

HT.5766 proposed Draft Broadband Guidelines BBGL
Comments and Observations from an SME perspective
Open Letter to the Commission

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We welcome the opportunity to comment on the proposed draft Broadband guidelines (BBGL) (which are subject to change and amendments). We thank the Commission, DG Competition and DG Connect staff for their work on updating the guidelines. It is apparent that a great deal of effort was put into the proposed guidelines. We provide the comments on the guidelines in good faith and in the sincere hope that it assists the Commission balance the often-competing objectives and priorities when dealing with broadband state aid cases.

It is our hope that the revised guidelines would ensure legal certainty for SME ISP operators and that the wording of the guidelines can be easily interpreted and can be relied upon by all stakeholders when assessing a member states adherence to the guidelines when they are carrying critically necessary tasks in pursuit of the political objectives of the state aided measure:

- a) Identifying and implementing less distortive measures to support the rapid deployment of broadband networks.
- b) Scoping and designing the state aided measure.
- c) Mapping premises covered by existing operators.
- d) Mapping premises to be covered by operators and investors.
- e) Analysing consultation submissions that would validate the mapping exercise

When dealing with limited negative effects of an intervention, it is an inescapable fact any existing operator whose coverage is not adequately recognised by a competent public authority, those operators become a de facto lightning-rod for the negative effects of the measure. That is those operators are being told (colloquially) *“to take one for the team”* and suffer the negative effects without any remedy. Moreover, there does not seem to be any quantifying and remediation of this issue outlined in the guidelines. If in the pursuit of an arbitrary step change, there is a sanctioned overbuild of a network that was privately developed the damage done to that operator with state funding should be compensated (according to the state aid intensity of the measure) and this compensation should be factored into the cost benefit analysis (CBA) of the totality of the measure.

If one was to summarise the BBGL it would be a guide for Member states and stakeholders to measure the problem and then how to solve the problem. Measuring the problem requires good data to feed into the analysis. To that end we would advocate that In

evaluating existing operators' coverage, it is important to be cognisant of current standard industry practice and give adequate credence and weight to real world operator experience. The track record of an SME operator who deploys in an area and deploys additional sectors (sub sectoring) and or backhaul links should be taken into consideration when evaluating operators' mapping submissions and the operators' consultation submissions.

Mapping the connectivity options that citizens / businesses can avail of should not be blunted to a binary qualification criterion for an entire ISP's coverage area. Ruling out an ISP's entire coverage area (with premises both connected and unconnected) because of concerns a proportion of the claimed coverage area would inevitably lead to heavily distortive overbuild of that operator.

Before an intervention in the market, one should measure / map the market with the best possible surface topographical data (Topographical data could include high resolution 2M Lidar surveys, 2 Meter resolution Photogrammetric derived height data) should be procured and licensed by the aid granting authorities to assist in the mapping and efficient planning of both public and private investments. (This is particularly important where high resolution GIS Topographical data in a region is expensive and out of the reach of smaller providers). This mapping data should be made available in an open format (openstandards GIS, geotiff, ASCII) to mapping / radio planning software providers and ISPs on an equal access basis. Increased resolution of topographical data increases the certainty of the coverage maps for both FWA and mobile access networks.

The results of the consultation should be published, and stakeholders should be made aware of the status of operators mapping submission before an aid granting authority notifies the Commission of an aid measure.

In working to achieve the objective of high-speed broadband to all EU citizens, due consideration must be taken of ISPs (who are at the vanguard of connecting the unconnected). To use a medieval analogy, the warriors at the frontline would welcome the arrival of the cavalry to assist them connecting the unconnected but in so doing we would only welcome that as long as we are not to be trampled by the state funded cavalry as they roll out their broadband networks overbuilding our private unsubsidised networks.

It is also important that introduction of supply side measures be meaningfully decoupled from demand side measures, and that demand stimulation provisions of supply side interventions are limited to the minimum necessary. The combination of supply side measures and demand side measures can lead to an unacceptable distortion of the market.

We welcome any clarifications from the Commission on the standards that operators should meet in order to have their coverage areas appropriately recognised.

The enhanced transparency measures laid out in section 7 of the BBGL are welcome.

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1 INTRODUCTION

Re BBGL (11) *“In 2020, the Commission launched an evaluation of the 2013 Broadband Guidelines¹¹ to assess whether they were still fit for purpose. The results¹² showed that, in principle, the rules work well. However, the evaluation also showed that some targeted adjustments are needed. In particular, the Broadband Guidelines should be adapted to reflect recent **legislative developments, current priorities, as well as market and technology developments**¹³.”*

As committed technologists and forward looking market operators at the vanguard of addressing the digital divide, we do support the political objectives of connecting the unconnected in a performant manner. It is important that the existing performant market infrastructure is recognised, and that due regard is given to SMEs who have an organic demand based investment and upgrade strategy.

