Liberty Global Response to the Consultation on the Revision of the Guidelines on State aid for broadband networks

Introduction

Liberty Global welcomes the opportunity to comment on the European Commission's proposed revised guidelines on state aid for broadband deployment (proposed Guidelines). Broadly speaking, we believe that the current Guidelines have worked well. They have limited the use of public funds to those areas where there is no prospect of private investment for the deployment of 'fixed ultrafast' access networks, backhaul networks and 5G mobile access networks, thereby avoiding the distortion of competition. There is no reason nor justification for the proposed Guidelines to deviate from this established approach.

As Europe embraces the possibilities of the digital transition, with ambitious 2025 and 2030 strategic objectives, it is vital that the right environment is created for broadband rollout. Liberty Global strongly supports the Commission's Gigabit Society goals. Private investment is essential to ensure that all European citizens benefit from high-speed internet and gigabit coverage. This may be supplemented by state aid, provided it does not distort competition or disincentivise private investment. Hence, state aid must be targeted at areas where private investment is not viable.

Legal certainty and continuity are a prerequisite to an investment-friendly environment – regulation should be robust and future-proof. Regulatory policy must also reflect the principles of appropriateness and proportionality to avoid overregulation which would undermine the investment-friendly environment. Next to this, the proposed Guidelines should observe the principle of technology neutrality – a mixed technology approach will maximize scope for innovation and infrastructure competition and is the most cost-effective means to achieve the 2025 and 2030 strategic objectives. The proposed Guidelines must ensure that distortion of competition as a result of state said is avoided.

The text and spirit of the proposed Guidelines should undoubtedly reflect these principles. Failing to do so would result in a set of tools that when applied undermine the investment-friendly environment, distort competition and put the achievement of the 2025 and 2030 strategic objectives at risk. While the current Guidelines have broadly worked well, Liberty Global is concerned that parts of the proposed Guidelines do not properly reflect these principles and urges the Commission to change them.

Section One: Supporting broadband rollout and the digital transition

The Commission's strategy on Connectivity for a European Gigabit Society (Gigabit Society Strategy), adopted in September 2016, sets out a vision of Europe where availability and take-up of high-speed networks enables the widespread use of products, services and applications in the Digital Single Market. The Commission launched a series of complementary initiatives to help reach these objectives, including the new European Electronic Communications Code (Code)[1]. This vision, as laid out in the Gigabit Society Communication[2], confirms and builds upon the previous broadband objectives for 2020 and relies on three main strategic objectives for 2025:

- Access to connectivity offering at least 100 Mbps for all European household
- Gigabit connectivity for all of the main socio-economic drivers such as schools, hospitals
- Uninterrupted 5G coverage for all urban areas and major terrestrial transport paths

Through the Shaping Europe's Digital Future Communication[3], the Digital Compass Communication[4] and the Digital Decade Proposal[5] the Commission has further specified the strategic objectives for 2030:

- All households in the Union should be covered by a Gigabit network
- All populated areas should be covered by 5G

Connectivity is essential to achieve the promise of digital transition. The main goal for fixed connectivity is shifting from high-speed internet coverage by 2025 to gigabit connectivity by 2030. For mobile, the emphasis is on expanding 5G coverage.

Liberty Global supports the goals of the Commission to ensure that all Union households are covered by a Gigabit connection by 2030 and that all populated areas can benefit from 5G. Private investment is essential to ensure that these strategic objectives are achieved. We are determined to invest in networks and the capex to turnover ratio we are putting forward keeps the competitive pressure high towards other operators. We consider that the market will provide for the vast majority of coverage needs, through privately financed deployment of both fixed and mobile networks.

We have invested significantly and continue to invest in our fibre rich networks. By taking a mixed technology approach, we ensure that Gigabit-capable networks are made available quickly and efficiently across our footprint. Our networks are built to provide Gigabit speeds, ultra-high capacity, reliability, and resiliency for our customers. We are now offering 1 Gbps – the target speed for 2030 under the Digital Decade Proposal – to over 30 million homes across the Netherlands, Belgium, Switzerland, Poland and Slovakia, Ireland, the UK and Switzerland. Speeds will ramp up to 10 Gbps and beyond as demand for high-speed, reliable services grow.

