



## **GIGAEurope response to the draft revised Guidelines on State aid for broadband networks consultation**

**10 February 2022**

### **Introduction**

In its 'Path to the Digital Decade' Decision, the Commission set ambitious connectivity goals for 2030 of all European households having access to a Gigabit network and all populated areas being covered by 5G.

We welcome that for the first time the revised draft guidelines are to provide guidance on state aid for the deployment of mobile networks. The revision of the Broadband State Aid Guidelines represents a great opportunity to rethink the most suitable approach to state aid for mobile networks so that the state aid framework helps achieve the 2030 connectivity targets and directly supports the digital transformation in a fair and ideally equal manner across the EU.

The 2021 Digital Economy & Society Index outlines the magnitude of the challenge as we depart from 14% 5G and 59% gigabit network coverage across the EU. Reaching these connectivity targets by 2030 requires a combination of private infrastructure investment and, where necessary, publicly funded networks. Private investment drove impressive growth of gigabit fixed network coverage from 16% in 2013 to 59% in 2020 across the EU. Coverage doubled over the last two years despite pandemic related supply chain & staffing challenges.

Ever since liberalisation, private investment has been driving infrastructure competition to the telecommunications incumbents that led to constant cycles of network innovation, increasing connectivity speeds to gigabit, falling consumer prices for ever higher bandwidths and faster network roll-out. These market dynamics must be preserved in the Digital Decade. The revised Broadband State Aid Guidelines play a key role in protecting private investment incentives by preventing market distortion as the result of undue publicly funded infrastructure rollout. One important aspect to consider in this context is that widely varying connectivity infrastructure legacy & topology and finite resources per member state requires state aid policy to foster and cultivate a flexible combination of all available ultrafast fixed access and wireless technologies to reach the Digital Decade coverage goals and bridge the Digital Divide.

Unprecedented amounts of state aid will be hitting the market in the near future. An analysis of the national recovery & resilience plans under the EU Next Generation Fund and the National Broadband Plans of 20 Member States shows that €16.9bn is earmarked to be allocated to funding household gigabit connectivity and €15.2bn to 5G<sup>1</sup>. Calls worth €258 million<sup>2</sup> to support gigabit and 5G networks

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<sup>1</sup> <https://www.vodafone.com/sites/default/files/2021-06/deloitte-llp-europe-digital-decade-rrf-gap-analysis.pdf>

<sup>2</sup> <https://digital-strategy.ec.europa.eu/en/news/launch-new-calls-worth-eu258-million-support-digital-connectivity-infrastructures>



have been launched under the Connecting Europe Facility. Updated guidance on the conditions for allowable state aid is therefore urgently anticipated by private operators in the current market environment that is impacted by the ambitions of the EU's digital strategy and by pandemic financial recovery instruments.

## Key Messages

### I. GIGAEurope general position on State Aid to Broadband

- The current State aid regime **has worked well** as it supports the use of **public funds only in those areas where there is 'market failure', so no (prospect of private investment in the) deployment** of 'fixed ultrafast' networks and 5G.
- Private investment into 'fixed ultrafast networks' and 5G complemented by **transparent, proportionate and very targeted state aid** will lead to the **most sustainable and rapid outcome** in terms of wide availability of ultrafast networks and 5G in line with the 2030 connectivity goals, whilst **unnecessary pressure on public spending is avoided**.

For state aid to remain proportionate and targeted, GIGAEurope believes that authorities should:

- Adopt a **forward-looking perspective on market development** to reflect:
  - **Innovation competition**, whereby market demand already incentivizes operators to invest in upgrading infrastructures and in permanent innovation of speeds
- Observe **technology neutrality**:
  - ultrafast network coverage is achieved most efficiently by operators deploying a **mix of fixed & wireless network technologies**, which will also form the basis of **sustainable infrastructure competition** going forward.

