

EU electronic communications code and co-investment

Taking stock of the policy discussion

SUMMARY

The EU regulatory framework on electronic communications sets common rules on how electronic communications networks and services such as telephony and internet broadband connections are regulated in the European Union (EU).

While the revision of this framework has started, a debate arises on how best to foster investment in the EU for deploying the very high capacity networks that are increasingly needed for 5G mobile services, as well as e-services such as e-health, e-administration, cloud computing and connected cars. One of the proposals of the European Commission is to amend the current regulatory framework in order to facilitate co-investment (i.e. when several investors agree to invest together) for building new high-capacity network infrastructure. However, the European Parliament and Council both want to amend the text significantly.

This briefing discusses the policy context and the rationale behind the rules on co-investment proposed in the draft EU electronic communications code, and assesses the main areas of convergence and divergence between the initial positions of the co-legislators. Furthermore, some key issues for discussion are highlighted, including what types of co-investment agreements and assets should be exempted from regulation, the degree of competition safeguards needed and the extent of national regulators' oversight of the co-investment projects.

For further information on the broader discussion over this legislative proposal, please see our ['EU Legislation in progress'](#) briefing.



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Background

Gigabit society

Consumption patterns and usage of electronic communications and services are changing rapidly, and a number of studies have shown that typical broadband connections (i.e. with megabit download speeds) are no longer sufficient to provide the type of digital services on which society increasingly relies. Over the next 10 years, very high capacity internet connections (i.e. with gigabit download speeds¹) will be needed to supply a variety of e-services and applications (such as e-health, e-administration, cloud computing, next generation TV, connected cars), on an increasing number of connected devices.

This trend has been described as a shift towards the [gigabit society](#), a world in which homes and businesses benefit from pervasive broadband communications that offer gigabit speeds and instantaneous services, and enable a range of new applications for collaboration, productivity and entertainment. To deliver such services, a large part of the current broadband networks, built mostly with traditional copper infrastructure and generally delivering only megabit speeds, will need to be upgraded or replaced with very high capacity networks largely built with new fibre infrastructure and able to deliver gigabit speeds.

According to an [Arthur D. Little report](#) for Vodafone, **gigabit speeds** will be increasingly necessary to provide services in the **healthcare sector** (e.g. remote care), in the **energy and utility sector** (e.g. smart grids), in the **education sector** (e.g. e-learning), and in the **media and entertainment sector** (e.g. high-definition TV).

A [Deloitte study](#) predicts worldwide household **demand for gigabits speeds will surge by 2020** and a [study prepared for the European Commission](#) estimates that a significant proportion of EU households will require gigabit connections by 2025.

EU connectivity targets

In taking stock of this evolution, the European Commission concluded that more needed to be done in the EU for the deployment of fast broadband networks, and called for creation of the right environment and conditions for the deployment of very high capacity networks in its 2015 [digital single market strategy](#). Furthermore, in its [strategy on connectivity for a European gigabit society](#) adopted in September 2016, the European Commission sets three ambitious connectivity targets for 2025: (i) the main socio-economic drivers, such as universities, public administration and transport hubs, should have access to gigabit connectivity; (ii) all European households should have access to at least 100 megabits per second (Mbps) speed connections; and (iii) all urban areas, as well as major roads and railways, should have uninterrupted [5G coverage](#). Against this background, the current EU regulation is being amended in order to foster the rollout and use of very high capacity networks.

Very high capacity networks and policy objectives under EU regulation

Under the [EU regulatory framework for electronic communications](#) introduced in 2002 to set common rules for all electronic communications networks and services infrastructure, national regulators (NRAs) must seek three primary objectives: 'promote competition', 'consolidate the internal market' and 'strengthen end-users' rights'. In 2009, the [EU Telecom Regulation](#) was amended to include the 'promotion of efficient investment and innovation in new and enhanced infrastructure' amongst the objectives of EU telecoms legislation.