2 OBJECTIVE AND DEFINITIONS

2.1 Scope

Re BBGL (12) *“To prevent State aid from distorting or threatening to distort competition in the internal market and affecting significantly trade between Member States, Article 107(1) of the Treaty on the Functioning of the European Union (‘the Treaty’) lays down the principle that State aid is prohibited¹⁴. In certain cases, however, such aid may be compatible with the internal market on the basis of Article 107(2) and 107(3) of the Treaty.”*

It is critically important in setting the thresholds that define market failure that they reflect performant markets in commercial areas and not be so high as to ensure that many operators’ infrastructure fail the assessment (in order to justify a state funded overbuild). The assessment thresholds should not be set too high so as to precipitate a paper based or hypothesised market failure despite market operators are currently meeting subscribers’ needs and have a track record in upgrading networks capacity as demand grows. Such exaggerated demand thresholds would result in unacceptably high distortion of the market.

2.2 Definitions

Re BBGL (19) *“For the purposes of these guidelines, the following definitions apply:”*

...

Re BBGL (19) ‘relevant time horizon’

There is no definition for the period of time where the state aided measure has finished building the network, but the network may still be in receipt of subsidies.

It is important that while the state aided network is operating the conditions set down for its operation (the contract, KPIs and aid measure full decision text) ought to be kept available for the running lifetime of the measure. This is to aid competitors and users have transparency on what is required of the aid beneficiary, and to facilitate interested parties to alert the Commission to departures from the conditions set down by the aid decision from the Commission.

Re BBGL (19n) 'crowding out of private investors'

It is not apparent how this phenomenon is measured and remediated if identified.

2.3 Types of broadband networks

Re BBGL (21) “For the purposes of State aid assessment, these guidelines consider fixed ultrafast access networks as networks which **provide at least 100 Mbps download speed at a fixed location as defined in recital ((19)j).**”

We request that “provide at least” be reworded to **reliably provide** so as to prevent opportunistic behaviours by granting authorities during mapping and assessments of operator submissions by ruling out performant wireless networks that are generally technically capable of delivering 100Mbps to the customer premises. It is understood that “reliably provide” would exclude premises that cannot achieve 100Mb/s due to distance from VDSL cabinet or distance from the base station.

Re BBGL footnote 21 and BBGL (22) “At the current stage of technological development, there are different types of fixed ultrafast access networks, including: (i) fibre-based networks (FTTx)²⁰; and (ii) advanced upgraded cable networks using at least the ‘DOCSIS 3.0’ standard. Wireless networks such as **certain fixed wireless access networks**²² and in the future satellite networks²² may also be able to provide ultrafast broadband services.”

Footnote 21 “In particular fixed wireless access networks based on 5G technology, potentially also other wireless technologies that include fixed radio solutions, especially the next generation of Wi-Fi (Wi-Fi6)”.

The un clear wording “certain fixed wireless access networks” and “potentially” could result in opportunistic behaviours by member states subjecting smaller FWA operators who have invested in FWA technology being unfairly declared as non-compliant during a mapping exercise or disproportionately subject to in-depth analysis.

Comparing the proposed text and the report commissioned by the Commission “The role of State Aid for the rapid deployment of broadband” it is noticeable that Wi-F5 has been treated differently to 5G FWA.

Performant Wi-Fi4 in low density deployments and Wi-Fi5 should be accepted as meeting the 100Mb/s target as per [The role of State Aid for the rapid deployment of broadband Table 3-2: An overview of the performance of technologies (pages 69-71)].

Transmission technology	Year of specification release/introduction	SDO - Specification	FttX	Data rate downlink peak in Mbit/s	Data rate uplink peak in Mbit/s	Shared access medium	QoS mgt	BB target 100 Mbit/s	VHC BB upgrade to 1Gbit/s symmetric
5G FWA	4Q2017	3GPP	Fbac khaul	10,000	5,000	n ²	1	y	Y ²⁰
Radio waves	Unlicensed access								
Wi-Fi	1997	IEEE802.11	-	2 ¹³		y	2	n	N
Wi-Fi	2000	IEEE802.11b	-	11		y	2	n	n
Wi-Fi	2000	IEEE802.11a	-	54		y	2	n	n
Wi-Fi 4	2009	IEEE802.11n	-	600		y	2	y	n
Wi-Fi 5	2013	IEEE802.11ac	-	1,300 ¹⁴ /6,900		y	2	y	y
Wi-Fi 6	2019-2020	IEEE802.11ax	Fbac khaul	4,800		y	2	y	y
LoRaWAN	2015	Release 1.0	-	0.05	0.05	y	2	n.a.	n.a.

