

**Contribution by The Broadband Association ANGA (ANGA Der Breitbandverband e.V.)
on the EU Commission's draft of the revised Guidelines on State aid for broadband net-
works (Broadband Guidelines)**

I. Introduction and general remarks

The last two years under the COVID19 pandemic have shown that a sufficient broadband connection is an absolute essential for individuals, undertakings and social institutions to facilitate and uphold economic and social life. It is therefore necessary to achieve the European gigabit society objectives. That includes the EU Commission's connectivity goals that shall be achieved by 2025:

- (i) all European households should have internet connectivity of at least 100 Mbps download speed, upgradable to 1 Gbps
- (ii) socio-economic drivers such as schools, hospitals and public administration as well as digitally intensive enterprises should benefit from Gigabit connectivity (1 Gbps upload and download)
- (iii) all urban areas and all major terrestrial transport paths should be covered by an uninterrupted 5G network.

The Broadband Association ANGA unites about 200 undertakings from the German broadband sector, including Vodafone Germany, Deutsche Telekom, Telecolumbus (PŸUR), Deutsche Glasfaser, EWE TEL, several regional fibre companies like M-Net in Munich, wilhelm.tel in Hamburg, NetCologne and many more. The ANGA members do their part in building out and upgrading their broadband networks – fixed and mobile – to offer as many households and socio-economic drivers as possible access to gigabit internet.

So far, market driven broadband deployment has played the most important role in achieving the gigabit objectives. Infrastructure competition by alternative network operators has insured innovation and private investment for many years now. We believe, this will also be true for the foreseeable future. Hence, public intervention such as state aid should only play a subordinate role in order not to distort competition. This in mind, the EU commission has to limit the scope of intervention according to their new Broadband Guidelines to situations of market failure, i.e. areas that will not be deployed with ultrafast networks by private investment in the years to come.

The Commission's draft proposal for the new Broadband Guidelines does not yet fully commit to these boundaries. The draft shows inconsistencies, apparently mixes up intervention thresholds and target/step-change requirements and fails to take into account recent Commission decision practice (namely SA.54668 (2019/N) – Bavarian gigabit scheme, and SA.52732 (2020/N) – National gigabit scheme Germany). As a result, we see the danger of overarching state interventions that could distort competition, devalue private investment and hence hinder gigabit roll out instead of fostering it.

We will discuss these and other issues in detail below:

II. In detail

1. State aid for fixed networks

The first big change in the draft for the new guidelines compared to the 2013 version is the focus on “ultrafast access networks”. Ultrafast access networks have to provide at least 100 Mbps download speed. The previously relevant NGA networks only had to reach 30 Mbps download speed.

Putting the **emphasis on download speeds** is and remains correct with a view to market developments and user behavior: the demand for higher upload speeds is significantly lower than for download speeds. The offer of asymmetric speeds therefore fulfills user demand – and will continue to in the foreseeable future.

We fully support the Commission’s **evaluation of the technical capabilities** of different network technologies. The draft Guidelines correctly regard FTTx and cable networks with at least DOCSIS3.0 as well as potentially fixed wireless access networks as “ultrafast networks” (recital 22)) and FTTB/H as well as DOCSIS3.1 as capable to deliver 1 Gbps download speeds (footnote 5 to recital 5)).

a) Intervention thresholds

However, the draft Guidelines fail to consistently set out the criteria for the assessment of market failure in “white”, “grey” and “black” ultrafast areas. In particular, the additional criteria according to which a market failure should be determinable in each case, run the risk of unduly neglecting the extent to which the private sector is able to address end-users’ needs and of widely broadening the scope for public intervention. This goes to the detriment of private investments and infrastructure-based competition. The draft thresholds would counteract the careful assessment required to identify market failure.

Thresholds of 1 Gbps download and 200 Mbps upload speeds are more appropriate for the step-change assessment and as requirements for the subsidized networks in cases of state intervention, but not to assess market failure.

In practice, these thresholds are otherwise likely to often lead to a finding of market failure for grey or even black ultrafast areas, even though one or more ultrafast networks are already available there that can deliver download speeds of well over 100 Mbps. In fact, even the usual retail products provided by operators of FTTB/H networks today tend to fall below the minimum 1 Gbps download and 200 Mbps upload thresholds.

State intervention, however, should remain the exception and not become the rule. But the thresholds proposed by the draft could lead to exactly that: Public intervention in large parts of the territories of the Member States. In any case, what should be the relevant factor for determining the performance of a given network are its potential technical capabilities – not marketed bandwidths at a given time.

