

European Commission  
Directorate-General for Competition  
– Unit C4  
State Aid Registry, 1049 Brussels

e-mail: COMP-BBGL@ec.europa.eu

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**Object: Public consultation on the Revision of the Guidelines on State aid for broadband networks - Open Fiber's Observations**

Open Fiber ("OF") welcomes the opportunity to express its views on the Draft Revision of the Guidelines on State aid for broadband networks ("Draft").

First, we would like to express our appreciation for the complex update of the State Aid Guidelines 2013 ("current BBGL") carried out by the Commission to make the new Guidelines as consistent as possible with the *Communication on the 2030 Digital Compass* ("DC 2030")<sup>1</sup>, which provides a clear vision and path towards a sustainable and more prosperous digital future.

As known, this new vision revolves around four cardinal points with specific targets for each one. As regards connectivity, the DC 2030 states that by 2030, 100% of EU households should be covered by a Gigabit network (thus, VHCN).

The importance of VHCNs is also confirmed by the Directive 2018/1972 ("EECC"), in which their deployment and take-up is stated as one of its main objectives (art. 3). Moreover, the EECC sets optical fibre as a benchmark for VHCN, not just in terms of speeds but also of other performance parameters (art. 2 (2)).

Therefore, **OF appreciates that the Draft, which were originally intended to bolster the achievement of the 2020 targets set by the Digital European Agenda (DAE), is now reflecting and promoting the achievement of the new gigabit connectivity goal.**

As an example, in the Draft, the existence of market failure has been reviewed in light of VHCN performances (i.e., 1 Gbps download and 200 Mbps upload speed). Furthermore, with regard to the public consultation process, the Draft introduces an interesting provision to make the consultation more effective and reliable (i.e., the NRA must invite

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<sup>1</sup> See paragraph 5 of the Draft.

interested parties to submit substantiated information regarding their networks present or credibly planned to be deployed in the target area within the relevant time horizon<sup>2</sup>).

Despite such important improvements, which are favourably noticed by OF, **we would like to briefly illustrate our main concerns about the Draft, which we believe should be addressed with due attention by the Commission.**

***Firstly, as we will further explain below, we believe that some provisions of the current BBGL, which have been deleted in the Draft, could still have a positive impact on the market and therefore should be maintained by the Commission.***

As known, the BBGL had strongly encouraged the adoption of passive access products to ensure effective wholesale access for third party operators. Conversely, the Draft, by considering VULA service as a substitute for physical unbundling to new passive infrastructure, eliminates such “favour” for passive services (in practice making them equivalent to active ones).

In our view, to make subsidised networks as open and available to the widest audience of operators as possible (with a view to achieving the DC 2030 connectivity goals), the new BBGL should continue to encourage the adoption of a passive only model and, therefore, they should not consider VULA as a substitute of passive access services.

Furthermore, concerning the wholesale-only model, the Draft no longer mandates its adoption for the granting of State aid in black areas, nor it maintains that additional points should be granted to such a model in the context of tenders concerning white and grey areas. On the contrary, we deem that the reasons behind the preferential treatment granted by the current BBGL to the wholesale-only model are still valid. Therefore, such a preferential treatment should be maintained in the new BBGL.

***Secondly, OF would like to share some suggestions to the Commission to make the new BBGL even more effective and incisive to reach the DC 2030's connectivity goals.***

In particular, we are of the view that the best practices aimed at improving the consultation process should be the basis for the introduction of mandatory guidelines to be implemented by the MS.

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<sup>2</sup> See also footnote n. 65 of the RG according which “the result of a public consultation are only valid for the relevant time horizon after which if changes or additions to target area are proposed, mapping and public consultation shall be redone”.

As for take-up measures, besides the social and connectivity vouchers described in the Draft, the Commission should consider also different and breakthrough State aid measures aimed at incentivising the incumbent to switch off its legacy network. This is a crucial topic that should be addressed with due attention in addition to the other policy measures to make the transition from legacy networks to more performing VHCN networks smooth and streamlined.

***Thirdly, there are some new provisions which might be clarified by the Commission and (eventually) revised.***

In particular, the definition of “step change” adopted by the Draft to white, grey and black areas appears rather complex (i.e., double or triple the download speed) and seems neither in line with the definition of market failure made by the same Draft (i.e., a market failure exists where no gigabit networks are present or planned in the time horizon considered) nor with the DC 2030 targets, in particular with regard to grey areas. Therefore, it should be simplified, accordingly with the gigabit goals (i.e., 1 gigabit regardless of the reference area).

