

11 February 2022

**Contribution to the public consultation on the Revision of the Guidelines on State aid for broadband networks**

Dear Mr Kuik,  
Dear Sir/Madam,

The German Broadband Association, BREKO, welcomes the opportunity to comment on the recently published Communication from the Commission on the draft revised guidelines on state aid for broadband networks, which aims to clarify the existing regulatory framework and adjust it to latest market and technological developments. We share the European Commission's motivation to help bridge the digital-divide and contribute to a more competitive and sustainable digital economy in Europe through the updated guidelines. Especially in light of the Covid-19 pandemic, the growing importance of highspeed connectivity has become increasingly evident to ensuring accessibility, quality of life and the subsequent economic recovery. In this context, the need for clear and robust measures at the European level for facilitating and accelerating the deployment of fibre networks have become more pertinent than ever. With this in mind, it is vital that regulatory interventions do not hinder the efficient roll-out of fibre infrastructures, disincentivise private investment or distort competition on the internal market.

On this background, we would like to share our contributions on the draft guidelines, with particular attention to the legislative context, definitions and types of broadband networks, conditions for aid, and demand-side measures aimed at supporting the take-up and deployment of fixed networks.

## 1) **Legislative context and the role of fibre in Europe's digital transformation**

BREKO concurs with the overarching policy objectives laid out in the Digital Compass Communication, namely connecting all European households to a gigabit network by 2030 at accessible conditions. This will require an overall acceleration in the pace of deployment of fibre infrastructure, necessitating a regulatory landscape conducive to meeting ambitious roll-out targets. Within the German market, we further welcome that the new federal government recently adopted a fibre (FTTH) target without setting a predefined deployment timeframe. The new connectivity target will be considered a long-term infrastructure project, which is driven by private investment and, further supported by the federal government's funding scheme for grey areas. As highlighted in the draft guidelines<sup>1</sup>, investments into highspeed networks must primarily come from commercial investors and only complemented, in the absence of a viable private investment potential, by public funds. While a relative investment gap may indeed exist in certain regions of the Union with regards to the construction of digital infrastructures, state aid measures, as a principle, must be limited to those areas with the lowest connectivity and no viable private investment alternative in order to not crowd-out commercial deployment endeavours.

We would like to underscore the importance of achieving coherence between different legislative and regulatory initiatives brought forward at the European level, whether already adopted or currently in the pipeline. In this regard, we acknowledge that the draft guidelines make due reference to a range of initiatives including the European Electronic Communications Code (EECC) and the European Green Deal Communication. In addition, the ongoing revision of the Broadband Cost Reduction Directive (BCRD) should also be duly taken into consideration within the context of the draft revised guidelines so as to ensure policy coherence for the acceleration of fibre deployment and to avoid any unintended consequences capable of hindering network roll-out.

It is also recognised that new connectivity measures introduced by the updated guidelines will introduce a new policy framework which takes into consideration recent market dynamics. As such, it is important that the new set of rules will not only focus on the existence of market failure, which in its current definition is insufficient to determine funding eligibility due to current capacity constraints in civil engineering and permit granting, and risks curbing the market momentum that has developed over the last years. This will help bridge the digital divide between urban and rural areas and support actions aimed at fighting rural depopulation, which are key priorities of the EU's Recovery and Resilience Facility<sup>2</sup>. All this contributes to promoting the envisaged digital transformation, which in turn aids the achievement of the EU's sustainability goal to reach climate neutrality by 2050. Secure and performant electronic

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<sup>1</sup> Section 1, para.6, page 3

<sup>2</sup> Section 1, para.7, page 3

communication networks, in particular fibre, as the most sustainable infrastructure technology, will play a significant role in reaching that objective<sup>3</sup>.

Overall, within this legislative and policy context, we consider that certain guiding principles are crucial and absolutely necessary for safeguarding an efficient, functioning and competitive market in electronic telecommunications, insofar as state aid measures are concerned. These are (i) limiting the use of state aid to those instances where intervention is necessary as a last resort to connect areas affected by market failure, (ii) maintaining competitive and innovative market dynamics by avoiding market distortion, crowding out private investment or disincentivising commercial agreements, (iii) prioritising fibre networks as the most energy efficient infrastructure technology to help reduce emissions and contribute to long-term sustainability, and (iv) ensuring overarching policy coherence at the European level to facilitate the acceleration of the deployment of fibre networks through a clear regulatory framework.