In the context of the [revision](#) of the current regulatory regime – and in the light of the new connectivity objectives – the European Commission proposes to require national

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regulators to 'promote access to and take up of very high capacity connectivity' and to 'ensure widespread availability and take up of very high connectivity'.² Therefore, one of the principal goals of EU telecom regulation would be to foster the deployment of 'very high capacity networks'. This notion³ primarily refers to a range of fixed and mobile network infrastructure including entirely fibre-based networks, such as fibre-to-the-home (FTTH), and networks mixing copper and fibre elements (fibre-to-the-building (FTTB) and fibre-to-the-cabinet with very high bit rate digital subscriber lines (FTTC/VDSL)). In addition, fibre lines (i.e. fibre-based backhauls) are used to connect wireless [5G networks infrastructure](#).

Box 1 – Main types of fibre network infrastructure

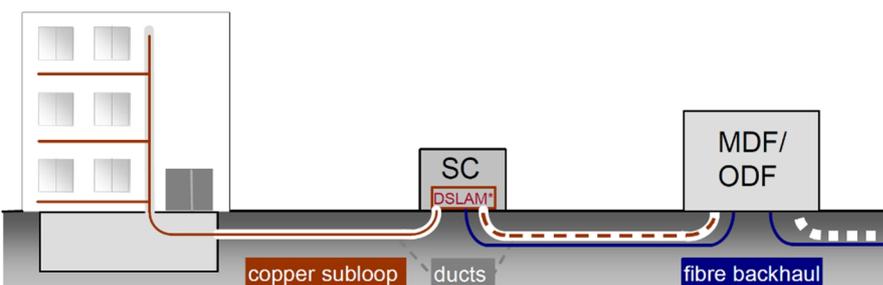
FTTH – Fibre to the home: the entire network up to the end-users' premises is built with fibre links.



FTTB – Fibre to the building: the final link to the end-users' premises is still built with copper.



FTTC/VDSL – Fibre to the cabinet: a significant part of network is still built with copper but enables operators to provide enhanced speeds on the basis of different technologies, such as [vectoring](#) and [G.Fast](#).



Source: BEREC, [Next generation access](#) – Implementation Issues and Wholesale Products, BoR (10)08.

Investment gap

The European Commission estimates that [€500 billion](#) in investment is necessary over the coming decade to roll out the networks necessary to reach the 2025 connectivity objectives. However, a number of reports argue there is a risk that such investments will not materialise in the given timeframe, and the Commission itself stresses a likely [€155 billion](#) investment gap under current investment trends.

According to an [Arthur D. Little study](#), while new giga-networks are being deployed in large parts of Europe, they only covered some 33 % of EU Member State households at the end of 2016. A [study prepared for the European Commission](#) also indicates that, without more investment, the connectivity targets are out of the reach of some EU Member States, and that the EU will fall behind compared to other regions of the world (e.g. Japan) in terms of rollout and usage of very high capacity networks. Research by [Fibre-To-The-Home Council Europe](#) estimates that €137 billion is needed by 2025 to reach gigabit society targets with an FTTH network infrastructure.

Notion of co-investment

Deploying fibre networks requires a large amount of investment. Co-investment refers to initiatives in which two or more investors agree to invest together to deploy electronic communications networks infrastructure used to provide services such as internet broadband connections. Three main co-investment models are usually identified:⁴

- In the **joint-venture model**, a new entity jointly owned and controlled by the co-investors is established for developing and operating network infrastructure. The joint venture (JV) sells fibre access services to its partners and potentially to third parties on an access basis.
- In the **reciprocal access model**, co-investors are responsible for developing and operating their own network infrastructure (usually in geographically separate areas) and reciprocal access arrangements allow parties to the co-investment agreement to serve customers via each other's network infrastructure (through passive or active access).
- In the **long-term access model**, one party is in charge of the construction of the network infrastructure and a contractual agreement establishes how to provide access to new infrastructure and share costs, risks and profits between all the co-investors.

