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Introduction

1. Just as it is relevant for the Commission to pay heed to its previous State aid approval decisions since the introduction of the 2013 Broadband Guidelines so too is it relevant to consider the circumstances in and means by which Aid Granting Authorities (AGAs) have obtained that approval and which are relevant to or have a bearing on the Commission's proposals in this consultation.

2. This submission aims to assist the Commission in achieving its aim in paragraph 2 of Annex I of increasing transparency.

3. In these Guidelines the words "able" and or "capable" are themselves capable of carrying two meanings. In paragraph (32) the sense appears to refer to a present sense, whereas in paragraph (42) it appears to be being used in a future sense. When 'capable' is used to refer to the ability of an existing market economy broadband network/operator to provide the speed limit service required (*e.g.* 100Mb/s (UF) or 1000Mb's (1Gb/s)), this too can be referencing such an existing network's theoretical technical ability in the abstract future sense (*e.g.* the European Space Agency *has the ability* to launch the James Webb Telescope), or in the alternative, a more concrete, present ability (*e.g.* the James Webb telescope has been built and installed at the ESA's French Guiana site in the ESA's Ariane 5 rocket which is *presently ready to launch*).

4. Accordingly, for the purposes of mapping existing markets to identify market failure, an existing market operator can have the ability (capability) to deliver presently service (in the ready to launch sense) in its coverage area both to existing connected subscribers and not yet connected subscribers as well as the ability (in the future sense) to deliver such service to unconnected premises in the future. Indeed, such networks are capable of adding more coverage to their existing ones and that latter aspect was provided for the 2013 Guidelines by reference to the obligation on AGAs to "map" operators' future investment plans. It is submitted that the consideration of market failure asks the question whether networks presently exist "in the target area" that are already presently providing the required speeds (and for these purposes the Commission has made it clear that a target area is a geographic area in which premises are located, not each individual household or business premises).

5. It is further submitted that the risk of crowding out the private market is to be judged by reference to not just the present ability of market economy operators to service connected premises in their coverage areas, but also to their future ability (in the sense of their ability to grow and expand) to meet demand from those unconnected premises in those areas as and when demand arises. Hence, the question that arises here is whether the proposed Guidelines can justifiably deem a market failure to have occurred in respect of unconnected premises in an existing provider's coverage area if that existing network <u>is unable</u> to provide service to them within 4 weeks.

6 The 2013 Broadband Guidelines at Article (63) required the AGA to "determine whether broadband infrastructures exist in the targeted area." Those Guidelines did not make it explicitly clear that the way the term "broadband infrastructures" was to be interpreted for this purpose was <u>both</u> as a survey of infrastructure which can be used/reused for the SAM <u>and</u> as a survey of the presence of existing private market operators and their networks so as thereby to designate target areas as white, grey or black. By reason of this continuing ambiguity the Commission is therefore requested to explicitly confirm this dual meaning and, when using this expression, to explain each time in which sense it is being used.

7. The original purpose of the mapping exercise was to ascertain if private market operators and their networks providing the required speeds existed in the target area so as not to distort the private market with the State Aid Measure (SAM) or crowd it out. If such an operator existed then under the 2013 Guidelines (footnote 92) all premises passed by the operator had to be mapped as being able to receive service

from that provider. If no market operators existed or had concrete future investment plans then a market failure could be concluded and the entire area could be mapped as being within the SAM intervention area.

8. These Guidelines now propose a considerable change. Even if a private market operator exists in the target area, only those premises to which it is presently able to provide service (in the ready to launch sense) are to be treated as receiving service and not included in the SAM intervention area. Such premises include those already connected to the existing network as well as those unconnected premises within its coverage area to which it is able to provide service. The Guidelines propose to deem as market failure those unconnected premises to which the existing network is not presently able to provide service.