Additionally performant 4G /LTE FWA deployed at a certain density should be accepted as meeting the 100Mb/s target as per [The role of State Aid for the rapid deployment of broadband Table 3-2: An overview of the performance of technologies (pages 69-71)

Transmission technology	Year of specification release/ introduction	SDO - Specification	FttX	Data rate downlink peak in Mbit/s	Data rate uplink peak in Mbit/s	Shared access medium	QoS mgt	BB target 100 Mbit/s	VHC BB upgrade to 1Gbit/s symmetric
Radio waves	Licensed access								
2G-GPRS	1999	ETSI Rel. 98	-	0.085	0.0021	y	2	n	n
EDGE	2003	ETSI	-	0.237	0.059	y	2	n	n
EC-GSM-IoT	2017	3GPP Rel. 13	-	0.098	0.098	y	2	n.a.	n.a.
3G-UMTS	2000	ETSI Rel. 99 TR 101 111	-	0.144 ¹² / 0.384/2.0	0.1/ 2	y	2	n	n
HSPA	2006/2007	3GPP Rel. 5/6	-	14.4	5.8	y	2	n	N
HSPA+	2008/2009	3GPP Rel. 7/8	-	21/42	11	y	2	n	N
4G-LTE	2009	3GPP Rel. 8	Fbac khaul	2x2MIMO 70 4x4MIMO 300	16QAM- 2x10 22 64QAM 2x20 75	y	2/3	y	N
IMT Advanced	2010	ITU		1,000 10 ¹⁵					
NB-IoT	2017/2018	3GPP Rel. 13/14	-	0.025/ 0.079	0.062 /0.010	y	2/3	n.a.	n.a.
LTE-M	2017	3GPP Rel. 13	-	0.3/0.8 ¹¹	1.0/0.37	y	2/3	n.a.	n.a.
4G-LTE Adv.	2011	3GPP Rel. 10	Fbac khaul	3,000	1,500	y	2/3	y	N ²⁰
4G FWA¹	2009/11	3GPP	Fbac khaul	50-150	20-40	n ²	1	y	N
5G NSA NR⁹ Rel. 15	4Q2017	3GPP TR 21.915	Fbac khaul	5,000	2,500	y	2/3	y	N ^{19, 20n}
5G Rel. 15	2Q2019 ⁸	TR 21.915	Fbac khaul	10,000 50 ¹⁶	5,000 25 ¹⁶	y	2/3	y	Y ²⁰
5G Rel. 16	2Q2020	TR 21.916	Fbac khaul						
5G Rel. 17	2Q2021	TR 21.917	Fbac khaul						
IMT2020	2020	ITU		20,000 100 ¹⁵	10,000 50 ¹⁵				

Note this table was edited to remove Wired Technologies for convenience (no other edits were made).

3 THE COMPATIBILITY ASSESSMENT UNDER ARTICLE 106(2) OF THE TREATY

4 THE COMPATIBILITY ASSESSMENT UNDER ARTICLE 107(3), POINT (C), OF THE TREATY

5 AID FOR THE DEPLOYMENT OF BROADBAND ELECTRONIC COMMUNICATIONS NETWORKS

Re BBGL (35) *“The Commission considers the market for fixed broadband services as separate from the market for mobile broadband services³⁷. The rules for the assessment of aid may therefore differ, depending on the market concerned.”*

BBGL Footnote 37

“Where deployment costs of a fixed network are very high, a high performance mobile network may be used as an alternative to fixed network. However, there remain significant qualitative differences between the two technologies. Unlike fixed networks, mobile networks allow end users to move while communicating (for instance in a car). On the other hand, fixed networks offer a higher degree of stability and security in particular for data transmission. For the time being, end-users typically use both technologies as complements instead of substitutes..”

While we agree that fixed broadband markets and mobile broadband markets are separate markets, FWA operators would be concerned that on the one hand aid granting authorities could rule that an overbuild of FWA networks with a fibre network is necessary. Then on the other hand, use the stated goal of increasing mobile coverage in our FWA operating area to subsidise a mobile communications intervention in the same geographical area. The result would be that at the higher end the market would be taken by fibre and then the lower cost price conscious market would be taken by mobile providers thereby squeezing the FWA operator every which way. So, while fixed and mobile broadband markets are separate, there needs to be strong vigilance and adequate measures to prevent double distortion of unsubsidised FWA operators' markets (due to leakage / transfer between the two markets). SME FWA operators should have protection from this subsidised situation regardless of the number of years the SME FWA network is in operation and should have protection for the lifetime of the state aided measure. If protection from undue distortion is impossible then remediation / compensation for affected SME FWA operators must be considered and appropriately implemented (and factored into the CBA).

There is a need to assess the possibility of this occurring on any given combination of fixed and mobile state aid measures, a monitoring and mitigation / remediation strategy.

Regarding footnote 37 it is agreed that there is a significant qualitative difference between the two technologies, however there is a significant risk that a subsidised mobile operator can undercut the unsubsidised SME FWA operator to make up for the qualitative differences.