Co-investment projects already implemented in the EU vary according to, inter alia, their legal structure, the parties involved (e.g. historical telecom operators, alternative operators or 'access seekers', financial players); the type of infrastructure and technologies concerned (e.g. fibre-to-the-home, fibre-to-the-building, fibre-to-the-cabinet); the type of assets subject to co-investment (e.g. passive fibre lines, active access); their geographical reach (i.e. urban areas, less densely populated areas, rural areas); and the type of applicable regulation (e.g. regulation of the dominant operator or symmetrical regulation).⁵ The ownership structure also varies and has an important impact on the way the co-investment projects are implemented (i.e. right to make decisions on new investments, transfer of the assets, and length of the co-investment).⁶

Most of the co-investment examples in Europe concern purely **commercial agreements** between co-investors (e.g. Portugal, Spain, Italy and Ireland).⁷ In Germany, EWE and Deutsche Telekom have recently announced the creation of [joint venture](#) to invest up to €2 billion over 10 years to build an FTTB/FTTH network and connect over a million private households, mainly in rural areas. Commercial co-investments are primarily **subject to national competition authority scrutiny**. Another approach chosen in France is to pursue a **regulated co-investment strategy** (with very **detailed symmetrical rules** and a **dispute settlement mechanism**), whereby all operators deploying a very high capacity networks must offer other operators the opportunity to enter into a co-investment project to build the last section of fibre networks (i.e. terminating segment).

Rationale for fostering co-investment in the EU

Fostering infrastructure-based competition

Two different [models of competition](#) are generally envisaged in the telecoms sector: service or access-based competition on the one hand, and infrastructure-based competition on the other. Under access-based competition, new operators can enter the market and provide electronic communication services to their customers by using the network infrastructure of existing network operators (usually former monopolies). In this scenario, regulators are, in principle, bound to design detailed access rules. On the contrary, under infrastructure-based competition, new operators invest in deploying their own proprietary networks in order to enter the market and serve their customers without having to rely on access regulation.

The EU regulatory framework has traditionally favoured an access-based competition model in line with the [ladder of investments](#) theory that assumes that new operators need access to the dominant operator's networks before they can incrementally invest in rolling out their own network infrastructure. Following this approach, the framework obliges operators with significant market power (i.e. the dominant operators) to meet stringent [access obligations](#) under the control of national regulatory authorities (NRAs).

However, in the [current review](#) of the EU telecoms rules, the Commission's assumption is that while the key principles of EU regulation remain valid, significant adjustments are necessary to provide incentives for operators to make economically viable investments in high-capacity networks.⁸ In its impact assessment, the Commission stresses that access regulation can have a deterrent effect on investment, and proposes a set of measures aiming at fostering infrastructure competition and diminishing the intensity of regulation on dominant operators when they participate into a co-investment to deploy very high capacity networks.⁹

Expected benefits

According to the European Commission, co-investment agreements offer significant benefits in terms of pooling of costs and risks associated with the construction of very high capacity networks, enable smaller-scale operators to invest on economically rational terms and promote sustainable competition.¹⁰ Studies have concluded that the examples of co-investment in France and Portugal show that such arrangements can be successful in extending the deployment of such networks beyond very dense areas, i.e. where the deployment of parallel networks would not typically be economically viable.¹¹

