



February 2022

ETNO's response to public consultation on Draft Guidelines on State aid for broadband networks

ETNO welcomes the publication of the draft Guidelines on state aid for broadband networks (hereafter Guidelines) and the opportunity to provide its comments.

ETNO shares the Commission's evaluation that recognises the need to update the Guidelines and we appreciate that the draft overall addresses several issues raised by ETNO during the public consultation and follow-up meetings.

In particular, ETNO agrees with the need to update network categories, in order to better identify market failure and step change in the light of the new connectivity objectives for the years 2025 and 2030, and to clearly define conditions to be met for allowing state aid.

ETNO also deems important that the new Guidelines specifically encompass state aid measures for mobile networks and on the demand-side (vouchers), reflecting recent and increasing cases in respect to the past.

Furthermore, ETNO welcomes that the draft confirms the basic compatibility principle that a state aid scheme has to fulfil to be approved, among which avoiding market distortion and overbuilding of private investments that, according to ETNO, shall remain the most relevant potentially negative element to be assessed against the benefits of providing better connectivity to final users.

The present document is aimed at providing ETNO's comments on some specific parts of the Guidelines.

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1. Scope, type of broadband networks, definitions

ETNO shares the new categories of broadband networks defined in the Guidelines, in particular:

- agrees that market failure for fixed should be nowadays assessed with reference to ultrafast networks and no longer to basic broadband and NGA;
- appreciates the inclusion of a category for mobile broadband;
- appreciates the inclusion of a separate focus on backhaul.

2. Conditions

ETNO welcomes the Commission's reassertion of the primacy of private investment and the principle of technological neutrality.

We agree with the Commission that the aid may be granted if it:

- facilitates economic activities (§5.1.1.);
- has an incentive effect (§5.1.2.);
- complies with other provisions of Union law (§5.1.3.);
- has positive effects: reduces digital divide and/or contribute to foster the achievement of Union Green Deal objectives and promote sustainable green investments across all sectors (§5.2.1.);
- corrects a market failure, that means that it brings about a material improvement that the market alone cannot deliver (including for example where existing network provides citizens or business end-users with a suboptimal combination of service quality and prices). The Guidelines clarifies that *"The mere existence of market failures in a certain context is not sufficient to justify State intervention. State aid may only be directed at the market failure that remains unaddressed by other policies and measures."* (§5.2.2.).

ETNO believes that the compatibility principles, which are in line with the previous Guidelines, are appropriate for the Commission to assess whether the measure will have a positive impact and not distort competition.

3. Compatibility assessment and step change for fixed networks

White areas: ETNO agrees that in case of white areas market failure may be demonstrated if also the other conditions are satisfied. As far as regards step change (recital 99), we deem that in most cases it would be appropriate to set the 100 Mbps target also where existing networks are below 30 Mbps speed. It's also worth noting that white NGA areas should be quite residual at this stage and therefore the distinction between areas with connectivity below and above 30 Mbps is no longer needed. Therefore, save for very specific national circumstances, the provision of at least 100 Mbps ultrafast download speed (and tripling the available download speed) should be the minimum target in white areas, in line with the 2025 Gigabit objectives.

Mixed areas: According to the Commission's proposal, overbuilding of grey addresses must be limited to maximum 10% of all premises in a white target area. We welcome that the Commission intends to put a limit to the overbuilding, however the proposed threshold is not able in our views to ensure that the overbuilding is limited to the minimum extent necessary. A one-size-fits all threshold is not advisable and difficult to define. As a principle, overbuild must not be allowed unless in very exceptional circumstances where it cannot be technically avoided.

Upload speeds: §104 and §105 of the Draft Guidelines imply that state aid might be allowed also in presence of network/s providing 1 Gbps download speed (and 200 Mbps upload speed) but not 1 Gbps

upload speed. This provision risks to create a loophole to justify a public intervention in a currently competitive area, therefore eluding the need to demonstrate a market failure. Indeed, even though it is true that upload is becoming more important, the specific future relevance of upload remains difficult to predict, typically for mass-market. Particularly in this case, allowing a public intervention without clear safeguards would most certainly crowd out private investments and, therefore, this provision should be deleted.