## 2) Definitions and types of broadband networks

The current state aid guidelines have been in force for almost a decade, during which time the market landscape and technological capabilities have evolved exponentially. This attests to the importance of establishing a framework that is future-proof and adaptable to shifting technological needs in the field of electronic telecommunications. In order to meet the growing demand for bandwidth, it is crucial that state aid interventions envisaged today duly cater tomorrow's network capacity needs by acknowledging fibre as the benchmark. With that in mind, it is important to set definitions which will not unintentionally incentivise alternative network technologies which do not demonstrate longevity in meeting evolving capacity needs.

In this context, we acknowledge the Commission's reference to satellite connectivity and agree that it can indeed be an appropriate technology to connect very remote target areas, with no economic incentive for fibre deployment in the short and medium term, within a transition period until they can be accessed by gigabit speed networks. However, as demonstrated in a recent study<sup>4</sup> commissioned by BREKO on the performance of satellite internet technologies, such as SpaceX's Starlink initiative, it should be underlined that satellite networks cannot be considered substitutes to fibre connectivity.

Further to the foregoing, it should be pointed out that the EECC has introduced the term 'Very-High-Capacity networks' (VHCN) as a central concept for the regulation of electronic

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<sup>3</sup> Section 1, para. 8, page 3

<sup>4</sup> Prof. Dr.-Ing. Kristof Obermann, *Leistungsfähigkeit von Satelliteninternet gemäß dem Starlink-Konzept*, Studie der Technischen Hochschule mit Mittelhessen im Auftrag des Bundesverbandes Breitbandkommunikation e.V. (BREKO) (available at: [https://www.brekoverband.de/site/assets/files/14148/gutachten\\_leistungsfahigkeit\\_starlink.pdf](https://www.brekoverband.de/site/assets/files/14148/gutachten_leistungsfahigkeit_starlink.pdf)).

telecommunications<sup>5</sup>. Pursuantly, BEREC proceeded to issue specific guidelines clarifying the exact definition and scope of application of VHCN<sup>6</sup>. Considering that the EECC has already been transposed and implemented in most Member States, the introduction of the term 'ultrafast access network' in the draft guidelines creates an alternative terminology and may give rise to legal uncertainty in terms of the scope of intended measures. As such, it is unclear as to why the Commission has elected to use the term 'ultrafast access network' instead of 'VHCN', for which there already is an existing regulatory framework.

It should also be mentioned that the draft guidelines specify the 'relevant time horizon'<sup>7</sup> cannot be shorter than two years, however without distinguishing between different time horizons pertaining to deployment phases. In the interest of providing a sufficient degree of planning security for market operators, BREKO holds that the relevant time horizon for *starting* a project must not be longer than twelve months. Currently in Germany, the relevant time horizon is implemented as three years. Yet, a time horizon of two or three years is not long enough to determine which specific project will be *finalised* and *completed*. That being said, BREKO would like to further stipulate that the relevant time horizon is not an appropriate concept to determine the existence of market failure with the given market situation. There are currently major capacity constraints and bottlenecks in civil engineering and permit granting, which lead to protracted building activities and uncertainties for network providers. A predefined timeframe can therefore not be considered the right parameter to measure market failure and as a consequence cannot rightfully determine whether a project has a viable private investment potential. We thus welcome any initiative to reduce the time frame for verifying planned private investments since this would have a positive effect on accelerating fibre deployment. However, we are highly critical of applying this concept as a determinant for market failure.

### 3) Conditions of aid for the deployment of electronic communications networks

We agree with the Commission consideration that the market for fixed broadband services is separate from the market for mobile broadband services<sup>8</sup>. In this regard, we observe that for the foreseeable future, fixed networks will continue to offer a considerably higher degree of stability and security, and as such, the two markets are expected to stay complementary to one another. This appreciation allows for the effective development of a viable state aid framework which takes into due account the specificities of the market for fixed networks.

With this in mind, we would like to make certain observations on the first and second conditions of aid for the deployment of electronic communications networks as provided for in Section 5 of the draft guidelines.