5.1 First condition: facilitation of the development of an economic activity

Re BBGL (41) *“Proving an incentive effect of aid for the deployment of fixed or mobile networks entails the verification through mapping and public consultation, as described in Sections 5.2.2.4.1 and 5.2.2.4.2, whether stakeholders have invested or intend to invest in, respectively, fixed or mobile networks in the target areas within the relevant time horizon. If a similar investment would be made in the area even without the aid, it can be considered that the aid lacks an incentive effect.”*

While mapping is separate from the public consultation in sections 5.2.2.4.1 and 5.2.2.4.2 (and as indeed they were distinct and separate paragraphs in 78)a and 78)b of the 2013 guidelines), it would help the user’s understanding and for absolute clarity if the wording *“entails the verification through mapping and public consultation”* could be clarified better with the wording, **“entails carrying out a mapping exercise and verifying the mapping exercise with a separate public consultation”**.

5.2 Second condition: the aid measure must not unduly affect trading conditions to an extent contrary to the common interest

Re BBGL (50) *“A market failure may also be demonstrated if the existing network provides citizens or business end-users with a suboptimal combination of service quality and prices⁴². This may be the case when certain categories of users may not be adequately served or, especially in the absence of regulated wholesale access tariffs, retail prices may be higher than those charged for the same services offered in more competitive but otherwise comparable areas or regions of the Member State. If, in addition, there are only limited prospects that alternative operators will enter the market or provide services in that area, the funding of an alternative network could be appropriate.”*

Footnote 42 “In case Member States consider that this is the reason to intervene, the Commission will examine whether the Member State can demonstrate clearly and with verifiable facts that end users’ needs are not met. This could be proven through consumer survey, independent study, etc.”

We are concerned as to how the study and survey can be verified as truly independent? How can the study and survey be conducted by the aid granting authorities so that opportunistic behaviours by the authorities and responding consumers are detected and mitigated? Asking consumers who are not technical aware of the different and possible scenarios, is not very scientific . A more scientific and proportionate way of indicating or defining market failure is where the speeds offered in a proposed target area are less than the average 95th percentile busy hour consumer demand in a commercially successful area (market). In other words, should aid granting authorities be able to declare a market failure when users in commercially successful areas are not yet consuming (at peak time) the nominal speeds offered in a proposed target (intervention area)? Intervening and overbuilding existing and deployed private investment in a market early is not limiting the distortive effects of the aid while the consumers are not consuming (demanding) the performance that the new network gives. If an unsubsidised operator is consistently upgrading capacity to keep with customer demand it is distortive and disproportionate to subsidise an overbuild in this scenario.

Re BBGL (52) *“Aid can bring about a material improvement that the market alone does not deliver in areas where there is no fixed network in place or credibly planned to be deployed within the relevant time horizon, able to address end-users’ needs. At the current stage of market development and given identified end-users’ needs⁴⁴, a market failure may be demonstrated where the market does not and is not likely to provide end-users with a connectivity of 1 Gbps download speed. Upload speed is becoming increasingly relevant to guarantee user’s access to a number of services. Market failure may therefore also be demonstrated in the absence (and unlikely provision by the market in the relevant time horizon) of a connectivity of 200 Mbps upload speed⁴⁵. As the decade progresses, a market failure may also be demonstrated⁴⁶, where the market does not and is not likely to satisfy identified end-users’ needs for enhanced upload speed⁴⁷ up to 1 Gbps (see Section 5.2.3.1.4).”*

Footnote 44 “Sonia Strube Martins, Christian Wernick; Telecommunication policy journal 45 (2021): Regional differences in residential demand for very high bandwidth broadband internet in 2025”

Footnote 46 “Demonstrating a need for enhanced upload means that the Member State provides reliable evidence from **verifiable sources**, for instance surveys of end-users’ needs, studies on profile of end-users and traffic evolution, smart specialisation strategies, etc.” [emphasis added]

“At the current stage of market development and given identified end-users’ needs”⁴⁴ and associated footnote 44, attempts to tie identified users’ needs with a reference to an excellent academic paper which attempts to **predict** end-users needs. Defining subscribers’ needs would need additional real-world data to properly identify subscribers needs (performance / usage) in commercial areas compared with nominal (achievable) broadband offerings in proposed target area.

The verifiability of the reliability of the evidence for market failure is key, for how are market operators to be certain of the standard of evidence used to justify a measure (namely the “studies on profile of end-users and traffic evolution, smart specialisation strategies, etc.”) would be fit for purpose if the studies are not based on real world data? Declaring market failure or an operator’s network a failure because of a hypothesised performance requirement would undermine legal certainty.

Regarding “As the decade progresses, a market failure **may** also be demonstrated” we understand that “may” indicates subject to analysis of the Commission. Is it possible for the Commission to outline what conditions / criteria would have to be met in order for it to consent to such a measure?