Against this background, we suggest setting intervention thresholds in the Guidelines which take into account recent decision practice (SA.54668 and SA.52732).

b) Mixed areas (white and grey)

The concept of mixed areas (recitals 58 and 59) consisting of target areas which are partly white and partly grey contradicts the principles of state aid control. Overbuilding of existing networks in areas not eligible for funding will always have distortive effects and crowd out private investment. **Any overbuilding, how little its extent may be, will always be “undue” and hence inadmissible.** We do not see any room for Member States to demonstrate that overbuilding would be proportionate and would not create undue distortions of competition. In fact, a reduction of the necessary state aid amount cannot by itself constitute a justification for or render overbuilding proportionate.

Moreover, despite the 10 per cent maximum limit and depending on the layout of mixed areas, the (cumulative) effect on the already existing networks may be anything but limited and have significant distortive effects. **Thus, the concept of “mixed areas” has a great potential for abuse. It should be removed from the revised Guidelines altogether.**

c) Step-change

As argued above, the draft Guidelines appear to mix up the categories of intervention thresholds on one side and the step-change and target requirements the new subsidized network must meet on the other. These should, however, be strictly considered separately from each other. **While the intervention thresholds need to be set in a way that carefully assesses market failure and limits distortions of competition to a maximum extent, step-change requirements should reflect technological developments, take into account the Commission’s 2025 connectivity objectives and make sure that state-funded fixed networks are future-proof.** In this regard the Commission should explain, why the broadband guidelines do not aim for the deployment of very high capacity networks (VHCN) in their step-change requirements.

The draft guidelines fall behind these necessities. In particular, the target requirements for “white areas” could lead to the rollout of subsidized networks with a bandwidth even below that of “ultrafast” networks and which are far from being upgradable to Gigabit. Considering the objective of offering all households gigabit upgradable connections this approach irritates. ANGA believes that any state funded network should meet the parameters required by the Commission’s own connectivity targets.

d) Enhanced upload speeds

Another example for the blurring of intervention thresholds and target requirements are the provisions on the new category of “enhanced upload speeds”. Such enhanced upload speeds – i.e. upload speeds of up to 1 Gbps – might be needed by individual users in the future. In this case, the member state may, after demonstrating such need, grant state aid for the deployment of networks offering up to 1 Gbps upload speeds even if a network providing 1 Gbps download but not 1 Gbps upload speeds already exists. If such aid is granted, it must result in “a significant, sustainable, pro-competitive and non-temporary technological advancement without creating disproportionate disincentives to private investments”.

So even if a gigabit capable network already exists, state intervention shall in the future be possible to guarantee gigabit upload speeds in certain cases. ANGA sees this very critically. There is simply no market failure determinable. Even if individual end-users should prove their need for higher upload speeds, it is foremost the decision of telecoms undertakings to react to such demand. If upgrading a network for only single customers is not economically viable, that does not necessarily imply a market failure. In fact, not to answer such demand might be the sensitive reaction – considering that connecting all customers to gigabit download speeds is the primary objective of the Commission’s 2025 targets.

ANGA wants to emphasize that to date as well as in the foreseeable future, upload bandwidth requirements remain significantly lower than for download speeds. Even with the rising use of home office applications during the COVID19 pandemic, i.e. video conferencing, currently offered upload speeds sufficiently fulfill users’ needs. Telecommunications operators have in the past and will in the future adapt their offered upload speeds to customers’ requirements – and if need be, also upgrade their networks accordingly. **Hence, there is no room for the suggested “enhanced upload speeds” regime.**

e) Use of existing infrastructure

ANGA welcomes that more guidance and stricter rules on the use of existing infrastructure to participate in tenders are provided for in recitals (132) et seq. of the draft Guidelines. This will help to ensure more open tender procedures.

The guidelines have to ensure though, that municipalities do not in their tenders demand from bidding operators to use existing infrastructure that is unfit for deployment purposes. Ducts of municipal utilities for example, are often unusable for building house connections. These scenarios would have to be excluded from any requirement to make use of existing infrastructure in the context of a competitive selection procedure.

f) Extension of networks in adjacent areas

The use of subsidized networks to push privately funded broadband deployment into adjacent areas does economically make sense. This can lead to a reduction of public funds needed for a comprehensive buildout of a given area. **It has to be ensured though that existing gigabit network infrastructures are not overbuilt.** This would have significant distortive effects on competition. The revised guidelines therefore must contain provisions to counter these effects.

However, the rules contained in recitals (148) and (149) of the draft guidelines are not appropriate to meet this objective, both from a procedural point of view and with regards to the preconditions they set for excluding private extensions into gigabit areas.

