access maintained or adapted by the national regulatory authority;

(c) the co-investment offer complies When assessing co-investment offers and processes referred to in point (a) of the first subparagraph, national regulatory authorities shall ensure that these offers and processes at a minimum comply with the criteria set out in Annex IV and are made in good faith.

2. In the absence of an offer pursuant to meeting the conditions in paragraph 1, where a national regulatory authority is considering to impose obligations as regards new very high capacity networks elements that are part of the relevant market in accordance with Articles 66 to 72, it may, as an exception to Article 66, decide not to do so if the operator designated as having significant market power on that relevant market makes an offer to conclude commercial access agreements to any operator over the lifetime of the new network which in the specific circumstances are reasonably likely to result in effectively and sustainably competitive related retail markets, and to foster the development of sustainable competition in the longer term, including where appropriate efficient infrastructure competition. In so doing, it shall take into account whether:

(a) a transparent process is in place and on terms which the national regulatory authority considers capable of ensuring sustainable competition on the related retail markets in the long term including inter alia fair, reasonable and non-discriminatory terms offered to potential access seekers, taking appropriate account of the risk incurred by the access provider in deploying the new network;

(b) the offer to enter into such commercial access agreements is made public publicly available by the operator in a timely manner and at least 6 months before the marketing of end-user services based on such new networks elements;

(c) the national regulatory authority concludes that the offer of commercial access has a reasonable prospect of allowing access seekers to compete effectively and sustainably with the operator designated with significant market power in downstream markets, and provided that such access seekers are or intend to be service providers, or to host such providers, in relevant retail markets.

~~the commercial access agreement in question is accepted by market participants representing the majority of the market and sustainable service competition is safeguarded; and~~

~~(e) access seekers not accepting the commercial access agreement can benefit from the same quality, speed, conditions and end-user reach as was available before the deployment, either through commercial agreements based on fair and reasonable terms or by means of regulated access maintained or adapted by the national regulatory authority.~~

This paragraph is without prejudice to the regulatory treatment of commercial access agreements that do not meet the above criteria, but have an impact on competition and are taken into account in the market analysis process pursuant to Articles 65 and 66.

3. ~~By way of an exception to paragraph 1, Member States may decide that~~ A national regulatory authority may, ~~in duly justified circumstances,~~ impose, maintain or adapt remedies in accordance with Articles 66 to 72 as regards new very high capacity networks elements referred to under falling within paragraph 1 ~~4~~ in order to address significant competition problems on specific markets that have arisen since its analysis that the conditions in that paragraph are met, where the national regulatory authority establishes that given the specific characteristics of these markets, these competition problems would not otherwise be addressed.

4. When considering offers to conclude agreements pursuant to the first or second paragraph, and except where such offers clearly do not fulfil one or more relevant conditions or criteria, the national regulatory authority shall perform a market test by conducting a public consultation of by consulting stakeholders and interested parties, in particular on the offered terms. Such consultation shall allow potential co-investors to provide a counter-offer, identifying where they deem the initial offer not to be in line with the requirements in point (a) or in Annex IV and to determine whether the initial offer is accepted by market participants. The potential co-investors or access seekers may provide views on the compliance of the initial offer with the conditions provided in this Article and propose changes to that offer. requirements in point (a) or in Annex IV, Taking into account all the views expressed in the consultation, and the extent to which such views are representative of different stakeholders, the national regulatory authority shall to

determine whether the initial offer is accepted by market participants has a reasonable prospect of allowing co-investors and access seekers to compete sustainably with the operator designated with significant market power in downstream markets. The national regulatory authority shall communicate to the operator designated as having significant market power its observations on the main outcomes of the market test. In light of those observations, the operator may revise its offer with a view to rendering the initial offer compatible with the first or second paragraph.

To that end, National regulatory authorities may, in particular, request that the operator designated as having significant market power make a proposal of commitments, based on either the initial or a revised offer, which they may make binding, in relation to any of the co-investment or commercial access offers foreseen in this Article. In the case of co-investment offers pursuant to the first paragraph, such commitments may be made binding for a period that is at a minimum [seven] years and at a maximum the expected lifetime of the network. For commercial access agreements pursuant to the second paragraph, such commitments may be made binding for a period that is at a maximum [seven] years.

National regulatory authorities shall continuously monitor compliance with the requirements set out in this the first or second paragraph, as applicable, 2 and Annex IV and may require the operator designated as having significant market power to provide it with annual compliance statements. Where the national regulatory authority has made commitments binding, Article 29 shall apply in case of non-compliance.

*This Article Paragraph is without prejudice to the power of a national regulatory authority to take decisions pursuant to the first paragraph of Article 26 in the event of a dispute arising between undertakings in connection with a co-investment agreement deemed by it to comply with the conditions set out in ~~the~~ the first paragraph and with the criteria set out in Annex IV or with a commercial access agreement deemed by it to comply with the criteria in the second paragraph.*

5. In addition to its obligations pursuant to Articles 32 and 33, when a national regulatory authority intends to take a decision pursuant the first, second or third paragraphs it shall submit this request to the Commission. The Commission, taking utmost account of the opinion of BEREC and acting in accordance with the procedure referred to in Article 110(3), shall take a decision authorising or preventing the national regulatory authority from taking such measures within three months of the request.