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<sup>5</sup> Art. 2.2 EECC

<sup>6</sup> BEREC Guidelines on Very High Capacity Networks, BoR (20) 165

<sup>7</sup> Section 2.2., para. 19 (I), page 7

<sup>8</sup> Section 5, para. 35, page 12

- a) Incentive effect: BREKO agrees with the premise that aid must not be granted to finance the cost of an activity that an undertaking would have nonetheless carried out in the absence of an aid measure<sup>9</sup>. In this spirit, it is essential that the applicable state aid framework ensures the presence of the incentive effect through an effective evaluation of the market and any intended measure. That said, we would like to draw attention to the inherent difference between measures aimed at the demand-side as opposed to measures targeting traditional network construction and deployment activity. While we take note that certain demand-side initiatives such as vouchers are addressed in Section 6 of the draft guidelines, we would like to underline that the concept of incentive effect must not be applied in a manner that can undermine the organic relationship which exists between demand-side initiatives and broadband deployment by virtue of market dynamics.
- b) Necessity for state intervention and the concept of economic benefit: We share the Commission's conviction that state aid must not be resorted to where such is capable of significantly undermining the incentives of commercial investors to invest in the first place<sup>10</sup>. At the same time, we observe that the discourse on necessity for state intervention, as presented in the draft guidelines, bases itself on several assumptions which relate to the concept of economic benefit and equitable market outcomes. While both these assumptions are central to the important objective of reducing the digital divide, attention must be paid to the underlying causes contributing to the lack of private investment in certain segments of the market. This is in particular the case with areas where there is an absence in demand for ultrafast access networks, which does not necessarily prove the existence of market failure, making it difficult to determine how economic benefit for society can be ascertained<sup>11</sup>, thereby presenting legitimate questions as to how such assumptions can translate into a diagnosis for market failure capable of justifying state intervention.
- c) Existence of market failure as regards fixed, mobile and backhaul networks: BREKO acknowledges the relevant provisions aimed at clarifying the draft guidelines through the inclusion of new intervention thresholds and types of target areas, namely, areas classified as white, grey and black<sup>12</sup>. As a general remark on this topic, we would like to emphasise that state aid interventions must clearly prioritise connecting the least connected areas, which do not have any foreseeable viable private investment potential, i.e. white areas, with one ultrafast access network. Measures which are aimed at using public funds to multiply the number of existing networks or to overbuild physical fibre infrastructures

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<sup>9</sup> Section 5.1.2., para. 39, page 13

<sup>10</sup> Section 5, para 51, page 15

<sup>11</sup> Section 5.2.2., para. 47, pages 14-15

<sup>12</sup> Section 5.2.2.1., para. 52-54, page 16

in a given area must be strongly and consistently avoided in order to not exacerbate the digital divide.

In that sense, the fact that the draft guidelines foresee the possibility of a potential market failure in a black area where at least two independent ultrafast networks already exist, is a cause for concern<sup>13</sup>. State aid must not be used for overbuilding fibre networks as a matter of principle, let alone in a black area where more than one network providing at least 100 Mbit/s is present. In situations as such, viable economic alternatives i.e. open access agreements between market participants, must be considered the preferred vehicle for achieving the underlying policy objectives. Given existing capacity shortages in civil engineering resources and bottlenecks in permit granting, allowing state aid measures for black areas especially in the absence of an obligation to prioritise white areas, risks diverting important resources away from least connected areas and undermining the efforts to reduce the digital divide. At the same time, this would lead to the wasteful and unsustainable usage of physical resources, because networks would be overbuilt in areas with sufficient connectivity coverage. In equal measure, such lack of clearcut prioritisation for white areas decreases the feasibility of attaining the targets laid out in the Digital Compass Communication. This issue will be the determinant of whether the draft guidelines prove a success or a failure. We therefore recommend that black and grey, as currently defined within the guidelines, areas are not considered as intervention areas for the purposes of state aid.