Re BBGL 5.2.2.1.1 White areas

Re BBGL (55) White areas are those in which there is no ultrafast broadband network and such network is unlikely to be developed in the relevant time horizon.

This paragraph is simple, clear and unambiguous.

Re BBGL 5.2.2.1.2 Grey areas

Re BBGL (57) “A market failure **may** be demonstrated if the existing or credibly planned ultrafast network cannot provide at least 1 Gbps download and 200 Mbps upload speeds⁴⁹.”

BBGL footnote 49 “While download and upload speeds are currently the most relevant quality of service parameters, certain users or the provision of certain services may increasingly require specific characteristics in addition to speed (such as latency or jitter) that could be taken into account to justify the existence of a market failure.”

We understand “may” here to indicate ‘subject to analysis of the Commission’. Once again, is it possible for the Commission to outline what conditions / criteria would have to be met in order for it

to consent to such a measure? How is the latency and or jitter requirement / threshold that would be used to declare / justify market failure determined? We would be concerned that an arbitrary threshold could be set by aid granting authorities to support a measure that overbuilds existing performant networks.

Re BBGL 5.2.2.1.3 Mixed areas (white and grey)

Re BBGL (58) In principle, the proposed intervention should be designed such that the entire target area is either white or grey.

We agree with this principle.

Re BBGL (59) *“However, for reasons of efficiency, 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 place⁵⁰. Overbuilding must be limited to maximum 10% of all premises in the target area⁵¹. 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).”*

BBGL Footnote 50 “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.”

BBGL Footnote 51 “The State aid amount has to take into account the revenues made from the premises affected by overbuilding to avoid overcompensation in the calculation of the funding gap.”

SME FWA operators could be disproportionately affected by this measure. A small local FWA operators coverage area could be less than 10% of the proposed intervention area. While an inconvenience and increase in cost for the intervening measure it would be devastating for the operator being over built. 10% of an overbuild would naturally appear limited or even reasonable from a granting authorities’ perspective but for the local operator it could be a substantial proportion to 100% overbuild from their perspective. That said the clarification of footnote 51 is welcome, however it does not deal with the issue of remediation of the measured damage proposed or would be done to the overbuilt performant operator. If a problem of overbuild is worth measuring it is worth solving. It is understandable that there is a desire to make state aid interventions easier for aid granting authorities but (perhaps necessary) infringements on rights of unsubsidised existing market operators need to be appropriately remedied (according to revenue and potential revenue lost over the subsidised lifetime of the measure factoring in state aid intensity). There is a concern amongst SME FWA operators that currently there exists a strong motivation for opportunistic behaviours by aid granting authorities with the practice of declaring grey areas as white areas. Perhaps a mechanism for declaring grey/white mixed areas and remedying overbuilt operators would provide a more elegant and fair solution for all concerned.

5.2.2.2 Existence of market failure as regards mobile access networks

There needs to be consideration of what the deployment of an additional Mobile access network in an area would do as regards Spectrum availability in an area for FWA operators (for backhaul). Also regulatory measure should be taken to assess and remedy any negative effects on costs for unsubsidised FWA operators, for instance where the new mobile operator purchases a number of Licensed links to a tower site and possibly increasing the price on Licensed links for other operators (Low spectrum usage area) to a (High spectrum usage area) or worse still consuming all remaining spectrum for licensed links.

Re BBGL (65) “Public support for the deployment of a mobile network in such an area may be considered necessary only when it can be cumulatively demonstrated that the existing or planned mobile network does not provide end-users with sufficient quality of services to satisfy their evolving needs and the public support will adequately remedy the identified market failure, thus bringing about a material improvement that the market cannot deliver⁶⁰. Limited capacities of the existing or planned mobile networks may be due to, for instance, insufficient density of antennas, specific spectrum bandwidth or the characteristics of active equipment⁶¹.”

There is a significant risk that an intervention in support of the market failure cited in BBGL paragraph 65 could allow a subsidised mobile operator to compete with unsubsidised FWA operators. There is a need for a codified mitigation and / or remediation for such risk or occurrences.

Re BBGL (66) “A market failure might thus exist in the presence of a 4G or even a 5G network where such a network does not and is not likely to provide end-users with sufficient quality of services to satisfy their evolving needs.”

There is a significant risk that an intervention in support of the market failure cited in BBGL paragraph 66 could allow a subsidised mobile operator to compete with unsubsidised FWA operators. There is a need for a codified mitigation and / or remediation for such risk or occurrences.

Re BBGL (67) “New forms of economic activity and services will require seamless online access (for instance for connected and automated mobility along transport paths) and, in addition to certain minimum speeds and capacity, also other specific characteristics such as lower latency, network virtualization or the capacity to connect multiple terminals in the industrial or agricultural context. In such situations, despite the presence of a mobile network, public support may be needed to address specific market failures related to identified use cases.