Regulation favouring any specific technology at this stage is likely to chill investment in cheaper and faster-to-deploy technologies. A mixed technology approach will not only maximize scope for

[1] Directive (EU) 2018/1972 establishing the European Electronic Communications Code (Recast), OJ L 321/36 [2018] (EECC).

[2] Commission 'Connectivity for a Competitive Digital Single Market - Towards a European Gigabit Society' (Communication) COM 2016/0587 final

[3] Commission 'Shaping Europe's Digital Future' (Communication) COM/2020/67 final

[4] Commission '2030 Digital Compass: the European way for the Digital Decade' (Communication) COM/2021/118 final

[5] Commission 'Establishing the 2030 Policy Programme "Path to the Digital Decade"' (Communication) COM/2021/574 final

innovation and infrastructure competition, but can also serve as the most cost-effective means to achieve 2025 Gigabit Society and 2030 Digital Decade Proposal objectives.

Regulators and governments should therefore continue to promote private investment through a mix of technologies and only thereafter consider public funding to those remote and economically challenging areas where it is proven beyond any doubt that there is no prospect of commercial deployment. This is particularly relevant with the wave of state aid that will be made available in coming years. 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 for allocation to funding household gigabit connectivity and €15.2bn to 5G[6]. Calls worth €258 million[7] to support gigabit and 5G networks have been launched under the Connecting Europe Facility. With such an emphasis on funding broadband networks, it is vital that this funding is transparent, highly targeted, appropriate and proportionate.

Section Two: Legal certainty

Legal certainty and continuity are essential to an investment-friendly environment – regulation should be robust and future proof. We welcome the continuation in the proposed Guidelines of the two established conditions for the justification of state aid, namely:

(1) the facilitation of the development economic activity; and
(2) the aid measure must not unduly affect trading conditions to an extent contrary to the common interest.

These are established concepts which are well understood. However, it is important that the application of these concepts remains consistent with established norms and avoids the introduction of vague parameters which could open the door to overbuild and regulatory divergence.

For example, the proposed Guidelines introduce the provision that state aid for broadband deployment could be compatible if it provides a quality of service beyond the requirements in legal obligations to which an operator is subject[8], for example, legal obligations regarding quality of service associated with spectrum licenses. We are concerned about the prospect of an open-ended use of "quality of service" by Member States to prove the "incentive effect" under the first condition. This could lead to significant regulatory divergence across Member States and present a constant moving target of "improved" quality of service to justify public funding. Clear guidance on the parameters for what constitutes "improved" quality of service should be provided to avoid regulatory divergence and ensure consistent application of state aid rules. Clear guidance should

[6] https://www.vodafone.com/sites/default/files/2021-06/deloitte-llp-europe-digital-decade-rrf-gap-analysis.pdf
[7] https://digital-strategy.ec.europa.eu/en/news/launch-new-calls-worth-eu258-million-support-digital-connectivity-infrastructures
[8] Paragraph 40

also be given on the assessment of quality of service for mobile networks[9] to prevent divergence and legal uncertainty.

Under the second condition, "suboptimal" price/quality of network services is quoted[10] as a potential form of market failure that could justify state aid. According to the proposed 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. No guidance is given on how suboptimal service levels should be assessed by these tools. Clear definitions of "suboptimal" and "service quality" are a key prerequisite for the proposed Guidelines to facilitate transparent price/quality benchmarks and to ensure that this is not used as a tool for perpetual price regulation, or acts as a moving target to demonstrate market failure as discussed in the previous paragraph. In addition, operators should also be timely consulted – during these surveys or studies – to give their perspective on verifiable and objective inputs, such as market analyses, market (pricing) benchmarks or independent market research. This ensures that the assessment of service and pricing is a holistic reflection of market conditions. It increases legal certainty and guards against the distortion of competition. Like many of the issues we raise, the current formulation of this provision in the proposed Guidelines not only risks legal uncertainty, but increases the risk of market distortion and breaches the principles of appropriateness and proportionality.