### II. GIGAEurope position on the draft Revised Guidelines

#### a. The draft Revised Guidelines blur intervention thresholds for market failure and step-change in fixed access.

- The proposed *threshold* for demonstrating market failure in fixed access, 1Gbps download/200Mbps upload, may lead to public intervention at large as this threshold fails to reflect actual market demand and is at odds with recent decisional practice. As such, this threshold would be more suitable for assessing 'step-change' in fixed access.
- Presenting *1Gbps upload* as an indicator of market failure 'as the digital decade progresses' as well as potentially constituting 'step-change' in fixed access, is highly speculative and even more at odds with market demand. This criterion risks opening up the floodgates for public funds. Moreover, it undermines technology-neutrality and infrastructure competition by favouring FTTH network solutions.



**b. The draft revised Guidelines contain a number of provisions that are a slippery slope towards overbuild in fixed access.**

- Introduction of a *new 'mixed area' definition* for fixed access networks. There seems no justification to tolerate a random 10% overbuild. The cumulative effect of this provision may lead to significant market distortions for existing network operators.
- The conditions regarding the *possibility of network extensions into adjacent areas* can lead to an over-building of existing network infrastructures and thus to significant distortive effects on competition.

**c. Reduction of the 'relevant time horizon' from 3 to 2 years is at odds with common practice.**

- Market failure can in practice not safely be determined after a two-year period in view of delays in network deployment due to lack of sufficient civil works engineering capability.

**d. The Guidelines should leave existing 'mapping' practices in tact as they have worked well.**

- The **new mapping specifications are superfluous** as they are covered under existing rules under the EECC as well as other well-established practices and may **lead to new legal uncertainties** – for example with regard to the definition of 'premises passed' which is at odds with existing approaches and may disadvantage certain private investors by excluding existing infrastructure footprints.
- 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 funding and significant distortions of competition.

**e. We welcome the extension of the Guidelines to mobile. We support the guidance for demonstrating market failure in mobile and a flexible approach to the step-change concept in the context of mobile networks.**

- What could be added in the final guidelines is how the State Aid framework could facilitate the acceleration of a step change technology such as 5G standalone. This guidance should be detached from the guidance provided on how Member States can use public funds to go beyond coverage obligations imposed under Spectrum auctions.



## GIGAEurope detailed comments to the draft revised Guidelines

Public intervention such as state aid should only play a subordinate role in order not to distort competition. With this in mind, the revised Guidelines should limit state aid to situations of market failure, i.e. areas that lack ultrafast coverage and will not be deployed with Gigabit-capable networks in the years to come. GIGAEurope however believes that **the draft revised Guidelines do not fully commit to these boundaries**. The draft shows inconsistencies, mixes up intervention thresholds and target/step-change requirements, and fails to take into account recent Commission decision practice<sup>3</sup>.

As a result, we see the danger of overarching state interventions that would distort competition, devalue private investments and hence hinder gigabit roll out instead of fostering it.

### 1. General conditions for Compatible State Aid

Under the first condition for compatible state aid, the aid must convey an “incentive effect” that facilitates the development of additional economic activities by the undertakings concerned or the development of certain economic areas (31).

The revised Guidelines mention that (41) State Aid could be compatible if it provides a **quality of service** (QoS) beyond the requirements in legal obligations to which an operator is subject, for example, legal obligations regarding QoS associated with spectrum licenses.

- GIGAEurope is concerned about the prospect of an **open-ended use of ‘quality of service’** by Member States **to prove the “incentive effect”** of the aid for fixed networks under the first condition for compatible state aid.

It should be avoided that public funds are used to develop network innovations prematurely as, in the relevant time horizon, certain QoS may yet be uncalled for in view of the quality, capacity or speed requirements of existing prevalent applications or that end-users would not be willing to pay for this. It would put undue pressure on private operators to allocate investments to additional and maybe yet unneeded QoS to avoid a false impression that the market fails to facilitate development of a range of economic activities. Operators would rather allocate these investments to the most pertinent drivers for bridging the digital divide at a given time and prioritize accelerating timely roll-out of gigabit networks and 5G in line with the Digital Decade objectives.

- GIGAEurope believes that for invoking “incentive effect of the state aid”, the Guidelines should require **Member States to demonstrate that public funding for QoS is catering to realistic evolution of market demand** in the relevant time horizon, and operators should be given an opportunity to provide their perspective based on (business) customer usage and willingness-to-pay trends. In cases where this assessment leads to ‘crystal-ball’ speculations with regard to trend assumptions, GIGAEurope calls on the Commission to protect private investment incentives for rolling out QoS upgrades down the line.