The Commission's approach aims at setting a framework within which the **dominant operator will have an incentive to negotiate co-investment** with other players interested in 'building' (network) rather than 'buying' (access). However, **views diverge** as to what extent infrastructure-based competition and co-investment agreements can actually foster investment and deployment of new networks. Some scholars found that access regulation has a negative impact on investment in new generation networks ([Briglaue and others](#), 2017). By contrast, others have concluded that there is no evidence that the current access regulation has deterred investment in new generation networks in the EU ([Analysys Mason](#), 2015). Empirical research shows that access regimes limiting access to passive infrastructure such as ducts (and symmetric regulation of in-building wirings), have been more successful in fostering the deployment of entirely fibre-based FTTH networks (more susceptible to ensure long-term competition), than access regimes obliging the dominant operator to grant access to active access infrastructure ([Cave and Shortall](#), 2015). Along the same lines, some research found that co-investment has a positive effect on the level of investment in new generation networks when compared with standard access-based regulation ([Bourreau, Cambini and Hoerning](#), 2016). However, other scholars stress that, whether co-investment is conducive to investment or not largely depends on the types of assets and co-investment models

used. While co-investors may have more incentive to invest in passive infrastructure than a single vertically integrated operator, the benefits expected from co-investment on active assets are less straightforward ([Feasy and Cave](#), 2017).

Commission proposal and European Parliament and Council positions

Commission proposal

Co-investment and market analysis

Under EU regulation, national regulators can regulate electronic communications markets only when they find that regulation is necessary following market analysis.¹² Where regulators conclude there is a dominant operator (i.e. operator having significant market power, SMP), a set of measures must be imposed (e.g. access, transparency and price control obligations) in order to protect consumers and ensure all players can compete effectively. The Commission proposes to complement this rule by requiring regulators to take account of the existence of co-investments and their impacts on competition when they assess whether it is necessary to regulate electronic communications markets.¹³ This would merely codify the current practice.

Automatic and mandatory non-imposition of regulation (article 74 and annex IV)

The Commission proposed a new regulatory approach aimed at encouraging investors (including dominant operators) to enter into commercial co-investments in order to deploy very high capacity networks. As a matter of principle, article 74 of the draft text requires that regulators refrain from imposing regulation with respect to 'new network elements' that a dominant operator 'has deployed' or 'is planning to deploy' when several cumulative conditions (identified in article 74 and further detailed in Annex IV) are met, i.e.:

- The co-investment offer must only concern new network elements that contribute significantly to the deployment of very high capacity networks (i.e. likely to meet future needs);
- The deployment of new network elements must be open to co-investment offers according to a transparent process: the offer must be easily identifiable and detailed, including a roadmap of the project and all the significant milestones; the co-investment offer must be open to any investors over the entire construction phase;
- The co-investment offer must favour sustainable competition in the long-term, including fair, reasonable and non-discriminatory terms offered to potential co-investors (this concerns in particular the terms for joining and potentially terminating the co-investment agreement, such as the timing and financial conditions, and the obligation for co-investors to grant each other reciprocal access to the co-invested infrastructure for providing services to end-users);
- The co-investment offer must allow co-investors some flexibility (smaller co-investors must be able to gradually increase their commitments and allow co-investment rights to be transferred to third parties);
- The co-investment rules must safeguard existing competition for access seekers not participating in the co-investment. They must still be able to serve their customers on the existing terms (i.e. access based on commercial agreements or access obligations imposed by regulators should enable any access seeker to benefit from the same quality, speed, conditions and end-user reach already available to them).

The provisions requiring national regulators to refrain from imposing regulation on dominant operators in the context of co-investment (article 74 and annex IV) **represent a significant policy change**. Departing from the current EU regulation, to ensure co-investors' incentive to invest is not

stified, dominant operators would not be obliged to grant access to the new network elements of their very high capacity networks during the initial phase of deployment. Furthermore, the proposed text does not explicitly require regulators to conduct a traditional market analysis (based on a thorough competitive assessment of qualitative and quantitative data), but only to verify that a set of general conditions are fulfilled in deciding whether to impose regulation (regulators would however still be able to impose access and other obligations on the dominant operator at a subsequent stage or by way of dispute settlements). Therefore, the **competition safeguards** set under traditional regulation would be somewhat **limited** and the **ex-ante supervision role of national regulators** would be (initially) **reduced**.