We welcome the effort made in the proposed Guidelines to provide further clarity on certain terms and how they are applied in the state aid process, particularly those that reflect existing definitions or industry norms. However, we note that several of the proposed definitions are neither consistent with established definitions from key legislation such as the Code and the Broadband Cost Reduction Directive (BCRD), nor industry norms. Neither are all proposed definitions internally consistent with proposals later in the proposed Guidelines. A striking example is the concurrent use of VHCN, Gigabit network and ultrafast access network. Each of these is intended to capture future network standards but each has different parameters. Introducing multiple, competing terms across separate pieces of legislation creates confusion for operators as to what is considered a future proof network.

The Code provides a definition for electronic communications networks which essentially continues the definition that has been in place since 2009. The proposed Guidelines introduce a definition for broadband electronic communications networks which adds a non-defined speed requirement.[11] This departs from the established definition in the Code and thus creates legal uncertainty.

[9] Paragraph 66

[10] Paragraph 50

[11] Paragraph 19 (a) 'broadband electronic communications network' means a network able to provide high-speed internet access via various technologies and includes active and passive components

The proposed definition of mobile networks in the revised Guidelines at paragraph 19(c)[12] is based on the above proposed definition for broadband electronic communications networks but includes 2G, which typically does not have high speed capabilities. There is no doubt that 2G is a mobile network, but under the draft proposals it could not be considered a broadband electronic communications network as it would not reach the relevant speeds. This formulation is therefore internally contradictory.

The definition of "ultrafast access network" also adds a specific speed requirement – at least 100 Mbps download speed. This requirement refers to the 2025 speed coverage objective, but not the 2030 gigabit connectivity objective.[13] Additional confusion is created where the proposed Guidelines frame what is understood as market failure for ultrafast network in grey areas – the specific speed requirement for download is ten times higher and a 200 Mbps upload speed is also introduced. This demonstrates that adding specific speed requirements does not create robust regulation but rather results in static regulation. On the other hand, VHCN[14] was introduced under the Code as a dynamic concept to define high capacity. The criteria for a network to be considered a VHCN do not just focus on a single speed threshold, but also includes other key aspects of a high capacity network, including low latency, low jitter, etc. Introducing an insufficient and under-researched new standard that only focuses on speed seems to be contrary to the concept introduced under the Code. We believe using a concept that is based on multiple service indicators is best future proof, however without suggesting that VHCN should be the benchmark – if it were it should clearly allow for a mixed technology approach. Certainly, the introduction of "ultrafast access network" creates more legal uncertainty.

The existing time benchmark of three years for deployment has worked well. By stating that the "relevant time horizon" cannot be shorter than two years, the proposed Guidelines effectively reduce this benchmark from three to two years.[15] The realities associated with broadband deployment must be respected: planning, navigating the regulatory process and construction all take time. A three year period aligns better – although realistically it may be still be too short – with how operators plan and implement broadband network deployment and upgrades and therefore this should be retained.

[12] Paragraph 19 (c) 'mobile network' means a wireless electronic communications network which provides connectivity to end-users at any location in the area covered by the network using various generations of mobile technology (2G, 3G, 4G, 5G, 6G, etc.)
[13] Paragraph 19 (j) 'ultrafast access network' means an access network providing at least 100Mbps download speed as defined in recital (19)i);.
[14] Article 2(2) European Electronic Communications Code
[15] Paragraph 19 (l) 'relevant time horizon' means a time horizon used for verifying planned private investments and corresponding to the time frame of the planned deployment of the State funded network, starting from the moment of publication of the public consultation on the planned State intervention until the entry into operation of the network (a provision of wholesale and/or retail services). The relevant time horizon cannot be shorter than two years

There should also be clarification of the notion "as the decade progresses".[16] This impacts the timing under which Member States may 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 proposed Guidelines should promote infrastructure competition and avoid allowing Member States to use state aid to support a scenario whereby FTTH is considered as the sole future-proof solution. Creating an ever-shifting goalpost over the coming decade is a disincentive to investment.