Intervention in black area: ETNO welcomes that the Commission confirms that in principle an intervention in black areas creates an unacceptable distortion of competition. We believe, indeed, that intervention in black areas should not be allowed except in exceptional cases, limited at geographical level and only if the existence of an unsatisfied demand is concretely demonstrated.

4. Compatibility assessment and step change for mobile networks

ETNO shares the Commission approach that provides for separated guidelines for mobile and fixed since in general, aid schemes for mobile and fixed should be managed separately and therefore in this sense the market for fixed broadband services is separate from the market for mobile broadband services. Though the majority of the cases might have separated assessments of the markets, it might not be discarded that, exceptionally, in some specific national circumstances, public authorities may deem appropriate to assess mobile and fixed connectivity together since it has defined a single connectivity target which, on the basis of technology neutrality principle, could be reached by any fixed or mobile technology.

ETNO welcomes the technological neutral approach of the draft guidelines regarding the existence of market failure for mobile networks, not focusing on the specific presence of certain technology. However, this new approach based on end-user needs might result too vague and therefore provide a too high degree of flexibility to Member States. Some further guidance on how user's evolving needs might be finally measured and assessed is necessary in order to avoid market distortions. As a concrete example, the draft states that *"A market failure might thus exist in the presence of a 4G or even a 5G network where such a network does not and is not likely to provide end-users with sufficient quality of services to satisfy their evolving needs"* (§66). While this approach ensures technology neutrality (not linking the step-change to a leap in the technology used), it appears to be too broad and difficult to assess in practice. The risk is that every Member State might adopt its own approach, ultimately affecting the harmonized application of the rule across EU.

Though the lack of past experience does not give too much room for a clear indication, a preliminary proposal as a possible intervention threshold for mobile might be the average performance of a network in an urban area (measured in terms of maximum achievable speeds). If the average speed of the mobile network is not replicable in rural areas in the term of the mapping exercise, there might be, in principle, a scope to prove a market failure, provided that the intervention shall remain proportioned and representing a step change.

In any case, ETNO welcomes further guidance from the Commission on how Member State might map end user needs.

It is also worth noting the provisions of recital 108 clarifying the scope of the improvement among different technologies and the general definition gathered within recital 19, where a step change for mobile might represents a significant new investment and brings significant new capabilities to the market. Aligned with this consideration, clarifications provided in footnote 71 regarding the feasibility of state aid for active mobile equipment is also noted, as this equipment might play an important role when improving the final QoS provided to end customers.

Last, but not least, ETNO welcomes that the Commission recognizes that, state aid may be allowed to provide increased quality on top of coverage obligation under spectrum assignments, to the extent that a demand for such increased quality is demonstrated.

5. Compatibility assessment for backhaul networks

State aid for backhaul should be admissible only to the extent necessary and justified by concrete market failures (i.e., end user customers cannot receive a fixed gigabit speed or a mobile 4G/5G service of adequate quality due to lack of sufficient capacity in the backhaul part), and for the specific area of the state aid project.

Regarding step change, the Commission requires to double download and upload speed, but without mentioning whether it should also at least reach the minimum level of performance and reliability of fibre (i.e., Gigabit speed). ETNO believes that the Commission should clarify this point.

Concerning mobile broadband networks, state aid for backhaul for rural/remote areas might be necessary to meet QoS demands from end-users which cannot be met by private investments alone, because of the high costs for fibre backhaul in such areas. Thus, it will not distort infrastructure competition, in respect to existing competitive advantages, but rather support better coverage for all end-users.

6. Relevant time horizon

The draft Guidelines confirms that the relevant time period should correspond to the same time frame of the planned deployment of the State funded network, however the Commission proposes a minimum period of two years, instead of the three years provided for in the current Guidelines (§63).