There is a significant risk that an intervention in support of the market failure cited in BBGL paragraph 67 could allow a subsidised mobile operator to compete with unsubsidised FWA operators. There is a need for a codified mitigation and / or remediation for such risk or occurrences.

5.2.2.3 Existence of market failure as regards backhaul networks

From an SME operators perspective In a market where there are a large number of regional operators and there is clear market failure in the backhaul market an intervention in the backhaul network market would be preferable generally to intervene in the backhaul market first before committing to a large monolithic combined backhaul/access stated aided wholesale network.

5.2.2.4 Instruments to determine the existence of market failure

Clarity in how member states and stakeholders can measure market failure is absolutely critical. We welcome clarifications however there are some clarifications still necessary to ensure legal certainty for stakeholders and aid granting authorities. Clear prescriptive guidelines aid in the detection of (and hence risk of) opportunistic behaviour of aid granting authorities and stakeholders.

Re BBGL (73) *“To identify market failure areas, Member States must determine on the basis of a detailed **mapping (see Section 5.2.2.4.1) and public consultation (see Section 5.2.2.4.2)**, whether fixed or mobile networks are present or credibly planned to be deployed in the area in the relevant time horizon.”* [emphasis added]

While mapping is clearly separate from the public consultation in sections 5.2.2.4.1 and 5.2.2.4.2 (and as indeed they were distinct and separate paragraphs in 78)a and 78)b of the 2013 guidelines), it would help the user’s understanding and for absolute clarity if the wording *“mapping (see Section 5.2.2.4.1) and public consultation (see Section 5.2.2.4.2)”* could be clarified better with the wording, **“mapping exercise (see Section 5.2.2.4.1) and verifying the mapping exercise with a separate public consultation (see Section 5.2.2.4.2)”**.

Re BBGL (74) *“Member States must identify which geographic areas will be covered by the aid measure in question, by carrying out a mapping exercise. The Commission regards the methodology described in Section 3 (for fixed access networks) and 4 (for mobile and fixed wireless access networks) of Annex I as the most accurate mapping method. Member States may propose the use of alternative methods to those described in these two sections provided that they comply with recitals (4), (5),(9), (10) and (12) of Section 2, **are duly justified and include a reasoned opinion by the national regulatory authority supporting the use of the proposed alternative methodology.**”* [emphasis added]

The reasoned opinion of the regulatory authority on the alternative methodology should be subject to a public consultation and careful consideration should be given to ensure the alternative mapping methodology would not disadvantage SME ISPs.

Re BBGL 75) *“Member States have significant discretion to define the target areas. However, they are encouraged to take into account economic, geographical and social conditions in the definition of relevant areas. For instance, the size of the target areas may play a role in the outcome of the competitive selection procedure as areas that are too small might not provide sufficient economic incentives for market players to bid for the aid, while areas that are too big **might reduce the competitive outcome of the selection procedure.** Defining several smaller areas, which would lead to organising several selection procedures, would allow different potential undertakings to benefit from State aid thereby avoiding that one (possibly already dominant) operator’s market position is further strengthened by the measure.”* [emphasis added]

We would invite the Commission to consider a prohibition on needlessly large pre-qualification criteria for bidders, (e.g. minimum turnover) which would limit the opportunities for smaller companies to bid, and then subsequently award the tender to a newly formed consortium who by definition would have an existing turnover of 0 prior to contract start, particularly if the large intervention area is then subsequently carved up into many sub areas or deployment areas.

Annex I Section 2 - OBJECTIVE AND DEFINITIONS

ANNEX I - (6) "The public authorities responsible for the public intervention may map also other performance criteria to characterize the performance of networks under peak-time conditions (e.g. latency, packet loss, packet error, jitter, service availability₂). Member States may choose to do so in order to better target the public intervention to address market failures and ensure an adequate step change."

Annex I footnote 2 For these quality criteria the technical specifications provided by BEREC should be used: IP packet error ratio (Y.1540); IP packet loss ratio (Y.1540); Round-trip IP packet delay (RFC 2681); IP packet delay variation (RFC 3393); IP service availability (Y.1540).

The clarifications here are welcome, while the definitions of the standard measurements are set out. What exact performance levels must our networks achieve as a minimum so that we are assured that our investments would not be overbuilt? Footnote 2 deals with the standards for measuring performance but not the performance metric values themselves? We would welcome clarity on this. We suggest that the values be set by the Commission to avoid opportunistic over-specification of requirements by aid granting authorities. Clarification of the test period / and sample interval over which the statistics are to be evaluated. And that there are derogations for exceptional traffic events over which an operator has limited control over, eg statistically anomalous traffic loads (DDoS (Distributed Denial of Service etc.). It is important to consider that the busy hour may actually depend on the types and distribution of customers a network has, Business customers / Schools vs residential customers .