Additionally, due attention must be given to the current heterogeneity among Member States with regards to their existing national levels of deployment. Germany, for instance, has an increasing number of investors entering the fibre market, which shows the existing investment potential relative to certain other Member States, in terms of nationwide coverage. Consequently, grey areas emerge as a point where using public funds as a means of state intervention may cause market distortion if the aid measure is not carefully constructed with due attention to the technological characteristics of the existing networks, local demand and uptake capacity, and other local or regional variables ranging from deployment cost to availability of civil engineering resources. As such, a one-size-fits-all approach cannot be feasibly adopted for grey areas when it comes to making a determination on market failure. Moreover, considering recent market dynamics and capacity constraints in human and material resources, it once again should also be highlighted that deployment within a predefined timeframe cannot be considered the appropriate parameter to determine the existence of market failure.

Concerning the newly defined mixed areas, which can be partly white and partly grey, BREKO strongly disagrees with the Commission's approach to classify certain areas as

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<sup>13</sup> Section 5.2.2.1.3., para. 60, page 17

‘white’, which would allow overbuilding to a certain degree. For one, this would run the risk of certain areas, which would otherwise be connected via private and economically viable means, to be considered ‘white’ and remove any incentive effect through allocation of undue public funds. It would also raise many questions, as to how certain target areas are defined and the reasonability of the intervention. Adding to this, the permitted overbuilding threshold of 10% appears to be arbitrary and from a practical point of view, difficult to ascertain once construction activity has taken place. Therefore, the concept of ‘gap filling’ is susceptible to causing a potential distortion of the market in certain instances, particularly by opening the door to potential misuse of the provision to cater for more profitable areas over the least connected ones. We would like to once again underline that the draft guidelines must demonstrate a clear prioritisation for the allocation of state aid to first and foremost white areas, which are the most underserved, instead of using public funds to subsidise deployment activities in more economically viable areas. BREKO hence recommends that the final three sentences in Section 5.2.2.1.3 para. 59 are deleted.

Regarding potential situations of market failure, which may exist in the presence of 4G or 5G networks, we concur with the Commission’s understanding that such networks may fail to provide end-users with sufficient quality of services to satisfy their evolving needs<sup>14</sup>. We further agree with the principle that state aid cannot be granted to deploy a mobile network if the deployment of such network is part of the fulfilment of the obligations linked to the spectrum allocation<sup>15</sup>.

On the issue of market failure as concerns backhaul networks, we welcome the Commission’s approach to use fibre as a benchmark for performance and reliability. Fibre is indeed the most technologically capable electronic communication infrastructure with the highest Quality of Service (QoS), and as such, it is the most suitable, sustainable and future proof means for building backhaul networks.

- d) Instruments to determine the existence of market failure: We acknowledge that the draft guidelines designate two main instruments, namely detailed mapping and public consultation<sup>16</sup>, to identify the existence of market failure in the relevant time horizon. These instruments are, in essence, similar to the ones currently in place within the applicable framework of the German funding scheme for grey areas. Our experience indicates that relying solely on these two instruments causes undue delays and bottlenecks. This is in particular the case with respect to public consultation whereby relevant Member State

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<sup>14</sup> Section 5.2.2.2., para. 66, page 19

<sup>15</sup> Section 5.2.2.2., para. 68, page 19

<sup>16</sup> Section 5.2.2.4., para. 73, page 20

authorities may at times be overwhelmed with the amount of funding requests and submissions, especially within the context of markets investigations, the gravity of which is mainly felt by network operators. BREKO therefore considers that a more streamlined approach is necessary to facilitate the overall process. It would be preferable to introduce a new instrument to act as a primary gatekeeper for funding eligibility and the determination of market failure.

This gatekeeper instrument is envisaged as a mechanism of first instance, which can either result in a determination of (i) viable private investment potential, thereby directly eliminating the need for further assessment, or (ii) absence thereof, pursuantly entering into a secondary phase of assessment composed of the two instruments outlined in the draft guidelines. This is expected to reduce the need for detailed assessment for a number of funding applications, while helping improve the efficiency of the overall state aid allocation system. In this scenario, the gatekeeper instrument would consist of an independent body which would routinely assess private investment potential across different areas on the basis of predefined criteria, such population density, current broadband supply, and topography, among others. This will result in the establishing of exclusion area for which state aid cannot be allocated, hence, removing the need for proceeding with any further secondary assessment. At the same time, this will have the effect of shortlisting and prioritising the least connected areas which demonstrate a more pertinent state intervention potential. The gatekeeper instrument can be considered as part of a wider set of measures aimed at improving the transparency of current and planned deployment activities.