ETNO welcomes the clarifications and believes that linking the mapping to the deployment of the subsidized infrastructure is the right choice to limit the risk of crowding-out. However, ETNO believes that the current minimum three-year period is by the time being fit for purpose and should not be reduced. As far as regards §88 on imposing a commitment to private operators, it is necessary to stress that a margin to deal with unforeseeable delays in the deployment is needed, especially in light of the efforts that 5G capillarity might bring due to protracted procedures surrounding network rollout (permit granting), which are subject to many stages and multiple authorizations, and also due to resource shortage. It is objectively impossible to commit in all circumstances and markets on rollout estimates submitted for the upcoming 3+ years. Plans may be by nature subject to change (also due to factors not attributable to the private operators concerned). Therefore, operators shall have the possibility to amend/update their plans (especially after the first year) providing a reasoned justification and no penalties should be applied in case of delays due to justified reasons.

7. Mapping

Firstly, clarifications are needed on the application of Art. 22 of the EECC to State aid, in particular on *“The geographical survey shall include a survey of the current geographic reach of broadband networks within their territory, as required for the tasks of national regulatory and/or other competent authorities under this Directive and for the surveys required for the application of State aid rules”*.

Secondly, the *“recommended”* methodology in Annex I is very prescriptive on the one hand, while being far from practice on the other hand. It focusses on ‘achievable performance’ that can be relied upon under ‘peak-time conditions’, i.e. for fixed *“when a minimum 20% of the users are active and transmitting concurrently at the nominal peak rate”*, or, alternatively, but similarly unrealistic, relying on conditions described in recitals 4, 5, 9, 10 and 12 of Section 2.

As far as regards premises passed, it would be also welcomed a full alignment with BEREC definition that also clarifies that: *“BEREC notes that generally, for a premise to be passed, the broadband network must be deployed up to the boundaries of the private domain of the address (i.e. the borderline between the public and private domain). In case of FWA networks, a given premise is passed when there is an existing access point (typically the mast with antenna) nearby, typically with direct visibility to the end-user location and that a potential commercial offer can be accessible for end-users.”*

In addition, the Guidelines should specify that Member States should give priority to the coverage of “technical units”, namely the premises that will most likely need a VHC connections (residential premises, business premises, etc.).

Also for mobile the recommended methodology - which refers as well to peak time conditions - is strict, prescriptive and far from practice and open to subjective and purpose-driven approaches. On the other hand, it is very difficult to eliminate those shortcomings without the methodology becoming too prescriptive and sort of “one size fits all” missing important national circumstances.

Namely, the methodology aims to approximate user experience, thus necessarily implying numerous assumptions. Yet, it is extremely complex to holistically simulate user experience. For example, the 50% cell load does not take into account that actual network load may be to a much larger extent dependent on the type of content that users transmit at a given time rather than how many users are simultaneously transmitting, e.g. one user with heavy traffic needs (e.g. high-quality video stream or online gaming) may cause more load than a dozen users using their connection for emails or other applications with comparably low data intensity.

Most importantly, many Member States have been extensively using other methodologies for various other mapping purposes: for assessment of compliance with obligations under the individual rights to use spectrum, for transparency on mobile coverage to the public, and for identifying market failure as a basis for state aid. These methodologies have been tested in practice, are easier to apply and consequently also to verify. We believe that the methodology used to determine the absence of sufficient network coverage should be used at national level for similar purpose, in order to reduce the burden on operators.

In addition, it's worth noting that the recommended methodology also differ from what BEREC provides for the geographical mapping pursuant to article 22 of the EECC (see BoR (20) 42) as well as from BEREC provisions in the Report to enable comparable national broadband coverage indicators throughout

Europe (BoR (21) 172) that specifically aims at promoting a harmonisation in the measurement of the broadband indicators taken as reference in the DESI.

Indeed, according to BoR (20) 42, for mobile networks NRAs/OCAs may require optionally only the download/upload maximum speed. Accordingly, BoR (21) 172 recommends for mobile networks to rely on the 'maximum achievable speed' concept.