Recital (148) requires interested parties to oppose to private extensions in the public consultation process. This is unlikely to be an effective approach because at the beginning of the mapping and consultation process the target area is not yet (clearly) defined and can only be determined after the procedure. Therefore, it may be highly unclear which adjacent areas may be relevant for possible extensions. It may also be the case that network operators do not participate in the consultation process because they do not have any relation to the target area, yet their infrastructure present in adjacent areas may be subject to later overbuilding by extension of the subsidized network.

To avoid such practical imponderables from the outset, **rules on the permissibility of private extensions should apply without the need for opposition to extensions in the consultation process.**

Even more problematic are the conditions under which an extension is to be ruled out (temporarily). Recital (149) requires the relevant adjacent areas to be “already served by at least two independent networks providing speed comparable to those of the State funded network or that there is at least one comparable network in the adjacent area which entered into operation less than five years before the State funded network”.

This would potentially allow private extensions (and thus overbuilding) into (grey or even black ultrafast) areas which even according to the already too generously formulated intervention thresholds set by the draft (see above) would not be eligible for funding. **State aid-induced extensions into gigabit areas where clearly no market failure exists could thus massively crowd out private investment.**

The performance of the subsidized network can therefore not be a suitable benchmark criterion as to which extent existing network infrastructures are to be protected from being overbuilt by extensions into adjacent areas. Furthermore, it is neither comprehensible why a differentiation should be made between the aid beneficiary’s and access seekers’ extensions nor that the period during which no extension may be carried out should be limited to only two years after the entry into operation of the subsidized network.

The rules on private extension therefore need adaption (the basis for which could be decision SA.48418 – Bavarian gigabit pilot project). Otherwise, the permissibility of private extensions could *de facto* lead to an “anything-goes” scenario, with aid-induced extensions resulting in massive distortions of competition.

g) Wholesale access products in fixed networks

While it certainly is the case that demand for open wholesale access to funded networks (or for certain access products) has been limited, this is likely to change soon. As the rollout of fixed Gigabit infrastructure proceeds, both based on private investment and on aid measures, the issue of wholesale open access is becoming increasingly relevant for the market as a whole.

In addition, only a comprehensive wholesale open access obligation including all access products is a suitable means to limit the distortive effects of aid measures on competition.

Against this background (and with a view to the possibility of exceptions laid down in recital (150)), there is no basis to *a priori* limit the obligation for the aided network to provide effective and full physical unbundling to black ultrafast areas. **On the contrary, it is precisely where infrastructure competition has been less intense so far (i.e. in white and grey areas) that the physical unbundling requirement should apply.**

h) Relevant time horizon not the only determinant for market failure

In their draft for the new broadband guidelines the Commission states that a market failure has to be assumed if after a certain period of time a given area is not deployed with gigabit networks with private funds. The time factor is not the only marker for the commercial potential of a certain area, though. Hence, State Aid measures should not solely be based on the expiration of a relevant time horizon.

If an area is commercially viable but cannot be developed with gigabit networks within 3 years due to **construction capacity restrictions** in the market, **state aid will make no positive difference to the deployment speed** – mainly change the sequence of deployment to a less optimum state. Economic parameters should be used to determine market failure. **Therefore, ANGA suggests to introduce a new preceding procedure before a given area can enter into public consultation** (see below).

i) Areas with the potential for private deployment (potential analysis)

From ANGA's viewpoint the question of which areas qualify for state aid under the new regime is one of the most critical when it comes to finding the right balance between protecting private investments and allowing the use of public funds in case of market failure. Today the deployment of new network elements hinges on many aspects – but usually not the lack of funds. Private investors stand in line to literally put their money in the ground and telecoms operators build out their networks continuously. What slows down network deployment today is the deficiency of civil engineering capacities and administrative burdens when it comes to permit granting and the use of alternative deployment methods (i.e. trenching).

Therefore, to flood the market with public money will not speed up the deployment of gigabit networks – in fact it might even slow it down. Competition about the existing civil engineering capacities will increase even more. This would lead to the connection of lesser end users with gigabit in a longer time.

Therefore, it is crucial to identify those areas that will likely be built out by telecoms operators based on economic parameters. All areas that show the potential for privately funded deployment should be excluded from state aid procedures for a certain period, e.g. three years.

This buildout potential should at least in a first step be determined detached from concrete, binding commitments of operators. **We suggest that an independent scientific institution examines on a national basis which areas show – according to certain parameters – the potential of private deployment.** The results of this examination could then be matched with voluntarily provided and binding forecast data of operators where they state which areas they will build out within the next 12 months.