European Parliament position

The Committee on Industry, Research and Energy (ITRE) adopted its [report](#) (rapporteur: Pilar del Castillo Vera, EPP, Spain) on the proposal on a communications code on 2 October 2017, and the decision to launch trilogue negotiations on this basis was confirmed at the October II 2017 plenary session.

The European Parliament discards the principle of automatic and mandatory non-imposition of regulation when new elements of very high capacity networks are financed by ways of co-investment meeting the article 74 conditions, as proposed by the Commission. Instead, the Parliament proposes to leave some leeway to national regulators which 'may', or may not, impose regulation after having assessed the competitive landscape at stake. The exemption of regulation for new elements of very high capacity networks deployed in the context of a co-investment would be optional and no longer binding on national regulators.

Furthermore, the European Parliament wishes to reinforce the competition safeguards. Co-investment must remain open to new operator co-investors 'at any point during the lifetime' of the elements deployed by the new networks and 'ensure' sustainable competition in the long term. In the EP's view, the mere existence of a co-investment offer is not sufficient. At least one co-investment agreement based on the offer must 'have been concluded'. Furthermore, co-investors must provide or be willing to provide electronic communications services directly to end-users (i.e. on retail markets) themselves, or host service providers willing to do so. The Parliament insists that national regulators make sure that co-investors must have a 'reasonable prospect of competing effectively'. Furthermore, access seekers not participating in the co-investment must be able to benefit from 'fair and non-discriminatory access conditions' to the new high-capacity infrastructure.

The Parliament proposes to strengthen the supervisory role of national regulators, and reinforce transparency in the consultation process. National regulators would be required to conduct a market analysis (including a public consultation) to decide whether the conditions for non-regulation are met. Moreover, even when a co-investment has been cleared and no regulation imposed, regulators would nevertheless retain the powers to intervene at a later date to settle disputes between co-investors.

Council position

The Council announced its [position](#), significantly amending article 74, on 11 October 2017 and proposes three complementary sets of rules:

First set of rules: Regulators are obliged to refrain from imposing regulation in cases of co-investment offers (automatic and mandatory when the conditions of article 74 are fulfilled)

As a matter of principle, regulators would be requested to refrain from imposing regulation when there is a co-investment offer with adequate competition safeguards. In

line with the Parliament's position, the Council requires additional safeguards. The co-investment offer would remain open to new co-investors 'over the lifetime of the network' and 'ensure sustainable competition in the long term'. Furthermore, in order to avoid any undue 'first move' advantage, the co-investment offer would have to be made public 'at least six months before the marketing of end-user services'.

The Council proposes to significantly strengthen the supervision of the co-investment offer by national regulators. The latter would be able to request the dominant operator offer some 'commitments' to modify the co-investment offer. They could also conduct a 'market test' by consulting stakeholders and interested parties to assess how the terms and conditions of the co-investment offer can be amended to ensure long-term competition. Furthermore, regulators would be instructed to 'continuously monitor' the conditions of the co-investment and the Body of European Regulators for Electronic Communications ([BEREC](#)) would be asked to publish 'guidelines' to ensure consistent application of the conditions for co-investments throughout the EU.

The Council seeks wider discretion for national regulators and Member States on whether or not they regulate the newly built infrastructure elements. Member States can consider additional criteria to those listed in annex IV in light of specific local conditions and market structure. Regulators would retain the right to regulate, should they consider that, following market analysis, there is a need to intervene to ensure effective competition at retail level (i.e. in the provision of specific services to end-users). Finally, Member States would be able to decide that regulators could not impose regulation for a 'minimum period' (no longer than seven years) after the initial co-investment.