Annex I -(9) "The mapping exercise must be carried out at address level for fixed and fixed wireless access networks on the basis of 'premises passed' and at address level or on the basis of maximum₄ 100x100 meter grids₅ for mobile networks."

Annex I footnote 4 "Smaller grids (i.e. 20x20 meters) are considered preferable."

Annex I footnote 5 "The data delivery should be provided in the form of geographical (polygons) areas (raster & vector data)."

It would be better for everyone if we have greater certainty and better mapping data of broadband coverage intervening authorities should procure and make available to operators and or (link planning / radio planning) software providers. This data should be as high a resolution as practical. Best available GIS / Topographical Surface Model data in open data interchange formats such as geotiff /ASCII or other well known standard (either lidar or Photogrammetric surface model data that includes clutter such as trees and buildings) so that all stakeholders and intervening authorities can have more certainty about the mapping. It is important to realise that high resolution data can be extremely expensive and out of the reach of SME FWA providers.

The benefits to aid granting authorities of making that data available to operators are as follows

- Better coverage data comes back from providers. State authorities and consumers can have more confidence in the coverage data.
 - Providers can use the data to better plan coverage areas making private , public and PPP investments more efficient.
 - Providing the data would reduce the mapping time required as smaller operators may have to organise and procure data as a group and then hire GIS consultants to ingest the data into Radio planning /mapping software. (this is a significant workload and puts a huge burden on operators)
-

Annex I (10) *“Premises passed” means premises which can be connected within a short period of time at the normal activation fee for the end user, regardless of whether those premises are connected to the network. A stakeholder can report premises as passed only if, following a request from an end user, it commits to connect the premises and activate the service within 4 weeks from the date of the request and for normal activation fees, meaning without any additional or exceptional cost and, in any case, not exceeding the average activation fee in the Member State concerned.”*

4 weeks from the date of the request seems reasonable, on the basis that the operator is not being asked to connect a statistically unlikely number of customers to the network within 4 weeks. It is important that the Commission balance realistic demand on the operator to connect premises and not allow aid granting authorities place an unreasonable burden of proof of ability to install customers, (member states who have doubt can use their own resources to verify existing installed customers). Moreover, one must compare what is being asked of private operators with what performance the proposed state aided intervention would deliver! I.e. is it proportionate to disqualify a provider coverage for taking longer than 4 weeks for a given customer, when the state aided measure could take for example up to 3-7 years to connect some of the customers in the intervention area?

It is a simple fact that the first sectors and first clients deployed in an area are the most expensive, and most difficult to do technically and financially, it is straight forward to add capacity via sub sectoring and additional backhaul as part of common industry practice of a demand based growth & investment strategy.

We agree that the normal activation fees definition (so long this definition does not include expenses incurred through the customer choosing a custom install (for instance an overground drop wire would connect the premises but the customer insists on a trenched install))

Annex I (11) *“In providing the information on the performance of their networks, stakeholders should adhere to the highest scientific and professional standards. In particular, the methodology and the techniques used to for the purpose of mapping should derive from accepted professional standards.”*

We as responsible operators agree with this principle; however we request that clarity on the exact professional standards of evaluation by the member states is set out in advance of the mapping process. Aid granting authorities should provide a sample mapping submission (wired and wireless) mapping submission that would have sufficient information and quality that it would be accepted as a sufficient standard by the aid granting authority.

Annex I (12) *“In providing performance figures, operators must consider any bottleneck that could prevent them from being able to actually reach the performance declared (e.g. backhaul). Should the operators not confirm of having provided information on this basis, Member States can disregard this information.”*

This is most draconian, there should be a process mandating aid granting authorities to seek and evaluate this information from providers, particularly on short mapping exercises. It is not proportionate to rule out an existing network because of missing information in a mapping submission that was prepared under significant time pressure. Further it is not proportionate for a member state to automatically exclude a network because of a perceived bottleneck. The existing

operator should be afforded an opportunity to remedy the situation, before sanctioning an overbuild. It is a simple fact that it is likely more expedient for an operator to remedy a bottleneck than a state aided authority to procure and deploy an entire replacement (and overbuilding) network.

Annex I (13) *“As regards the alternative methods for carrying the mapping exercise, **for instance**, for packet-switched fixed networks, public authorities **may** propose as an alternative, where duly justified, to use 20% utilisation factor of the most loaded (bottleneck) links defined as the average traffic rate divided by the nominal rate, at peak-time. In the case of wireless and mobile networks public authorities may propose an alternative method for instance in terms of the calculation on a 95% cell edge probability or in terms of the calculation of the nominal cell load₆ not lower than 50%⁷. In any case, irrespective of the method pursued, all network performance figures must be provided in terms of ‘peak-time conditions’ in line with paragraph (8).”*

Annex I footnote 6 “The ‘cell load’ (cell loading) means the average percentage of the resources of a base station that are used by end-users with respect to a certain service.”