<sup>3</sup> Decisions SA.54668 (2019/N) – Bavarian gigabit scheme, and SA.52732 (2020/N) – National gigabit scheme Germany.



Under the second condition for compatible state aid, state intervention must be *necessary* to remedy a *market failure* (5.2.2 (47)). “Suboptimal” price/quality of network services is quoted (50) as a potential market failure that could justify state aid. According to the revised Guidelines, Member States that consider this reason to intervene must ‘clearly demonstrate’ with ‘verifiable facts’ derived from consumer surveys or independent studies, that end-users’ needs are not met.

- GIGAEurope would like to see the notions of “suboptimal” and “service quality” be defined more clearly in the Guidelines to facilitate transparent price/quality benchmarks and that **operators in these cases are also granted the opportunity to give their perspective** (on evidence provided by a Member State) based on verifiable and objective market analyses, market (pricing) benchmarks or independent market research and that this information is equally considered by the Commission in its assessment of the necessity of the aid in question.

We welcome that the revised Guidelines state that (51) state aid may ‘only be directed at the market failure that remains unaddressed by other policies and measures’.

- GIGAEurope believes the revised Guidelines should explicitly recommend that Member States implement the **best practices** contained in the **EU Connectivity Toolbox** and in the *recently revised regulatory framework*<sup>4</sup> before considering potentially distortive state aid interventions. The Connectivity Toolbox best practices and measures aim to help network operators reduce the cost of deploying networks, give operators access to the spectrum for the rollout of 5G and encourage operators to further invest in 5G coverage. Member States are due to report on the implementation of the Toolbox by end of April 2022<sup>5</sup>.
- Non-implementation of (certain) connectivity best practices that could have helped to avoid a certain market failure should be objectively justified by Member States as a condition for compatible state aid.

### Relevant time horizon

With a view to what has been common practice – and in deviation from the definition in recital 19 I) – **the “relevant time horizon” should not be shorter than three years** (instead of just two years) in order to comprehensively as possible give priority to private investments and to maintain opportunities for network rollout without public intervention.

In fact, a **market failure can in practice not safely be determined after a two-year period** considering that the delay of network deployment today hinges on the availability of civil engineering capacities – and rarely on the availability of funds.

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<sup>4</sup> European Electronic Communications Code (EECC) – Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018

<sup>5</sup> <https://digital-strategy.ec.europa.eu/en/policies/connectivity-toolbox>



## 2. Definition of Market Failure in fixed access networks

### White, Grey & Black areas

With regard to identification of market failure in fixed access networks, the draft Guidelines **fail to clearly 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 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 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 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.

- Therefore, **GIGAEurope suggests setting intervention thresholds in the Guidelines which take into account recent decision practice** in cases SA.54668 and SA.52732.

### Feasibility of gigabit upload for determining market failure

With regard to identification of market failure in **fixed access networks**, GIGAEurope is very concerned about speculations regarding potentially unmet needs for 1Gbps upload speeds for demonstrating market failure in the revised Guidelines (52): ***“As the decade progresses, a market failure may also be demonstrated, where the market does not and is not likely to satisfy identified end-users’ needs for enhanced upload speed up to 1 Gbps (...).”***

The **same consideration is also used to describe what would constitute a step-change** in circumstances where existing networks provide 1Gbps download speeds but not 1 Gbps upload speeds.

This **is another example for the blurring of intervention thresholds and the definition of ‘step-change’** in the draft guidelines. Combined with the proposed identification of a market failure (recital 52) when the market does not provide 1Gbps download speed and 200Mbps upload speed, GIGAEurope believes that using **the 1 Gbps upload performance indicator for both demonstrating market failure and step-change will facilitate arriving at a foregone conclusion,**



namely that only FTTH networks can satisfy connectivity policy targets. It would imply that existing cable gigabit networks are considered unable to cater for end-users' needs in the future.