Second set of rules: Regulators have discretion whether or not to impose regulation when the dominant operator provides a commercial access agreement to its very high capacity network that fulfils specific conditions (including in the absence of co-investment)

The Council wishes to extend the scope for non-regulation of new elements of high-capacity networks. Even in the absence of a co-investment offer, regulators could decide not to impose regulation when the dominant operator offers other operators commercially negotiated access to its very high capacity network. Before deciding not to regulate the new infrastructure, regulators would be required to verify that the commercial access agreement fulfils specific conditions that are 'likely to result in effective and sustainable' competition. Regulators would be required in particular to verify that a transparent process for assessing the terms of the commercial access agreement is in place, that such access is accepted by the majority of market participants and that the operators would retain adequate access even if they do not accept the commercial access agreement. Regulators and Member States would have wide discretion to decide whether or not to regulate the newly built infrastructure elements.

Third set of rules: Regulators may exceptionally impose regulation on a dominant operator's very high capacity network (even in case of co-investment) in specific cases

The Council wants to introduce an exception to the principle of non-imposition of regulation with respect to very high capacity networks, as proposed by the Commission. Member States could adopt legislation under which national regulators could impose, adapt or maintain regulation on the dominant operator's very high capacity networks if they establish that 'significant competition problems' could not be adequately addressed by a co-investment offer meeting the requirements of article 74 or a commercially negotiated agreement, given the 'specific characteristics of these markets'. The Council proposes creating a new comitology procedure (including BEREC consultation), according to which the Commission would ultimately have to clear the national regulators' desire

to impose regulation on a dominant operator's very high capacity network.

The European Parliament disagrees with the automatic and mandatory non-imposition of regulation proposed by the Commission. Under the EP position, the exemption from regulation for new elements of very high capacity networks deployed in the context of a co-investment would be **optional** for national regulators. Such an approach amounts to codifying the current practice. The Council position also departs from the Commission proposal by giving **wider discretion** to the national regulators and the Member States as to whether or not to regulate the newly built infrastructure elements (e.g. '**regulatory holiday**' period up to seven years).

Key issues for discussion

Types of co-investment and assets to be exempted from regulation

Under the Commission's proposal, all types of co-investment (including the joint-venture model, the reciprocal access model, and the long-term access model), could lead to an exemption from regulation if the pre-defined conditions of article 74 are met. In addition, the draft text does not define exactly the 'new networks elements' that should be exempted from regulation. However, experts warn that some types of co-investment (e.g. the reciprocal access model, co-investments in areas that could be served by competing networks) are less beneficial for investment and present more risks for competition than others. They argue that regulators should exempt co-investment projects from regulation only after a case-by-case assessment of the nature of the assets that are co-owned, and of the competitive dynamics in the geographical area at stake ([Feasey and Cave](#), 2017). Some commentators consider that the definition of new network elements must be clarified (e.g. [BEREC](#)). Others warn that excluding some technologies (e.g. FTTC/VDSL) from the definition may have a detrimental impact on investments in some Member States ([Scott Marcus, Bocarova and Petropoulos](#), 2017).

Policy-makers must find a balance between **legal certainty** and **flexibility** in order to decide to what extent co-investment agreements should be exempted from regulation. This may entail **narrowing the scope of article 74** to grant regulation exemption only to some types of co-investment arrangements identified as being more beneficial for investment and conducive to long-term competition. Precisely identifying the **new network elements** exempted from regulation may also entail a policy choice towards **fostering the deployment of specific network technologies** (e.g. FTTH, FTTB).

Competition safeguards

Experts and commentators disagree sharply on the degree of competition safeguards needed. Some argue that co-investment will only induce additional infrastructure investment if the regulatory conditions are not over-restrictive ([Briglauer and others](#), 2017). By contrast, [BEREC](#) warns that co-investments can lead to anti-competitive coordinated behaviours. In particular, there is a risk of foreclosing the market to smaller players if they only benefit from the same quality, speed, conditions and end-user reach as was available before the deployment of the new network elements. BEREC also stresses that a co-investor which has full ownership or quasi-ownership, such as indefeasible right of usage (IRU) on part of the newly built infrastructure might constrain the lead co-investor more effectively than a simple right of access.¹⁴ For some scholars, whether competition safeguards are needed rests on an in-depth assessment and a review on a case-by-case basis of each co-investment project ([Feasey and Cave](#), 2017). Another study stresses that, while co-investment agreements in new technology such as FTTH are expected to result in substantial innovation and efficiency gains and could therefore avoid regulation, their competitive effects must be assessed over time once the co-investment has acquired substantial collective market share.¹⁵