The areas identified in this investigation should be excluded from entering into state aid procedures, i.e. the consultation process suggested by the Commission. The remaining underserved areas can immediately go into the consultation and tender process.

Should the Commission stick to its suggestion of referring to a relevant time horizon for the results of the public consultation process ANGA advises to keep the well established three years. (instead of just two years). This would as comprehensively as possible give priority to private investments and maintain opportunities for network rollout without public intervention.

Only if the market will not provide the potential areas with gigabit networks over time state aid should be used to do the job.

j) Annex I – Mapping

(i) New mapping procedure unnecessary

Annex I with its comprehensive and detailed technical specifications is surprising and seems highly superfluous for two reasons:

On the one hand, there appear not to have been any significant problems with the mappings carried out under the current state aid regime so far that would justify such a detailed specification. The suggested mapping requirements would, however, blur the boundaries between mapping exercise and consultation process even more and likely result in an enormous effort and complexity for all stakeholders. Even more serious is the **risk that with the very prescriptive methodologies** and technical specifications the draft guidelines intend to apply and which profoundly deviate from network dimensioning principles applied by network operators in practice, **mapping exercises would massively underestimate the capabilities of (existing) network infrastructures**. This would result in a considerable extension of areas eligible for public funding and significant distortions of competition.

On the other hand, **there are already processes** (to be) implemented in national law in all Member States on the basis of the provisions in Directive (EU) 2018/1972 (European Electronic Communications Code, EECC), namely Article 22 on geographical surveys of network deployments. Based on this, Member States have or will establish exhaustive mechanisms to assess existing (and possibly planned) broadband coverage, which may well serve as the basis for a mapping exercise in the context of state aid measures. **Therefore, there is simply no need to establish any additional mapping procedures via an annex to the Guidelines.**

In this context, it should also be taken into account that Article 102 of the EECC requires operators to create **transparency about essential performance characteristics** of broadband connections in the form of a contract summary, for which the network operators must also be liable vis-à-vis their customers. Art. 4 of Regulation (EU) 2015/2120 (TSM regulation) also already provided for transparency on the bandwidths available on broadband connections. **These existing data can be used in order to assess not only the technical coverage but also the performance of the relevant networks.** A completely new mapping procedure on the basis of peak-time performance is unnecessary and dangerous.

The Commission should therefore completely refrain from making any (additional) specifications on mapping in the context of the revised Guidelines. Instead, the new broadband guidelines could refer to the respective sections of the EECC.

If the Commission should stick to their proposal for a new mapping mechanism, they should make sure that technical mapping parameters observe actual market practice and that within a given area applicable to subsidies **the neediest sub areas should be prioritized**. Considering the large number of potentially eligible households and the subsequent amount of funding procedures facing only a limited quantity of construction capacities such prioritization is necessary - not least so as not to crowd out private investment.

(ii) definition of “premises passed”

In this context, the definition of “premises passed” in recital (19) of Annex I is way too restrictive. The definition would unduly exclude many premises for which there is a supply capability on the basis of existing infrastructure.

Both in terms of time (service activation within just 4 weeks) and in terms of costs (not exceeding average activation cost), arbitrary specifications are made in Annex I that appear to be completely detached from what is standard market practice.

This starts with the fact that the draft speaks of “activation fee”, which usually does not refer to the costs of connecting a building or premise passed by broadband network to that network. Such costs of turning a “passed” building or premise into a “connected” one, as well as the fact that they are borne by the owner, are customary in the market and universally accepted.

If at all, the Annex should refer to “connection fees” and mandate for “premises passed” to include all address points for which it is possible to set up a building connection at standard market conditions and within a reasonably short period of time.

2. State aid for mobile networks

ANGA welcomes that for the first time the revised draft guidelines are to provide guidance on state aid for the deployment of mobile networks. In particular, a flexible approach to the step-change concept in the context of mobile networks is the right approach to take into account ever-evolving technological developments.

While as a matter of principle, State aid must not be granted to rollout mobile networks in areas subject to coverage obligations placed upon mobile operators in spectrum allocation procedures, a more differentiated approach seems to be appropriate in cases where the public support is limited to the rollout of passive mobile infrastructure.

In these cases, significant private investment by mobile network operators is required in order to ensure actual mobile coverage. Therefore, there is no basis to per se rule out the use of public funds or of publicly funded (passive) infrastructure for the deployment of a mobile network which is part of the fulfilment of coverage obligations.

In any case, coverage overlaps from funded sites into areas subject to coverage obligations should be considered irrelevant. Otherwise, there is a risk of unsolvable delimitation issues in practice, and the goal of addressing a market failure as comprehensively as possible could be missed.

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