In GIGAEurope's view, the 1Gbps upload requirement merely resembles a neutral-sounding way to allow state aid for FTTH and **risks overbuild of existing cable gigabit networks and undermines competition between different network technologies that has spurred private investment so far.**

GIGAEurope believes that the perceived need for 1Gbps upload speeds in the draft revised guidelines does not match the evidence of what common applications need in terms of upload speeds at present or are expected to require in the near future – see *Annex for an overview of the requirements of the prevalent services where upload speed plays a significant role.*

- GIGAEurope **calls for the deletion of the reference to 1 Gbps upload as an indicator of market failure** or at the very least would like the current text be adapted to reflect a more technology-neutral wording: “Potential market failure would arise if networks are **not upgradable** to 1Gbps upload speeds.”

This would still provide an incentive for network operators to invest in future-proof standards, for example cable Docsis 3.1<sup>6</sup> and Docsis 4.0<sup>7</sup>, but **allow network technology roadmaps and increased upload offerings to evolve in line with proven demand.**

In order to further warrant legal certainty for private investment in gigabit networks other than FTTH

- GIGAEurope also calls for **clarification of the notion “as the decade progresses”**. This impacts the timing for allowing Member States to claim market failure in the absence of 1Gbps upload speeds.

Only a mix of network technologies can realize the Digital Decade policy objective of all European households having access to a gigabit network by 2030. The Digital Decade gigabit connectivity objective therefore relates to download speed, not upload. To support this objective, the revised State Aid Guidelines should **promote technology-neutrality and infrastructure competition** and avoid allowing Member States using state aid to support scenarios based on FTTH only.

GIGAEurope reiterates that private network 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 need for the suggested “enhanced upload speeds” regime.

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<sup>6</sup> The DOCSIS 3.1 standard supports up to 2 Gbps of upstream capacity and commercially available cable modems and gateways can support up to 1.5 Gbps of upstream capacity, see: [https://berrec.europa.eu/eng/document\\_register/subject\\_matter/berrec/download/0/9480-contribution-by-cablelabs-to-the-draft-b\\_0.pdf](https://berrec.europa.eu/eng/document_register/subject_matter/berrec/download/0/9480-contribution-by-cablelabs-to-the-draft-b_0.pdf)

<sup>7</sup> *Docsis 4.0* supports up to 6Gbps upload and up to 10Gbps download speeds, allowing for multi-gigabit symmetric services over HFC networks, see: <https://www.cablelabs.com/technologies/docsis-4-0-technology>



### Introduction of 'mixed (white and grey) areas'

To assess market failure in fixed access networks more specifically, the revised Guidelines also introduce a **new concept of 'mixed (white and grey) areas'**.

GIGAEurope is very concerned about the introduction of the new 'mixed area' distinction (5.2.2.1.3). We believe that the revised Guidelines should principally aim to **avoid any overbuild** of existing infrastructure and we can see **no justification to allow a random 10% overbuild** to reduce a Member State's funding gap by incorporating expected revenues from connecting homes that are already passed by an existing network. Asking Member States (footnote 50) to 'demonstrate that overbuilding ensures a significant reduction of the state aid amount needed for a given target area', is a slippery slope and **defeats the whole purpose of the guidelines related to conveying legal certainty and trust for private investors to make the expected return on their investments**. Moreover, despite a 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.**

GIGAEurope believes that the revised Guidelines should **stick to the approach contained in the 2013 Broadband State Aid Guidelines regarding white, grey and black areas** only, as this has worked well in practice and prevented overbuild of existing infrastructure.

### **3. Step-change in fixed networks**

As argued above, the draft Guidelines clearly appear to mix up the categories of intervention thresholds on one side and the step-change 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 the 2030 Digital Decade targets and make sure that state-funded fixed networks are future-proof.

The draft guidelines fail to do the latter. 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 anything but upgradable to Gigabit. If for example, a given area is provided only with a DSL network offering connections with up to 16 Mbps, the step-change requirements would be fulfilled by connecting the street cabinet with fibre – FTTC solution – which would then grant connections up to 50 Mbps. Considering the objective of offering all households gigabit upgradable connections, this approach appears to miss the mark. We believe that any state funded network should meet the parameters required by the Commission's own connectivity targets.