Regarding detailed mapping and the analysis of coverage<sup>17</sup>, we concur with the Commission's approach that Member States should enjoy a wide margin of appreciation to define the target areas. We further agree with the assessment that the size of target areas may play a role in the outcome of competitive selection procedures and that areas which are too big might indeed reduce the competitive outcome. It should also be highlighted that onerous mapping reporting obligations carry a disincentivising effect on smaller market undertakings due to a disproportionality in their compliance capacity when compared to dominant market players. Furthermore, detailed requirements will in general hinder the roll-out process since network operators are compelled to relocate scarce deployment resources to fulfil their administrative obligations. Therefore, it is crucial that any reporting requirements for projects that will be started need to be implemented on a voluntary basis and limited to twelve months in order to create a level-playing-field.

As concerns public consultations, BREKO agrees that the procedure must be transparent

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<sup>17</sup> Section 5.2.2.4.1., para.75, page 20-21



and accountable, and therefore the obligation for Member States to publish the consultation on a publicly available webpage at national level is welcome. We note, however, that the draft guidelines introduce a qualifier for which investment plans are to be taken into account as part of the assessment, by introducing the concept of ‘credible investment plans’<sup>18</sup> without defining what this term constitutes in practice. In the absence of a proper definition which delimits the scope of how the term ‘credible’ is to be interpreted and applied, one might question whether the ambiguity of this provision may give rise to legal uncertainty and divergent implementation leading to a dismissal of otherwise viable investment plans.

While we note that the issue of credibility of future investment plans is to a certain extent addressed within the context of nonbinding best practices featured in the draft guidelines, we nonetheless would like to point out the examples given, albeit detailed, fail to take into due account local variables<sup>19</sup>. We can attest to certain difficulties on this matter since the relevant time horizon for market investigations in Germany is three years, a timeframe for which binding commitments by undertakings can often not be made. This is particularly true when there is a large number of funding applications being processed at the same time. Additionally, funding plans and circumstances may change over the course of time and binding commitments might oblige network operators to follow through with their initial plans despite the originally intended objectives of an aid measure no longer being fit for purpose.

We further note that the best practices concerning ex-post monitoring of private investment plans appears to have been conceptualised in a manner that prioritises public intervention over private investment<sup>20</sup>. Particularly, the relevant example talks about ‘corresponding areas being carved out from the public intervention’ with the implication that public intervention is considered as the baseline from which exceptions may be made to allow for private investment. This possible interpretation of the example given runs counter to the spirit of the draft guidelines which intends to avoid crowding-out of private investment. Moreover, the best practice purports that areas which have already been ‘carved-out’ for private investment may ‘at any time’ be included in a new public consultation exercise. This possibility further undermines the legal certainty private undertakings are entitled to benefit from in the conduct of their given economic activity<sup>21</sup>.

Concerning the relevant time horizon as an indicator to determine market failure, BREKO would like to emphasise that we strongly disagree with applying a predefined timeframe to establish funding eligibility in a given area. As such, a market failure definition must not

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<sup>18</sup> Section 5.2.2.4.2., para. 80, page 21

<sup>19</sup> Section 5.2.2.4.3., para. 85, page 22

<sup>20</sup> Section 5.2.2.4.4., para. 92, page 23

<sup>21</sup> Section 5.2.2.4.4., para. 94, page 23

be based on a parameter which cannot sufficiently take into account current market conditions and its future trajectory. This is particular true for Member States that only started developing a fibre momentum recently, have an increasing number of investors entering the market and therefore experience capacity constraints in civil engineering and permit granting. State aid measures, which are primarily intended to give financial support, will not be able to adequately address these shortcomings.

- e) Appropriateness of aid measures, step-change and proportionality: BREKO shares the Commission's stance that aid measures are not to be considered compatible with the internal market if the same outcome can be achieved through less distortive measures<sup>22</sup>. We consider that a gatekeeper instrument, as proposed in the preceding section of this submission (3.d.), could help strengthen the wider foundations for facilitating appropriateness of relevant aid measures, while also providing for the development of broader alternative policy instruments<sup>23</sup>.