Furthermore, the definition of “mixed areas (white and grey)” in the Draft could be difficult to apply in relation to the calculation of reduction of funding gap, which is needed for the target in case of overbuilding (particularly, if the State aid recipient does not own the network in the grey portion).

With reference to the “wholesale access terms and conditions”, we believe that the obligation to provide access to at least 50% of the existing network should be applied only for new passive infrastructure and not for the existing one, in order to make the access obligation feasible. Therefore, paragraph (144) and footnote (102) should be clarified accordingly.

Furthermore, below we illustrate **some concerns related to the rules for the extension of subsidized networks into adjacent areas and alternative policy instruments provided in the Draft**, which we believe should be object to an in-depth reflection and significant changes.

## 1. Current BBGL 's provisions still valid

First, as regard the wholesale access products for fixed access networks deployed in white and grey areas, paragraph (137) of the Draft states that *“The State funded network must ensure bit-stream access, virtual unbundled access (‘VULA’), access to street cabinets, poles/masts/towers, ducts and dark fibre.”*

Furthermore, footnote (100) says that *“As VULA is considered a substitute of physical unbundling to new passive infrastructure, the same rules for new passive infrastructure applies.”*

As known, while an active service (like VULA) is strictly dependent on the operator who offers it in terms of performance characteristics of the network, passive ones ensure greater flexibility and independence to the retail operators, which are therefore able to offer a wider range of services on it.

In this regard, it is important to bear in mind that the current BBGL did not distinguish the wholesale access products between white, grey, and black areas and did not include VULA among wholesale access products. At para. 80 a) of the current BBGL there is a generic reference to the effective wholesale access to third party operators. Therefore, the subsidized network had to offer access on fair and non-discriminatory conditions to all operators that request it and had to give them the possibility of an effective and complete unbundling. Moreover, para 80 b) also stated that additional points should be assigned in case of adoption of a passive wholesale only model.

Conversely, the Draft seems to be in contradiction with the fundamental objective of ensuring the widest range of services and achieving a gigabit coverage for all European citizens.

**VULA should not be considered as a substitute for passive access services when granting aid in grey and white areas. Therefore, OF believes that the Draft should continue to encourage only those operators who are able to offer access to a passive (gigabit) infrastructure.**

**This is even more true in case of public funding, where it is essential that the subsidised network will be as open and available as possible to the widest audience of operators, enhancing their competitiveness in the market.**

Secondly, the current BBGL mandated the wholesale-only model in case of public intervention for VHCN in black areas (see para 84 lect. b) and, in the same vein, stated that the award criteria should contain the provision that bidders proposing a wholesale only model shall receive additional points while *“where the network operator is vertically*

*integrated, adequate safeguards must be put in place to prevent any conflict of interest, undue discrimination towards access seekers or content providers and any other hidden indirect advantage". (see para 80 lect. b),*

Such approach was justified by the several benefits of the wholesale-only business model with respect to the vertically integrated one.

As reported in the WIK Study "Benefits of the wholesale only model in Italy" (2020)<sup>3</sup>, the wholesale-only model is more capable of attracting the necessary long-term investments in the new infrastructures. Moreover, wholesale-only operators do not usually have copper legacy networks and only focus on the deployment of new FTTH infrastructures.

Moreover, even the EECC recognises that some competition risks arising from the behaviour of operators following wholesale-only business models might be lower than for vertically integrated operators (recital 208). It thus envisages a lighter touch regulation for wholesale only providers, which are found to have significant market power (Art. 80).

OF represents an excellent proof of how a wholesale-only model can foster the deployment of an alternative VHCN in a non-discriminatory and fair way, for the benefit of both retail operators and final customers.

**Therefore, we consider that the current BBGL provisions concerning the favour for wholesale only models are still valid, hence they should be maintained in the new BBGL.**

## **2. OF's proposals**

To date, the public consultation has never allowed to distinguish between "credible" and "not credible" plans, since the forward-looking statements of the operators were usually resized because of the absence of adequate formal commitments by the operators and sanctioning system by the NRA.

The Italian experience shows several issues in the designation process of white/grey areas because of the lack of an adequate control by the NRA and the absence of binding commitments by the operators over their investment declarations collected during the public consultation.