Policy-makers must strike a balance between **safeguarding competition** and **fostering incentives to invest** in very high-capacity networks. To that end, competition law principles applicable to horizontal agreements ([Article 101 TFEU](#)) might provide useful standards for deciding on the degree of competition safeguards needed. Regulators such as competition authorities are bound to verify that **efficiency gains** would offset the **restrictions on competition** in order not to prohibit an agreement between companies. Three main issues are important to assess in this regard. First, the ability of the lead investor to **behave independently** from its co-investors should be reduced. This may entail specifying a **specific ownership structure**. Second, the ability of the potential co-investors to **compete on retail markets** with the dominant operator must be ensured. Third, restrictions on access to the new high-capacity infrastructure for access seekers not participating in the co-investment must be limited to what is necessary to achieve investment, and regulators should be bound to verify whether such **access restrictions are necessary over time**. This may entail specifying more clearly in article 74 that Member States should empower national regulators to run dispute settlement mechanisms and impose detailed regulation (including access pricing) if needed at any point in time, although a co-investment has been cleared and no regulation imposed. Furthermore, **substantive and procedural rules followed by competition authorities and regulators** when assessing co-investment projects should be aligned to the greatest possible extent to avoid inconsistent approaches. Setting some **guidelines** to ensure consistent assessment of co-investment projects between national competition authorities and national regulatory authorities throughout the EU might be useful.

Regulatory oversight

Some experts argue for limits to the intervention of regulators and the restrictions imposed on co-investors, given that competition authorities already have some instruments to tackle competition concerns once they materialise ([Briglauer and others, 2017](#)). To the contrary, [BEREC](#) favours an approach whereby regulators would have more discretion to assess the detail of the market dynamics at stake (i.e. the mere existence of an offer and setting conditions is not enough to lift regulation). BEREC stresses that co-investment agreements exempted from regulation should be identified based on an in-depth assessment of the competitive dynamics at stake (including criteria such as the number of co-investors, population density and whether access restrictions are included in the co-investment agreement). In addition, a 'market testing' approach has been proposed under which regulators would examine each co-investment proposal on its individual merits and within its own geographical reach (Feasey, 2017).¹⁶

Policy-makers must take a position on the **extent of regulatory oversight on co-investment projects**. Options vary from a presumption of non-regulation when the co-investment fulfils a set of pre-defined conditions, to requiring regulators to run an in-depth assessment of market conditions at stake or a fully fledged market analysis pursuant to Article 65(1) and (2) of the currently applicable regulation. An important issue to clarify is whether regulators would need to **delineate sub-national geographical markets** corresponding to the areas of the co-investment projects in conducting a fully fledged market analysis.

Stakeholders' views

The European Competitive Telecommunications Association ([ECTA](#)), mostly representing access seekers, warns that article 74 is based on the incorrect assumption that deregulation to the detriment of competition would lead to more investment, and called for the provisions on co-investment to be deleted or significantly amended. ECTA [welcomes](#) the improvements that the Parliament proposes to the Commission's text but [regrets](#) the Council's position, especially on granting Member States the power to block regulation for a period up to seven years. ECTA considers this amounts to a reduction in regulatory independence, politicises market regulation, reduces regulatory predictability and has no discernible benefit in terms of promoting investment. Along the same lines,

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companies that are members of ECTA have [warned](#) against loopholes offering dominant operators an opportunity to avoid regulation.