On the issue of step-change, we would like to urge the Commission to look beyond considerations of improved bandwidths and instead to base its assessment on technology capability. We can only proceed with designing viable state aid interventions when we acknowledge fibre as the main cornerstone for achieving the EU's connectivity targets. In other words, aid measures should not be deemed appropriate unless the technological basis for the funded network is fibre. Using public funds to support the deployment of less capable, less sustainable and less durable networks which lack the same degree of longevity as fibre would only result in a waste of public resources without achieving the overarching policy objectives. Therefore, we consider it crucial that the provisions foreseen in the draft guidelines with respect to step-change in fixed access networks<sup>24</sup>, particularly those concerning white, grey and black areas, are accordingly amended to designate fibre as the technological benchmark (FTTB and FTTH) for appropriateness assessment.

We highlight with disappointment that the draft guidelines, in their current form, permit aid measures for networks which neither reach gigabit speeds nor meet the Union's connectivity targets. Especially, with respect to white areas, we observe that the Commission deemed it appropriate to consider aid measures as compatible with the internal market insofar as download speeds are doubled (for existing networks below 30Mbit/s) or tripled<sup>25</sup> despite falling significantly short of VHCN parameters. This effectively allows public subsidisation for outdated network technologies incapable of achieving the desired policy objectives. Considering the cost of deployment as well as civil engineering needs, among others, this piecemeal approach whereby the Commission allows funding for outdated

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<sup>22</sup> Section 5.2.3., para. 95, page 24

<sup>23</sup> Particularly in contribution to the alternative policy instruments mentioned in Section 5.2.2.4., para 111, page 27

<sup>24</sup> Section 5.2.3.1., para. 98-103, pages 24-25

<sup>25</sup> Section 5.2.3.1.1., para. 99, pages 24-25

technologies for marginal and iterative step-change improvements will result in a much bigger cost down the line since further roll-out will be necessary and inevitable to meet future connectivity demands. As such, this supposed principle of technology neutrality undermines Europe's gigabit targets, delays fibre deployment and wastes public resources, while at the same time increasing financial and economic burdens of the digital transition and the efforts to bridge the digital divide.

In the same rationale, we note that the provisions for step-change with respect to grey and black areas<sup>26</sup> open the door for overbuilding of fibre networks. Providing state aid for network development in areas where at least one of the existing ultrafast access networks is underpinned by fibre technology (FTTB and FTTH) will crowd-out private investment, remove economic incentives and distort competition. We would like to once again reiterate that, in situations as such, viable economic alternatives i.e. open access agreements between market participants, must be considered the preferred vehicle to avoid overbuilding of fibre networks.

Similarly, with regards to the provisions of the draft guidelines on enhanced upload speeds<sup>27</sup>, we welcome the Commission's assertion that state aid for the deployment of networks providing enhanced upload speed must lead to a sustainable and non-temporary technological advancement without creating disproportionate disincentives to private investments. However, we consider that granting of state aid to improve upload speeds may inadvertently result in overbuilding of Hybrid Fibre Coaxial (HFC) infrastructure, thereby defeating some of the policy objectives and hindering a faster transition to full fibre networks. Therefore, the Commission should provide for appropriate safeguards designed to prevent overbuilding and crowding-out of private investment.

On the issue of proportionality of the state aid measure, we support the understanding that any aid given must be limited to the minimum necessary and that potential market distortions must be avoided to the maximum achievable extent<sup>28</sup>. Concerning the principle of technological neutrality as a component of proportionality, BREKO disagrees with the premise of the Commission's rationale. It is scientifically demonstrable that fibre networks are superior to traditional fixed networks which use outdated technologies that have a significantly lower degree of sustainability, energy efficiency, longevity and bandwidths capacity<sup>29</sup> when compared with fibre. It is therefore counter to public interest to advocate for a supposed principle of technological neutrality which neither serves the attainment of policy objectives nor favours the benefit of the citizen. Outdated technolo-

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<sup>26</sup> Sections 5.2.3.1.2. and 5.2.3.1.3., paras. 102-103, page 25

<sup>27</sup> Section 5.2.3.1.4., para. 104-106, pages 25-26

<sup>28</sup> Section 5.2.4., para 117, page 28

<sup>29</sup> Section 5.2.4.2., para. 127, page 30.

gies must be retired in order to pave the way for innovative and competitive digital markets and the adherence to technological neutrality risks damaging the European economy.