9. In relation to mapping existing networks and market failure under these Guidelines, it is to be noted that the survey to be performed is of those infrastructures that exist. If however AGAs are recommended to add into their survey features not inherent to the operation of existing private market networks then AGAs are not mapping the existing private market. Instead, by adding additional features which the Guidelines considers such networks should possess, it is submitted that this constitutes an attempt to force the private market to behave in a non-economic manner under threat of being overbuilt by the SAM. AGAs would thus not be mapping "existing infrastructures" but rather, in respect of existing market operators delivering the required speeds by economic means less expensive that those prescribed by the Guidelines, AGAs would be deliberately refusing to map existing market operators and their networks. The point is that AGAs must assess and map the existing market and existing networks as they are, not as AGAs believe they should be. Indeed if AGAs were permitted to do this, this would have the result of their SAMs having to meet even higher standards *e.g.* in terms of measuring the step-change SAMs are required to possess.

10. The Guidelines' assertion that market failure exists in a target geographic area if an existing network cannot serve all premises in its coverage now has a strange implication. As a result, an existing networks' existing coverage areas are to be treated as instances of non-market failure for those premises that are presently connected and market failure in relation to those premises in the coverage area that are not presently connected. This is the equivalent of saying that because such un-connected premises have not contracted for service from an existing network in whose existing coverage area they are located, the private market has failed. That assertion defies the reality of the market economy, in which customers have choice and providers invest in adding

capability to their networks as and when the market economy requires. It also overlooks the fact that at the time of the mapping there are un-connectable premises within the coverage area because they have not yet been built. Accordingly, to condemn portions of an existing network's coverage area as having 'market failed' because there are premises within it that are presently unconnected has to be error. By the same token, it would also be error to say they have 'market failed' because those networks have not yet scaled up their existing capabilities in their existing coverage areas to provide service to premises that have not yet (and, due to the market economy being competitive and dynamic, may never) become customers requiring service. Overbuilding such areas with State aided competition would thus *prima facie* appear to constitute crowding out of the existing market economy.

11. In relation to the prescription of a 5:1 concurrency ratio (if that is what the Guidelines intend at paragraph (15)), there is a very considerable difference between a fixed ratio set on an overly pessimistic basis (by reference to what is economically necessary in the market economy) and mandated in a static fashion as being applicable in all circumstances, as opposed to an obligation which is consistent with the reality of the market economy, namely to deliver the required minimum speeds reliably in a dynamic and flexible manner which both matches demand and contains a sufficient statistically reasonable overhead or reserve to accommodate concurrency events when and if they occur.

12. In considering whether existing broadband service providers are presently providing UF or faster services the Guidelines appear to be proposing that the test of such levels of service be measured not by the services actually being delivered to subscribers in the target areas but instead by sole reference to hypothetical standards which the Commission now states must be met regardless of whether they are necessary for existing private operators to achieve in order for the required speeds to be provided. **The Commission nowhere suggests that the required speeds cannot be delivered using less demanding requirements** but is now insisting that such capital expenditure be invested by existing private market operators even in situations such investment is not required to deliver the required speeds to existing subscribers. Not only does this not comport with the economic reality of the private market, but by forcing the existing market to make uneconomic investment to meet unnecessary and artificial hypothetical requirements the private market will be distorted and crowding out.

13. A FWA service is a network of networks. Individual transmission sites have one or more base stations (wireless transmitters) each providing service to the same, separate or overlapping coverage areas. In an existing coverage area, as and when demand so

requires, additional capacity (both in terms of the number of base stations serving subscribers' receiving antennas and in terms of capacity supplied to each base station via the backhaul network) is added. As a result of the fact of SME FWA private networks operating and growing in this way, the question of how they are assessed is critical. Ignoring the "premises passed" issue, on the basis that the assessment is performed by reference to each of their connected premises in the target area, the relevant question for assessing an existing private market FWA network is whether the base station for each of those premises is sufficient to provide them with the required speeds.