The provisions around SGEI in the proposed Guidelines are not clear.[17] In particular, it is stated that an SGEI may be considered where private investors are "not able to provide adequate broadband coverage to all users in the relevant time horizon, thus leaving a significant part of the population unconnected." The construction of this sentence is confusing – "all users" is not the same as "significant part of the population." Clarity is needed as to whether this applies to all users in a particular area, or to a portion of those users. In the event this applies to a portion of these users, the criteria used to assess what constitutes a "significant" portion of the population should be outlined.

The definition of "premises passed" in recital (19) of Annex I is 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 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 a reference must be made, 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.

To ensure consistency with existing EU tools and rules intended to encourage deployment of broadband and 5G networks, we believe the proposed Guidelines should explicitly recommend that Member States implement the best practices contained in the EU Connectivity Toolbox before considering potentially distortive state aid interventions.

[16] Paragraph 52

[17] Paragraph 29

Section Three: Distortion of competition

Liberty Global welcomes the proposed Guidelines' goal of creating an investment-friendly environment, the recognition of the vital role of private investment in broadband deployment and the commitment to limit market distortion as much as possible. Public funding of broadband networks should not distort competition – however, there are numerous occasions where the proposed Guidelines could result in the opposite. We list some of the key examples below

While noting the commitment to limit public funding of broadband deployment to scenarios of so-called market failure, Liberty Global is concerned that the examples of market failure outlined in the proposed Guidelines could crowd out private investment and distort competition.

In the context of grey areas, an ultrafast network is understood as one providing at least 1 Gbps download and 200 Mbps upload speeds. We disagree with the view that a market failure can be said to exist in areas where existing or credibly planned networks cannot provide connectivity of such download and upload speeds.[18] Speed should not be the sole factor considered in assessing the quality of a network – e.g. jitter and latency are also key considerations – see our comments above. Setting strict speed limits could breach the principle of technology neutrality, as certain technologies may more easily achieve these speeds, and in turn favouring technology over another. The focus should be on whether the network can be upgraded to achieve higher speeds to meet future demand.

Overbuild should not be allowed in grey and black areas.[19] Our view is that market failure does not exist in black areas, in line with the position of the existing Guidelines. Allowing overbuild of existing networks, particularly within the new "relevant time horizon", is an active disincentive to upgrades of existing networks. Deployment and upgrade of networks in black areas is typically considered financially viable. It is not an efficient use of public funding to build in these areas – public money is better targeted at those areas where private deployment is not viable.

There may be limited circumstances where market failure could exist in grey areas. However, this cannot be demonstrated solely based on the speed capability of the existing network. Firstly, as outlined previously, speed should not be the sole factor considered in assessing the quality of a network. Secondly, the proposed provision does not give time for upgrades to allow the existing network to meet these thresholds. Allowing overbuild in grey areas will disincentivise investment in existing infrastructure.

The introduction of the concept of "mixed areas" is unnecessary and unwarranted.[20] In practice, this would lead to grey areas being treated as white areas for the purpose of public funding of broadband networks. This will likely lead to overbuild and market distortion. Although the proposed Guidelines highlight that intervention in these areas should be limited to "gapfilling", and that

[18] Paragraph 52

[19] Paragraphs 57, 60

[20] Paragraph 59

overbuild should be limited to 10% of households in the area, it is unclear how this would be maintained in practice. The current distinction between white, grey and black areas worked well and there is reason nor justification to change this based on a hybrid area concept. Introducing this fourth category 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.