Therefore, we suggest the Commission to re-evaluate the need to define an additional methodology (as currently provided for in Annex I), instead of referring to already established approaches. As a second best, Member States should be free to use a different methodology than that in the Annex, if more suitable according to national circumstances.

8. Private extension in adjacent areas (§§147-149)

As a first remark, the provision seems to put a limit to the extent in which a private operator can invest with its own resources. As this would be not consistent with the objectives of State aid measures that should, on the contrary, have an incentive effect and therefore also generate more private investment, we kindly ask the Commission to confirm that investment with private resources are always allowed under State aid. As a second remark, the provisions include a very complex procedure, as It is very difficult to predict extensions during a mapping/public consultation as requested in the draft Guidelines. It is therefore unclear how to enforce this provision in practice and which issue should solve. ETNO calls for the clarification of this point. Privately funded interventions should in any case always be allowed (provided that no undue use of state resources is involved).

9. Tender procedures

Firstly, in respect to 2013 Guidelines, the new draft proposes a wider range of possible qualitative criteria¹ that in ETNO views risk to create uncertainty/ fragmentation especially if the criteria are not objectively measurable.

Secondly, ETNO welcomes that the draft Guidelines grant equal tender conditions to any investment model able to ensure effective access under fair and non-discriminatory conditions, not providing any unjustified advantage to a specific business model which has not proven over the years to be more effective than others (e.g. wholesale-only).

Indeed, we appreciate that the draft Guidelines correctly require that *"The State funded network must offer effective access under fair and non-discriminatory conditions to all operators who request it."* (§136

¹Beyond the geographical coverage, the sustainability of the technological approach and the impact on competition, qualitative award criteria may also include, among others: the performance of the network (including its security), the future proof qualities of the technological approach, the total cost of ownership, the climate and environmental impact of the network (Member States may also include obligations to implement mitigating measures in case the network may negatively impact the environment)

and §141) without any specific reference to additional points for bidders proposing a wholesale-only model, nor the limitation to act as a wholesale-only in case of intervention in black areas.

Indeed, we strongly believe that advanced non-discrimination safeguards (e.g. Equivalence of Input) as well as other pro-competitive investment models (such as co-investment) guarantees non-discriminatory access. We therefore welcome the deletion of the reference to wholesale-only, which was not justified in the current market situation.

Thirdly, § 125 suggests the option to grant aid without a competitive selection procedure to a public authority to deploy and manage a broadband network at wholesale level directly, or through an in-house entity (direct investment model), and even that the public authority may be allowed to provide retail services as a “retailer of last resort” where a consumer cannot get a retail service from the market. A much less intrusive option is described in §126, according to which a concession or other entrustment by a public authority or in-house entity to design, build or operate the network must be allocated through an open, transparent and non-discriminatory competitive selection procedure. Therefore, it should be explicitly stated that the option described in § 125, if maintained, should be referred to very specific circumstances to be assessed on a national basis and clearly justified on the basis of the competitive dynamics. The gap funding model should in any case be the “reference”, being the direct model a much more intrusive model of intervention.

10. Wholesale obligations

Wholesale obligations for fixed networks are similar to those set forth in the 2013 Guidelines. However, in ETNO’s view the beneficiary obligations should be aligned with the ones potentially imposed on the SMP operator.

The wholesale obligations for mobile networks are the most important addition in this paragraph. This is a new topic in the EU debate as, being mobile market competitive, there is no history of obligations imposed on SMP players (as in the fixed market). Nevertheless, it is worth mentioning that requirements of §139 as currently formulated are not proportionate given that they prescribe a very broad catalogue of possibilities without the grounds this may always be technically or operationally feasible. The subsidised operator should be required to provide reasonable wholesale access services at different levels and should have the possibility to suggest alternatives in case it cannot provide the specific service required by the access seeker. In any case it is not clear what service the guidelines refer to when mentioning bitstream access for mobile networks at §139. Bitstream is just applicable to fixed network, therefore the reference should be deleted in the case of mobile.