### **4. State Aid for mobile networks**

We welcome 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 and to allow Member States to bring transformational 5G into rural areas and consequently bridge the digital divide and avoid depopulation trends.



We therefore **welcome the guidance on mobile market failure** as defined by the European Commission in the draft guidelines. Paragraphs 65 and 66 of the draft guidelines combined with the guidance on step change in mobile networks (paras. 107-109) provide a straightforward approach for Member States on how to define target areas. Target areas can be for example 4G (or even 5G) networks where such networks do not (and are not expected to) provide end-users with sufficient quality of services to satisfy their evolving needs. Linked to the guidance on step change we welcome the fact that the EC recognises the need to bring transformational 5G (i.e. 5G Standalone - not built on 4G core and using legacy licenses) beyond urban (and sub-urban) areas and industrial parks and that public funds represent a key policy element to deliver on that objective.

According to paragraphs 107-109 each generation of mobile technologies represents a **step change** compared to the previous generation (i.e. 5G standalone is a step change compared to 4G). But the EC goes even beyond by considering standalone 5G a step change from non-standalone 5G.

The current draft also excludes the allocation of public funds for mere incremental upgrades which in our view is the correct decision - incremental upgrades on a given mobile technology shall not be considered as step change (e.g. incremental upgrades to 4G such as DSS are not to be considered a step change compared to 4G).

Another positive element of the draft guidelines is mentioned in footnote 71, which recognises that in the case of mobile networks, investments in active equipment may play an important role in the quality of services provided and that in such cases, public support may also be extended to active equipment as long it is an integral part of a significant upgrade of network's capability.

These are very positive elements of the guidelines that demonstrate the ambition of the EC regarding 5G deployment and consequently a step in the right direction to achieve the digital decade targets.

- **What could be added in the final guidelines is how the State Aid framework could facilitate the acceleration of a step change technology such as 5G standalone.** This guidance should be detached from the guidance provided on how Member States can use public funds to go beyond coverage obligations imposed under Spectrum auctions.

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.



## 5. Mapping and Public Consultation

With regard to the instruments to demonstrate market failure, GIGAEurope offers the following observations.

### New mapping specifications under Annex I

**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 that would justify such a detailed specification. The **suggested mapping requirements would blur the boundaries between mapping exercise and public consultation process** and likely result in an enormous effort and complexity for all stakeholders.

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 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 therefore unnecessary.

**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 **would massively underestimate the capabilities of (existing) network infrastructures**. This would result in a considerable extension of areas eligible for funding and significant distortions of competition.

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

If the Commission should stick to their proposal for a new mapping mechanism they should make sure 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.

- Definition of “premises passed”

In any case, 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 from the address points to be taken into account.

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.

## 6. Proportionality of state aid

With regard to the indicators described for Member States to demonstrate proportionality of state aid, GIGAEurope has the following observations.

### Use of existing infrastructure

We welcome 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.

### Extension of networks in adjacent areas

Due to the possibility of network extensions into adjacent areas, aid measures can lead to an overbuilding of existing network infrastructures and thus to significant distortive effects on competition. It is therefore right that the revised guidelines 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 regard to the preconditions they set for excluding private extensions.

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) 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 could thus massively crowd out private investment in areas where clearly no market failure exists.

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.

#### 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.



## **7. Compatibility of Take-Up Measures**

With regard to the use of vouchers to remedy a specific market failure in terms of take up of electronic communications services, GIGAEurope offers the following observations:

### **Social Vouchers and Connectivity Vouchers**

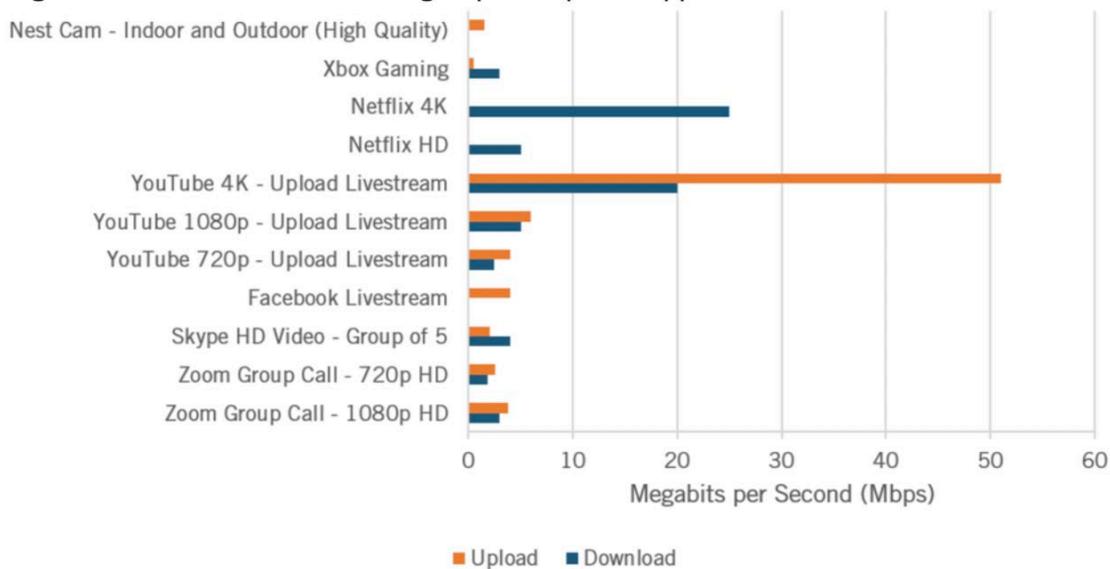
While take-up measures such as vouchers can be regarded as a useful remedy to address a specific market failure, voucher schemes require careful assessment as to the demonstration of market failure and their practical implementation. They entail a high risk of conferring an advantage on individual network operators only, even though they may be neutral on paper. Cumulatively, this can have a significant distortive effect on competition. Therefore, voucher schemes require a thorough assessment by the European Commission as regards their practical application, ensuring that the principles of technology and operator/provider neutrality are actually adhered to.



## Annex

The chart underneath shows the upload requirements of current mass market services, which are clearly under the thresholds mentioned in the draft Guidelines.

Figure 1: Bitrates of common “high-upload speed” applications<sup>16</sup>



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<sup>8</sup> “System requirements for Windows, macOS, and Linux,” Zoom, accessed March 26, 2021, <https://support.zoom.us/hc/en-us/articles/201362023-System-requirements-for-Windows-macOS-and-Linux>; “How much bandwidth does Skype need?” Skype, accessed March 26, 2021, <https://support.skype.com/en/faq/FA1417/How-much-bandwidth-does-Skype-need>; “What are the video format guidelines for Facebook?” Facebook, accessed March 26, 2021, <https://www.facebook.com/help/1534561009906955>; “System requirements,” YouTube, accessed March 26, 2021, <https://support.google.com/youtube/answer/78358?hl=en>; “Choose live encoder settings, bitrates, and resolutions,” YouTube, accessed March 26, 2021, <https://support.google.com/youtube/answer/2853702?hl=en#zippy=%2Ck-p-fps%2Cp%2Cp-fps>; “Internet Connection Speed Recommendations,” Netflix, accessed March 26, 2021, <https://help.netflix.com/en/node/306>; “Troubleshoot your network connection speed,” Xbox, accessed March 26, 2021, <https://support.xbox.com/en-US/help/hardware-network/connect-network/xbox-one-connection-speed>; “Internet bandwidth and speed requirements for Nest cameras,” Google Nest, accessed March 26, 2021, <https://support.google.com/googlenest/answer/9245832?hl=en#zippy=%2Cupload-bandwidth-used-by-nest-cameras-and-nest-hello%2Cnest-cam-ig-indoor-nest-cam-ig-outdoor%2Cnest-cam-indoor-nest-cam-outdoor-and-dropcam%2Cdownload-bandwidth-used-by-nest-cameras%2Ctotal-monthly-data-used-by-nest-cameras%2Cchow-your-cameras-data-usage-affects-devices-in-your-home>.