For these reasons, OF welcomes the introduction in the Draft of the best practices' measures related i) to assessment of private investment plans in the public consultation

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<sup>3</sup> In particular, WIK Study indicates that "markets which can support a diverse range of service providers, through the decision not to operate in retail markets, can better serve the diverse interests of different customer groups as well as supporting competition in future mobile networks, and facilitating the development of smart public services and industrial applications".

(para. 5.2.2.4.3) and ii) ex post monitoring of the implementation of private investment plans (para. 5.2.2.2.4.4).

Since the DG 2030 aims to cover 100% of the EU with networks capable of providing connectivity with Gigabit speeds, it is indeed essential that the confirmation of the operators' investment intentions is strengthened by i) a formal commitment and a clear investment schedule (best practice nr. one) and ii) an ex-post monitoring system (best practice nr. two).

However, although the introduction of best practices represents an important improvement with respect to the current BBGL, MS could decide not to adopt them because they are non-binding measures.

**To ensure a proper designation process of the areas to be targeted by public intervention, these best practices should be converted into mandatory provisions.**

**Furthermore, OF believes that, rather than identifying the designated areas based on future investment intentions and then assessing their credibility, NRAs could first check which is the actual coverage achieved by all operators on the market and consequently the areas that are not covered, where public aid is needed (i.e., the designated areas).**

In particular, based on the actual coverage declared by private operators, the NRAs could identify homogeneous designated areas and, in a second phase, launch a public consultation to verify and collect the expressions of interest of the operators (followed by a formal commitment) in the designated areas. Those designated areas in which no operator intends to invest should be put entirely up for public tender.

Finally, another important topic that the Commission introduced in the Draft, chapter n. 6, concerns the take-up measures that MS could adopt to foster the deployment of VHCN.

OF believes that a clear path towards the switch-off of copper services would represent a very effective policy measure aimed at favouring investment in and take-up of very high-capacity networks. Unfortunately, in Italy the regulation of the switch-off process has proven to be ineffective (no switch-off has occurred at all, even in the central offices included in the timetable of the significant market power ("SMP") operator).

In our view, it is still essential to identify a regulatory path to support the switch-off of the copper network, as it is consistent with the achievement of the targets set by the DC 2030.

Moreover, to overcome incumbents' resistance towards switch-off programs that prioritise social welfare, without allowing them to pursue their own interests, OF believes that the granting of public subsidies to the incumbents would represent an effective solution to

incentivise the copper switch-off. Subsidies would consist of stranded costs, thus grants able to compensate the loss of copper assets caused by the switch-off, where and when available. The amount of stranded costs should be decided based on the residual value of copper assets and the related cost of maintenance.

Therefore, **the new BBGL might include different and breakthrough State aid measures aimed at fostering the incumbent to switch off its legacy network. For example, the use of stranded costs shall be considered to compensate the damages of the switch-off process for the SMP operator in areas where an alternative network is present and the SMP operator has not rolled out, fully or in part, its own VHC network.**

### 3. Clarification

First, we would like to focus on the new definition of “mixed areas (white and grey)”, contained in paragraph (59) of the Draft.

According to the Commission, *“Member States may select target areas which are partly white and partly grey. Where some citizens and business users are already adequately served in the target area (or will be in the relevant time horizon), it has to be ensured that the public intervention does not lead to an undue overbuilding of the existing network. This can be prevented if the public intervention is limited to ‘gap-filling’ measures only. Where Member States can demonstrate that a limited overbuilding of the existing network is proportionate and does not create undue distortions of competition, the public intervention may take place. Overbuilding must be limited to maximum 10% of all premises in the target area. In such situations, the entire target area will be treated as ‘white’ for the purposes of assessing the public intervention (meaning that the conditions that apply to white areas also apply here).”*

At footnote (50) is specified that *“The Member State must demonstrate that the overbuilding ensures a significant reduction of the State aid amount which is needed for the target area (including that revenues from the grey area will be used to ensure coverage of the white area, thus significantly reducing the funding gap). For instance, to the extent that revenues made from connections are taken into account in the funding gap calculation (thus not relevant for wholesale-only networks), a public intervention providing the premise at the end of the street with a connection could become costly if, in order to avoid undue distortions of competition, it were not allowed to connect any other premises which are passed by the new aided network (even if those households are already passed by another network), given that this would reduce the revenues that the operator could expect to make, thereby increasing the funding gap.”*



Due to the significant impact that this provision could have in terms of the extent of public intervention, **it would be appropriate to clarify better the mechanism described at footnote (50), which otherwise could be extremely complicated to adopt by MS. For instance, it is not clear how the funding gap (and thus the revenues of the grey area) can be calculated if the concessionaire is not the owner of the already existing network in 10% of the grey area.**

Secondly, the definition of “step change” provided in the Draft at paragraph (98-103) seems to be difficult (besides not homogeneous) to apply, especially where the step change means that the speed must double or triple (as for grey areas). Moreover, such a definition does not seem to be in line with either the definition of market failure (i.e., absence of gigabit networks) made by the same Draft, in particular as far as grey areas are concerned, or with the connectivity targets of the DC 2030.