- f) The role of NRAs and best practices: BREKO agrees with the overall idea of providing NRAs with the resources and competences they need to make effective decisions<sup>30</sup>. In order to give Member States effective support, it is important to not implement a one-size-fits-all approach and give national authorities the competences to issue measures according to a Member State's particular needs. That said, this does not mean NRAs should enjoy decision-making authority on state aid matters, but rather act as a facilitator which provides guidance on local conditions and connectivity needs. It is equally important that National Competition Authorities (NCA) also have the necessary tools and competences to enable functioning competition on the internal market. In order to achieve a level-playing-field, it is crucial that no disproportionately high share of state funds is earmarked for a dominant operator, which would risk further strengthening their existing market position.
- g) Wholesale access: While we share the opinion that third parties' effective wholesale access to State funded networks is an indispensable component of any State aid measure, we would like to underscore that NRAs must enjoy a wide margin of appreciation in determining the applicable wholesale access obligations in a given area for state aid beneficiaries. Member States should as such have the necessary discretion to set the rules which best pertain to the local markets<sup>31</sup>. Regarding the deployment of sufficient new infrastructures<sup>32</sup>, we further consider the Commission's statement that 'ducts need to be large enough to host at least three networks' as disproportionate and onerous. This is because different Member States have varying duct infrastructures which impact on deployment speeds, expansion capacity and costs, as well as different standard construction practices necessitated according to geological topography and urban structure. Moreover, it also raises certain sustainability concerns, because most of the physical infrastructure laid, on average, will not be utilised, causing an inefficient allocation of resources and unnecessary emissions. It is therefore important to give Member States a larger margin of appreciation to determine factors such as duct size.

It is further observed that the draft guidelines establish a minimum effective wholesale access period of ten years for all access products except VULA<sup>33</sup>. We would like to bring to the Commission's attention the fact that the relevant period in Germany is seven years

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<sup>30</sup> Section 5.2.3.5., para. 113, page 27

<sup>31</sup> Section 5.2.4.4., para. 135, page 31

<sup>32</sup> Section 5.2.4.4., para. 136, page 32; Section 5.2.4.4.1.4., para. 141, page 33 and Section 5.2.4.4.2., para. 144, page 33

<sup>33</sup> Section 5.2.3.3.2., para. 142, page 33

according to the current legislation. Therefore, the relevant provision of the draft guidelines will result in a direct and significant impact on the German market, with the consequence of potentially shifting market dynamics and affecting overall competition in the wholesale market.

Additionally, the draft guidelines permit state funded planned extensions to enter adjacent areas which are already served by at least two independent networks providing comparable speeds<sup>34</sup>. It should be underlined that target areas are sometimes defined in a territorially broad manner during mapping exercises, which can result in building commitments that span over larger time periods thereby affecting profitability and return on investment. From this perspective, the prospect of allowing state funded networks to enter adjacent areas with existing or planned connections carries the risk of disincentivising private undertaking, granting undue advantage to aid beneficiaries and distorting competition, unless neither of the existing networks provide a bandwidth lower than 100Mbit, hence constituting a white area.

- h) Weighing the positive effects of the aid: While it is welcome that the Commission acknowledges the need to weigh the potential positive effects of an aid measure against the negative effects it may have on competition and trade, we nonetheless consider that the relevant provisions on what constitutes a positive effect and how this can be quantified is rather broad and is in need of further elaboration<sup>35</sup>. In that sense, it is crucial that the new state aid rules do not distort functioning markets and recent market dynamics, since private investment remains the driver of fibre roll-out. Any funding measure needs to be considered with this aspect in mind, so as not to cause unintended consequences undermining the policy objective achieving fibre markets.