14. This necessarily requires an examination of each base station at each site and the premises each serves. If, instead, the assessment is carried out by reference to the totality of all transmission sites and their base stations (*i.e.* a whole of network approach) this facilitates AGAs to disqualify the network from meeting the required speed requirement even though individual bases stations do meet them and or even if not meeting the requirements nonetheless still are delivering the required speeds. Take for example the creation of a new site with one initial base station and one subscriber. Over time additional subscribers contract for service and are connected. On the basis that there is no doubt that the base station meets the requirements when just the first such subscriber is connected and that that position remains until a cut-off point is reached, the market economy profit-motive supply and demand driven private operator will not add more base stations to serve the coverage area and backhaul capacity to serve them until it becomes necessary and will generate a return on the investment.

15. The point sought to be made here is that there appears to be an inherent contradiction in these Guidelines' requiring a premises-by-premises analysis but at the same time non-recognition of a private market network because, *e.g.* it has only connected one premises in its coverage area to the initial base station. Either that single premises is being supplied with the required speeds or it is not. The Guidelines' proposed assessment method of disqualifying the totality of a network and all premises serviced by it due to the fact that some (or indeed many) of its base stations are not capable of providing service immediately to all its connected premises in their coverage areas appears to be error by reason of the failure to recognise the operation of the private market and the Guidelines' imposition of standards (applicable only to SAMs) which require provision of service to 100% of premises.

16. This is perhaps particularly relevant in the case of an SME private market SME network that is in the course of rolling out an upgrade from one level of service, *e.g.* from NGA to UF. In such circumstances the newer technology and greater bandwidth requirements will likely require a higher price to be paid by subscribers and or a longer contract term than the previous lower level of service. Price conscious subscribers may hold out from upgrading in varying numbers across each base station coverage area. The result will be that the bandwidth and speed demands and requirements will vary across each base station depending on such service level upgrades. In such circumstances, the Commission's proposal to negatively assess (*e.g.* as UF) a network that is in the process of its subscribers choosing to upgrade to UF service simply because it does not presently have the capacity to provide 100% of its connected subscribers with UF service (when they do not need it yet) is a denial of how the free market operates and appears to mandate an invalid disqualification of the private market in target areas.

17. The entire purpose of the mapping exercise is understood to be **not** to test whether premises are connected to services supplying the required speeds, but rather to ask whether there exist (or are planned to exist) private market operations from which such services can be obtained if required. The moment an abstract approach is adopted which *e.g.* says (regarding an existing network), that anything less than a particular standard cannot provide the required speeds, constitutes a departure point (i) from recognising what the existing market is doing (ii) to a denial of its existence. It is submitted that to deny the existence of the free economic market and to ignore how it addresses and solves market problems (unless it conforms to additional standards which are uneconomic or not necessary) is not a mapping of the existing private market. Instead, by refusing to recognise the private market's normal market economy mode of operation and requiring it to perform in a non economic manner in order to avoid being driven out of business by a SAM, the Guideline requiring this approach is itself an engine of market distortion.

18. When an SME private market economy service is commenced at a new transmission site (from a mast, building or other high site) and when a new coverage area is added to a transmission site, subscribers are connected incrementally as and when they contract for service. The backhaul capacity (in terms of bandwidth) is provisioned at an initial opening level consistent with projected demand and additional bandwidth is then added at say, an 80% (of peak time) capacity trigger point so as to ensure that capacity always stays ahead of demand from subscribers so as to ensure the required speeds to each of them, including an adequate level of active concurrent use, is

available to them. Unlike a SAM funded for the purpose of providing, required to achieve and capacity-designed and capacity-equipped at the outset to provide, 100% coverage to all premises, a private market network scales capacity to meet demand as it arises over time, it being uneconomic (and unrealistic in a competitive economic free market) to assume, invest and capacity provision its network other than on a demand-led basis. The whole basis of the private market being to carry out an enterprise profitably on the basis of supply and demand, the application of and requirement that its operators behave uneconomically as though they are a SAM is both a contradiction and a complete antithesis to the way the private market operates.