[BEUC](#), the European consumer association, is also critical of the proposed provisions on co-investment. BEUC argues that such a provision would foster the rollout of new fibre networks without allowing NRAs to regulate 'new network elements' if there are co-investment offers that would enable SMP operators to use their market position to the detriment of smaller companies. BEUC therefore asks that the co-investment option is entirely deleted from the draft communication code. [La Quadrature du Net](#), a non-profit association campaigning for an open internet, warns against the creation of local oligopolies based on co-investment agreements, and calls for the imposition of symmetric regulation to alleviate such concerns.

In contrast, the European Telecommunications Network Operators' Association ([ETNO](#)), representing the largest telecom operators, regrets that the Parliament and Council are weakening the initial pro-investment stance of the Commission proposal, and [calls](#) for urgent realignment with the original policy objectives. Along the same lines, the [largest telecoms operators in the EU](#) stress that the spirit of the reform is to ensure infrastructure-based competition, and warn that more complexity could be detrimental to investment incentives. [Cable Europe](#) warns against the consequences of introducing legal uncertainties that will impact on those who are investing in gigaspeed networks. [DigitalEurope](#) is also concerned to see the Parliament weakening the co-investment provision and [urges](#) the co-legislators to bring the current texts on the negotiating table back into line with the original objectives, to guarantee a clear and consistent regulatory framework to foster infrastructure-based competition.

[BEREC](#), the body of European regulators, warns against the risk that co-investment reinforces or extends the market power of dominant operators and allows the co-investors to foreclose the market. Consequently, they plead for complete deletion of article 74 and annex IV or for substantial modification of the Commission proposal (in particular by making non-imposition of regulation discretionary – not mandatory – for national regulators) and strengthening of the competition safeguards.

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Endnotes

- ¹ Gigabits connectivity enables very fast connection to the internet, allowing users to download/upload one gigabit of data per second.
- ² See article 3 of the [proposal for a directive establishing the European Electronic Communications Code](#), COM(2016) 590 final/2.
- ³ According to the Commission's proposal, very high capacity network 'means an electronic communications network which either consists wholly of optical fibre elements at least up to the distribution point at the serving location or which is capable of delivering under usual peak-time conditions similar network performance in terms of available down- and uplink bandwidth, resilience, error-related parameters, and latency and its variation'.
- ⁴ For a detailed overview, see Berkeley research group, [Co-Investment and Commercial Offers](#), 2017; [BEREC report on Co-investment and SMP in NGA networks](#), BoR(12)41, 2012, pp. 33-39 and [Regulatory, in particular access, regimes for network investment models in Europe](#), September 2016.
- ⁵ Ibid.
- ⁶ For a detailed assessment, see Berkeley research group [Co-Investment and Commercial Offers](#), 2017, pp. 12-19.
- ⁷ For an overview, see Berkeley research group, op. cit., p. 18.
- ⁸ See European Commission [Impact assessment](#), p. 70.
- ⁹ See European Commission [Impact assessment](#), pp.18 and 72.
- ¹⁰ See Recital 184.
- ¹¹ See [Regulatory, in particular access, regimes for network investment models in Europe](#), 2016, pp. 126-127. For an analysis of the effectiveness of co-investment for fostering deployment of very high capacity networks, see data and observations pp. 155-204.
- ¹² Ex-ante regulation is warranted when three cumulative criteria are found: high and non-transitory barriers to entry impeded new competitors from entering the market; market structures are such that it is unlikely effective competition arises without the regulator's intervention; and competition law intervention alone is not sufficient.
- ¹³ See articles 65(2), 66(6) and 71 (2).
- ¹⁴ See [BEREC views on article 74 of the draft code co-investment and 'very high capacity \(VHC\) networks'](#), BoR(17) 87.
- ¹⁵ See Berkeley research group, [Co-investment and commercial offers](#), 2017, p. 5 and appendix B.
- ¹⁶ See Feasey, R., cited in De Luca, S., [Should the Electronic Communications Code include provisions on co-investments?](#), Cullen International, 2017.

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eprs@ep.europa.eu

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