#### 4) **Demand side measures aimed at supporting take-up and deployment of fixed networks**

BREKO supports efforts to introduce demand-side measures aimed at supporting take-up and deployment of fixed networks<sup>36</sup>. This is a particular area where we have consistently advocated with policy makers and regulators both at national and European level, since we consider demand-side measures, such as vouchers, important instruments in improving affordable access to connectivity which in turn supports economic growth and innovation. We share the understanding that these measures should be designed to reduce the costs for end-users<sup>37</sup>, however, only insofar as they pertain to fixed access networks in order to accelerate the attainment of the Union's gigabit connectivity target. As such, vouchers should be envisaged in a manner that encourages a switch from outdated networks to fibre networks to

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<sup>34</sup> Section 5.2.4.4.2., para. 149, page 34

<sup>35</sup> Section 5.2.6., para. 167, page 38

<sup>36</sup> Section 6, para. 173, page 39

<sup>37</sup> Section 6, para. 175, page 39

maximise benefits for the citizen and achieve the social and connectivity objectives (respectively referred to as social vouchers and connectivity vouchers in the draft guidelines).

It must be underlined that demand-side measures supporting both take-up and deployment are important to create the necessary market dynamics for accelerating roll-out in underserved areas. Alas, we observe that the Commission draws a significant distinction between connectivity vouchers aimed at take-up, on the one hand, and connectivity vouchers aimed at deployment, on the other. The draft guidelines even state that demand-side vouchers which support deployment would amount to a ‘misuse’ of the voucher instrument<sup>38</sup> and that connectivity vouchers can only be made available to end-users in areas where there is at least one existing network<sup>39</sup>. This effectively cuts off residents of underserved areas, such as white and grey areas without existing fibre connectivity, from having access to connectivity vouchers thereby discriminating against them as opposed to residents in black areas. Connectivity vouchers can serve as a viable instrument in facilitating the acceleration of fibre roll-out in areas with lower connectivity by creating a pull-effect for private investment. When used effectively, connectivity vouchers can emerge as a less distortive, cheaper and more efficient form of state intervention in certain contexts as opposed to supply-side measures. Indeed, it may at times be cheaper to fund vouchers to create demand in an underserved area, generating an indirect incentive effect for private investment, than using public funds to build the entire network.

Moreover, including technological neutrality as a condition for connectivity vouchers instead of designating fibre as a benchmark, the draft guidelines risk delaying the digital transition to a gigabit society by allowing the flow of public funds for outdated technologies<sup>40</sup>. In its current form, the draft guidelines open the door to distorting demand in the market by inadvertently permitting take-up measures capable of increasing adherence to slower, less secure, less sustainable and less robust existing networks with lower bandwidth. In return, this damages the very objectives the policy is meant to attain. Connectivity vouchers must, as a matter of principle, not be used for networks less capable than the fibre technology.

It should also be pointed out that any wholesale access obligations<sup>41</sup> stemming from demand-side measures should be in the discretion of the Member States as the national authorities are best placed to determine local market conditions. As such, the voucher model proposed by BREKO is conditioned on open access obligations in order to give all network providers fair, reasonable and competitive market opportunities.

To conclude, considering that the draft guidelines, once adopted, will have a direct effect on the

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<sup>38</sup> Section 6.2.2., para. 194, page 42

<sup>39</sup> Section 6.2.2., para 197, page 43

<sup>40</sup> Section 6.2.2., para. 194 and 196, page 42

<sup>41</sup> Section 6.2.2., para. 199, page 43

evolution of the European electronic telecommunications market for at least the next decade, it is of utmost importance that the new state aid framework is future-proof and able to bring Europe closer to achieving its connectivity objectives of becoming a gigabit society while bridging the digital divide. In this context, BREKO would like to highlight that the underlying draft guidelines cannot yet be considered fully fit for purpose, since they do not sufficiently take into consideration existing market conditions and the positive private investment potential. A robust, functioning and forward-looking regulatory framework will only be possible by acknowledging the crucial role of commercial fibre and putting in place a policy landscape which is favourable to accelerated fibre roll-out and an economically viable and competitive internal market. That said, while BREKO welcomes the Commission's efforts to revise and update the respective guidelines, we hope that the comments and contributions made in this submission will be duly taken into account to correct any pitfalls and ameliorate those provisions which risk undermining the wider policy objectives of the Union.

Should you have any further questions, please do not hesitate to contact us at any time.

Yours sincerely,

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