

## FINAL CA 13B

### Art 74 - Regulatory treatment of new network elements

The CA covers Art 74 and Annex IV. The related recital 184 is part of the Access CA (and works regardless of the outcome on Art 74). All relevant AMs, including AMs 133, 139, 1000-1037, 1110-1143 as well as **IMCO xx**, fall.

#### Article 74

##### Article 74

#### Regulatory treatment of new *very high capacity* network elements

1. ***Without prejudice to the assessment by national regulatory authorities of co-investment in other types of networks, A*** a national regulatory authority shall not impose obligations as regards new *very high capacity* networks ***which, if fixed, extend to the premises or, if mobile, to the base station***, 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~~ ***a relevant SMP*** operator ~~designated as significant market power on that relevant market~~ has deployed or is planning to deploy, if the following cumulative conditions are met:

(a) the deployment of the new network elements is open to co-investment ***at any point during their lifetime by any operator*** offers according to a transparent process and on terms which ***the national regulatory authority considers capable of ensuring*** ~~favour~~ 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;

***(aa) at least one co-investment agreement based on an offer made pursuant to (a) has been concluded and the co-investors are or intend to be service providers, or to host such providers, in the relevant retail market and have a reasonable prospect of competing effectively;***

~~(b) the deployment of the new network elements contributes significantly to the deployment of very high capacity networks;~~

***(eb)*** 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, either through commercial agreements based on fair and reasonable terms or by means of regulated access maintained or adapted by the national regulatory authority;

***National regulatory authorities shall determine whether the conditions above are met, including by consulting with relevant market participants. When assessing co-investment offers, processes and agreements referred to in the first subparagraph, national regulatory***

*authorities shall ensure that those offers, processes and agreements comply with the criteria set out in Annex IV.*

*2. When assessing co-investment **agreements** offers and processes referred to in point (a) of the first subparagraph, national regulatory authorities shall **conduct a market test by consulting potentially interested parties** ensure that those offers and processes comply with the criteria set out in Annex IV.*

*3. Paragraph 1 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 that paragraph and with the criteria set out in Annex IV.*

*4. Paragraph 1 is without prejudice to the power of a national regulatory authority to impose, following the next market review cycle after the co-investment is made, appropriate remedies pursuant to Article 66 and Articles 67 to 72 in circumstances where it determines that the continued application of the conditions set out in paragraph 1 and of the criteria set out in Annex IV would not be sufficient to ensure effective competition.*

*5. Paragraph 1 shall not prevent a national regulatory authority from maintaining or adapting remedies in accordance with Articles 66 and Articles 67 to 72 on an operator designated as having significant market power on a relevant wholesale market for inputs which, by virtue of the corresponding retail demand, are highly specialised as regards parameters such as quality or location and would not, by virtue of the limited number of addressable clients, justify on their own a commitment to even the reasonable minimum number of end user lines referred to in Annex IV.*

## Annex IV

### CRITERIA FOR ASSESSING CO-INVESTMENT OFFERS

When assessing a co-investment offer pursuant to Article 74 (1), the national regulatory authority shall verify whether the following criteria have been met:

- (a) The co-investment offer shall be open to any undertaking over the lifetime of the network built under a co-investment offer on a non-discriminatory basis. The SMP operator may ~~include in the offer~~ **stipulate** 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, etc.
- (a) The co-investment offer shall be transparent:
  - ~~the offer is~~ **terms and conditions must be** available and easily identified on the website of the SMP operator;
  - full detailed terms must be made available without undue delay to any potential bidder that has expressed an interest, including the legal form of the co-investment agreement and - when relevant - the heads of term of the governance rules of the co-investment vehicle; and
  - The process, like the road map for the establishment and development of the co-investment project must be set in advance, it must clearly explained in writing to any potential co-investor, and all significant milestones be clearly communicated to all undertakings without any discrimination.
- (b) The co-investment offer shall include terms to potential co-investors which favour sustainable competition in the long term, in particular:
  - All undertakings have to be offered fair, reasonable and non-discriminatory terms and conditions for participation in the co-investment agreement relative to the time they join, including in terms of financial consideration required for the acquisition of specific rights, in terms of the protection awarded to the co-investors by those rights both during the building phase and during the exploitation phase, for example by granting indefeasible rights of use (IRUs) for the expected lifetime of the co-invested network and in terms of the conditions for joining and potentially terminating the co-investment agreement. Non-discriminatory terms in this context do not entail that all potential co-investors must be offered exactly the same terms, including financial terms, but that all variations of the terms offered must be justified on the basis of the same objective, transparent, non-discriminatory and predictable criteria such as the number of end user lines committed for.
  - ~~The offer~~ **It** must allow flexibility in terms of the value and timing of the commitment provided by each co-investor, 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 shall be set at a unit level enabling smaller co-investors to gradually increase their participation while ensuring adequate levels of initial commitment. 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.

- A premium increasing over time has to be considered as 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.
- The co-investment agreement has to allow the assignment of acquired rights by co-investors to other co-investors, or to third parties willing to enter into the co-investment agreement subject to the transferee undertaking being obliged to fulfil all original obligations of the transferor under the co-investment agreement.
- Co-investors have to grant each other reciprocal rights on fair and reasonable terms and conditions to access the co-invested infrastructure for the purposes of providing services downstream, including to end-users, according to transparent conditions which have to be made transparent in the co-investment offer and subsequent agreement, in particular where co-investors are individually and separately responsible for the deployment of specific parts of the network. If a co-investment vehicle is created, it has to provide access to the network to all co-investors, whether directly or indirectly, on an equivalence of inputs basis and according to fair and reasonable terms and conditions, including financial conditions that reflect the different levels of risk accepted by the individual co-investors.

(c) The co-investment offer shall ensure a sustainable investment likely to meet future needs, by deploying new **very high capacity** network elements ~~that contribute significantly to the deployment of very high capacity networks.~~