The obligation at §139 and footnote 97 to provide “*the widest range of wholesale access products*” should be replaced by an obligation to provide “*a reasonable set of access products*” which needs to be upheld by an assessment of proportionality. Along the same lines, we also deem that §150 c), that forces Member States to demonstrate disproportionate costs for each access product before granting an exception, should be substituted by an obligation to simply prove the existence of alternative reasonable access products. This would reduce the burden for Member States/operator and allow a more efficient procedure, preserving competition.

Agreements have been purely based on commercial terms (for roaming, MORAN, MOCN) and they usually imply very thorough technical analysis of the involved operators. Therefore, the Guidelines should specify that Member States (and NRAs) should take into account also the technical conditions in the target area when defining the obligations (i.e., imposing all the range of obligations might not be feasible). Preferably, national authorities should aim for a market consensus where an effective and efficient point of access to publicly funded network elements is located

In addition, considering that there are no regulated nor standardized wholesale mobile access products, it is difficult to concretely envisage the type and level of wholesale access to subsidised mobile networks that may be sought by access seekers, particularly with regards to 5G and future mobile generations. We therefore suggest removing the safeguard period of 6 months between granting a wholesale service and the start of retail operations.

ETNO asks the Commission to clarify the financing procedure in case of increased capacity needed. Indeed, in case of access obligation, it is not clear who is financing the costs for access when it required by an upgrade or increased capacity of existing infrastructure and particularly whether the additional costs are covered by state aids (automatically or not), and if not, whether it is possible to fix prices without being bound by fair and non-discriminatory conditions. In this framework, ETNO believe that §139 should be deleted and that the Commission should consider that when not State funded, fair and non-discriminatory conditions should not apply.

11. Compatibility assessment for take-up measures

The 2021 DESI report shows that take-up is still very low in the EU, with an average take-up of 100 Mbps offers at 34% (still far from the 50% 2020 objective of the Digital Agenda for Europe) and a much lower take-up of 1 Gbps offers at only 1.3% against an average EU coverage respectively of 75.5% and 50.9%². Therefore, ETNO welcomes the introduction of guidelines to assess compatibility of demand-side state aid measures (vouchers).

Given the importance of this instrument and considering the lack of past experience about the right proportion of subsidies to be applied, ETNO believes the limit of 50% (§ 191) might be rendered flexible in function of the specific national context.

Finally, on the question of connectivity vouchers, ETNO believes that § 199 include an undue burden on a specific category of players and therefore should be deleted.

12. Transparency, reporting, monitoring and ex post evaluation plan

² Source: Broadband coverage in Europe 2020

ETNO welcomes that the Guidelines maintain transparency/reporting provisions and that also provide for an ex-post evaluation plan.

However, we believe that the transparency of the measure approval is not always guaranteed. Indeed, stakeholders often lose visibility of the process after the end of the national public consultation which usually include just a very high-level description of the measure with several options still under consideration. Also, the formal notification to the Commission is usually not publicly communicated and therefore stakeholders are left wondering whether the Commission's formal assessment has started or not and whether their comments have been taken into account in the final measure. In order to improve transparency and allow a proper involvement of the stakeholders also during the Commission's assessment of the measure which is often decisive, it would be therefore opportune that also the state aid draft measure notified to the Commission, along with an analysis of the replies to the public consultation, is made transparent (for example, through the publication on the Commission website on the date of the notification).

13. Reflection of environmental impacts in the application assessment

We recommend that this part is aligned with the incoming Broadband Cost Reduction Directive, which may also lay down certain special conditions for the assessment of environmental impact of access networks. Yet, we already welcome that the Draft states that state aid measures must be compatible with the internal market rules.

About ETNO

ETNO (European Telecommunications Network Operators' Association) represents Europe's telecommunications network operators and is the principal policy group for European e-communications network operators. ETNO's primary purpose is to promote a positive policy environment allowing the EU telecommunications sector to deliver best quality services to consumers and businesses.

For questions and clarifications regarding this position paper, please contact Maarit Palovirta, (palovirta@etno.eu) Senior Director of Regulatory Affairs.