The understanding and application of the concept of step-change is an essential plank of the existing State Aid regime and should continue to be so. While the intervention thresholds need to be set in a way that carefully assesses market failure and limits distortion of competition to a maximum extent, step-change requirements should reflect technological developments, take into account the 2025 and the 2030 objectives and ensure that state-funded fixed networks are future-proof. The proposed 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 below even that of “ultrafast” networks and which are far from being 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 and could lead to inefficient use of public funding.

We note the assertion that ex ante regulation of the market for broadband is considered important to foster competitive markets.[21] We agree that ex ante regulation can be an useful tool to foster competition in certain circumstances, however, this must be assessed on a case-by-case basis. Ex ante regulation was introduced 20 years ago to create competitive markets in the aftermath of liberalisation. Today there is a strong deregulation trend under both the Commission and national regulators. Hence it cannot be said – like the proposed Guidelines do – that the wholesale local access market is and will remain regulated in most member states. Doing so would hint at perpetual regulation which is contrary to the text and spirit of market regulation.

Section Four: Principle of appropriateness and proportionality

Any changes to the existing Guidelines should be appropriate and proportionate. The proposed Guidelines should build upon existing concepts and retain the elements of the existing Guidelines that function well. It is also vital that the proposed Guidelines complement existing legislation rather than seek to introduce additional requirements and concepts.

We welcome the proposal for demand-side measures to increase rollout and take-up of gigabit networks but they must be carefully assessed to show market necessity and be tailored to assist those end-users most in need. It is important that any voucher scheme is designed in a technology neutral, proportionate and appropriate manner. No single operator should receive favourable

[21] Paragraph 9

treatment under voucher schemes; in addition to distorting competition, this also reduces consumer choice.

The provisions regarding detailed mapping and analysis of coverage[22] should be aligned with the existing mapping obligations under the Code and the BCRD. The Code provides extensive guidance on mapping procedures. Duplicating existing mapping exercises is not an efficient use of public money; it also places an unnecessary burden on operators where multiple requests for similar information are issued. 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. Instead of introducing an additional burden on operators, mapping assessments under the State Aid regime should rely on those carried out under the Code. Greater cooperation between regulatory bodies will increase efficiency.

We recognise that public bodies require some assurance that proposed investment plans will materialise.[23] However, it is key that the methods used to assess this do not place an undue burden on operators. We welcome the emphasis that requests for information must be proportionate and made within appropriate timelines. In addition, it is important that the monitoring of progression on investment plans is proportionate and appropriate. Any commitments which operators sign with Member States to give updates on progress should be done voluntarily and the level of information to be shared should be proportionate.

The ex-post monitoring of the implementation of private investment plans should also be proportionate and appropriate.[24] Requiring operators to share excessive information places a regulatory and administrative burden which disincentivises investment.

[22] Section 5.2.2.4.1

[23] Section 5.2.2.4.3

[24] Section 5.2.2.4.4

About Liberty Global

Liberty Global (NASDAQ: LBTYA, LBTYB and LBTYK) is a world leader in converged broadband, video and mobile communications services. We deliver next-generation products through advanced fibre and 5G networks that connect over 85 million subscribers across Europe and the United Kingdom. Our businesses operate under some of the best-known consumer brands, including Virgin Media-O2 in the UK, VodafoneZiggo in The Netherlands, Telenet in Belgium, Sunrise UPC in Switzerland, Virgin Media in Ireland and UPC in Eastern Europe. Through our substantial scale and commitment to innovation, we are building Tomorrow's Connections Today, investing in the infrastructure and platforms that empower our customers to make the most of the digital revolution, while deploying the advanced technologies that nations and economies need to thrive.

Our consolidated businesses generate annual revenue of more than $7 billion, while our joint-ventures in the U.K. and the Netherlands generate combined annual revenue of more than $17 billion. Liberty Global Ventures, our global investment arm, has a portfolio of more than 75 companies across content, technology and infrastructure, including strategic stakes in companies like Plume, ITV, Lions Gate, Univision and the Formula E racing series.