19. The purpose of the mapping exercise is to identify private market failure *i.e.* (leaving aside future investment plans for one moment) the failure of the current existing private market <u>in its current state</u> to serve its existing customers (*i.e.* to ask <u>what speeds</u> are being provided). If such broadband is being provided or is in the course of being provided then by virtue of nothing more than its very existence in the target area, it is by definition going forward in the future in a position to provide such services throughout the coverage area to those that wish to contract for them thereby negating "market failure" and turning the target area being mapped from white to grey (or black).

20. Consistent with the definition of VHC networks in the EECC, in Annex 1 the Commission has introduced the possibility, as a choice but not a requirement, for Member States to add QOS factors to their considerations when mapping the private market for the purposes of considering market failures and also for measuring whether a SAM contains a sufficient step-change by reference to the private market. Two things flow from this. First, if Member States are going to exercise their choice to include QOS elements when mapping existing networks, it is submitted that the Guidelines must require AGAs to specify them in advance of any mapping exercises and that they must be reasonable (*e.g.* by reference to BEREC), as opposed to setting them so strictly as in effect, to be specifying an FTTH solution. Second, the issue of whether the existing market (in terms of existing networks, not future investment plans) is actually achieving the said QOS requirements is a question of fact, not theory or hypothetical modelling. Moreover, unless real-world customer bandwidth demand is extreme to the point of statistical unlikelihood, the fact that the Guidelines specify an extremely pessimistic and commercially unviable concurrency ratio such as 5:1, does not mean in the 'live' market economy, that a less stringent concurrency ratio is not or may not be sufficient to achieve those QOS requirements.

21. As a result, even though these proposed Guidelines seek to add QOS components to speeds delivered by the private market, they cannot be used to disqualify private market economy networks from recognition unless, by reference to those networks' real-world data it is shown that their market economy based demand-led economically viable concurrency ratio is insufficiently stringent to achieve them. In other words, the mere fact that an existing network is not using or meeting a designated pessimistically set commercially unviable concurrency ratio does not entitle a conclusion that the market is incapable of meeting them and is not meeting them in the real world.

22. Existing networks have grown (to the present day, on the basis that the 2013 Broadband Guidelines accepted and permitted their real-world traffic data to show they were delivering the required speeds). Such real-world market-economy-based data demonstrated what was sufficient for both the delivery of the required speeds and the level of investment required to provide them. By imposing standards as to the manner of the delivery of the speeds which require greater investment than those required on a private market economy basis the Guidelines seek to distort market economy behaviour into non-market economy based economically unjustified behaviour. In short it is submitted that such requirements constitute an artificial imposition on the private market which is unnecessary for private market economy delivery of the required speeds. The fact the private market is thereby compelled to make unnecessary investments (which makes their operation less economically feasible) to avoid being driven out of business by the SAM demonstrates the Guideline's distortionary effect. If as a result they decide that it is uneconomic to continue in the business it is the Guidelines that will be responsible for that market crowding out.

23. It is submitted that no matter how much the Commission may wish to be able to compare private market economy networks with State aided ones on an 'apples with apples' basis so as to be able to ensure that both are delivering to the same standard, the Commission's obligation as a matter of competition is to map the existing market as it is, not as the Commission wishes it would be. Moreover, such a mapping is essential not only to avoid crowding it out by the imposition of non-market applicable standards but also in order to fix the basis on which to assess the step-change required to be applied to SAMs.

24. The Commission is understood to consider SMEs and entrepreneurship as key to ensuring economic growth, innovation, job creation and social integration in the EU

and to be closely cooperating with Member States on developing SME-friendly policies, monitoring the progress in their implementation and sharing best practices. This being so, it is not understood why the Commission does not appear to be taking the requirements and limited resource capabilities of SME broadband operators into account in its proposals and instead is applying standards and obligations apposite to far better resourced large market operators.