Conversely, **OF deems that the step change should always require the deployment of a VHCN, the only one that can reach 1 gigabit speed, regardless of the reference area. Therefore, we suggest simplifying the provision according to the DC 2030’s connectivity goals.**

Thirdly, we would like to underline some concerns about “wholesale access terms and conditions”. Paragraph (144) of the Draft states that *“Access to new passive infrastructure (such as ducts, poles, cabinets, dark fibre, etc.) must be granted for the lifespan of the network element concerned<sup>101</sup>. If State aid is granted for new passive infrastructure, the passive infrastructure must be large enough to cater for at least three networks and different network topologies<sup>102</sup>. This is without prejudice to any similar regulatory obligations that may be imposed by the NRA in the specific market concerned in order to foster effective competition or measures adopted during the same period or after the expiry of the ten years period.”*

At footnote (102) it is specified that *“For instance, where new ducts are built, they should cater for at least 3 independent cables each able to host at least several operators. Where existing infrastructure has capacity constraints and cannot provide access to at least three independent cables, based on the principle first-come-first-served, the operator of the publicly funded network has to make available at least 50 % of the existing capacity to access seekers.”*

In our view, the application of this provision is not clear where it states that at least 50% of the existing capacity must be guaranteed for access to third parties.

Such an approach seems to overlook the case of an existing network that is already full or that was designed without considering the access of third parties for 50% of it. How should any infrastructure operators behave in this case?

**OF suggests clarifying that the footnote (102) works only as an exception of paragraph (144), namely the limit of 50% should be applied only in case of new passive infrastructure and not for the existing one, in order to make such obligation feasible.**

Furthermore, OF would like to understand the aim of the provision contained in paragraphs (147-149), concerning the rules for the extension of subsidized networks into adjacent areas.

Para. (148) states that *“When carrying out a public consultation inquiring about existing or planned network in the target area (see Section 5.2.2.3), the Member State must indicate that private extensions are permitted at a later stage unless interested parties in an adjacent area oppose such extensions during public consultation process.”*

Para. (149) establishes that *“If, in the mapping exercise and public consultation, interested parties demonstrate that the planned extension enters an adjacent area which is 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, private extension into such adjacent area may only be carried out two years after the publicly funded network enters into operation<sup>104</sup>.”*

Both the abovementioned provisions are not easy to understand and thus to implement by private operators. It seems that a private operator who obtained public funds is limited in being able to expand privately the network, since he must wait for two years after the publicly funded network enters into operation. The competitive risks that may arise from private extensions do not seem to justify the introduction of such complex, yet rigid measures, while the latter risk to hamper the goal to achieve full coverage with gigabit networks by 2030.

**OF suggests to the Commission clarifying such provisions to allow private investments in adjacent areas at any time needed.**

Finally, with reference to alternative policy instruments, paragraph (114) of the Draft states that *“In keeping with best practices, without prejudice to the competences of the NRAs under the regulatory framework, NRAs may issue guidelines for local authorities on, inter*



*alia, carrying market analysis and definitions of wholesale access products and pricing. Such guidelines should take into account the regulatory framework and recommendations issued by the Commission”.*

OF would like to understand in detail the application of such an interesting provision, considering the different national situations.

For instance, in Italy it would be useful to have guidelines concerning access to the laying infrastructure (to make access conditions homogeneous). Conversely, in those countries where local authorities have a significant role in the management of aid measures (i.e., France) the guidelines might refer to the definition of wholesale access products and related prices.

**Since the different applications (and impacts) of this provision, it would be appropriate to clarify better how it could be implemented by MS, with a view to making the application of the provision as homogeneous as possible at European level.**

OF would like to thank once again the Commission for the significant work carried out so far and remains at its disposal for any clarifications concerning the concerns and suggestions we expressed in this document.

Best regards