Annex I footnote 7 “If the resulting cell load is lower than 50% this should be properly justified by the operators to the competent public authorities.”

We understand that “may” would be subject to assessment and consent of the Commission. And that “for instance” is just an example and not a direction or a recommendation. There is a lack of clarity and there are contradictory interpretations around what is meant by average traffic rate at peak time, as by definition peak time usage would be significantly higher than average usage. Further the imposition of a 20% utilisation factor would place an overburden (in terms of cost) a 5:1 concurrency ratio for any given bottleneck would not be commercially viable or even required according to any usage data we currently have access to. Einstein once said when modelling a system, one should make the model as simple as possible but no simpler. We are afraid that in making an intervention easier for aid granting authorities, this one-dimensional simplistic value ratio of users sharing a resource, takes no account complexities of user behaviour, distribution, available capacity etc. It represents a seismic departure from established good commercial practice of monitoring a given links capacity versus demand and as demand reaches 80% simply increase the capacity in line with increased demand. We would be gravely concerned that Annex I (13) would open opportunistic behaviours by state granting authorities (to manufacture evidence of a market failure where none exists in reality).

Annex I Section 3. RECOMMENDED METHOD FOR MAPPING SPEEDS OF FIXED ACCESS NETWORKS

Annex I 3.1. CRITERIA FOR MAPPING SPEEDS OF FIXED ACCESS NETWORKS

Annex I (15) *“Peak-time conditions is understood as whenever a minimum 20% of the users are active and transmitting concurrently at the nominal peak rate provided by the operator to each of them, both downstream and upstream, which correspond to the usual oversubscription rate definition₈.”*

Annex I footnote 8 “The very same network infrastructure can provide very different performance levels to the end users depending on how many users are being multiplexed in bottleneck links and what their nominal speeds are. Performance depends on the number of users concurrently active (which increases during peak-time conditions). Such ‘statistical multiplexing gain’ (minimum 20% meaning 1:5 activity level) requires also that accurate- enough user traffic distribution models are employed by operators”

The imposition of a 20% utilisation factor would place an overburden (in terms of cost) a 5:1 concurrency ratio for any given bottleneck would not be commercially viable or even required according to any usage data we currently have access to. Einstein once said when modelling a system, one should make the model as simple as possible but no simpler. We are afraid that in making an intervention easier for aid granting authorities, this one-dimensional simplistic value ratio of users sharing a resource, takes no account complexities of user behaviour, distribution, available capacity etc. It represents a seismic departure from established good commercial practice of monitoring a given links capacity versus demand and as demand reaches 80% simply increase the capacity in line with increased demand. We would be gravely concerned that Annex I (13) would open opportunistic behaviours by state granting authorities (to manufacture evidence of a market failure where none exists in reality).

Annex I 3.2. INFORMATION FOR VERIFICATION PURPOSES – BEST PRACTICES

We understand that “may” would be subject to assessment and consent of the Commission. For legal certainty and ensure rights of stakeholders are respected, and to mitigate against undue burden being placed on SME ISP operators, we would ask that the Commission publish situations in which the Commission agree with aid granting authorities that further verification data requests to SME ISP operators is warranted.

Annex I 3.3. INFORMATION FOR IN-DEPTH VERIFICATION PURPOSES – BEST PRACTICES

We understand that “may” would be subject to assessment and consent of the Commission. For legal certainty and ensure rights of stakeholders are respected, and to mitigate against undue burden being placed on SME ISP operators, we would ask that the Commission publish situations in which the Commission agree with aid granting authorities that further in-depth verification data requests to SME ISP operators is warranted.

Annex I Section 4.1. CRITERIA FOR MAPPING THE PERFORMANCE OF MOBILE AND FIXED WIRELESS ACCESS NETWORKS

Annex I (20)i-iii *“For the purpose of this mapping method, Member State should request stakeholders*

to calculate their network performance taking into account the following principles:

- i. use the best industry practices⁹ considering all the major effects on the wireless signal propagation¹⁰;*
 - ii. base the calculation on a 95% cell edge probability¹¹ of reaching the declared performance and in any case no less than 95% of probability to reach the declared performance in each of the grid points considering possible variations of propagation conditions due to random effects and possible variations among the points within the area considered (i.e. at address level or on the basis of maximum 100x100 meter grids);*
 - iii. assume peak-time conditions as follows:*
 - a. for mobile networks, a nominal cell load¹² no lower than 50%¹³ or higher in the case of peak-time traffic conditions being significantly higher;*
-

- b. *for fixed wireless access networks, the expected realistic peak-time traffic conditions should be used to derive the appropriate cell load for calculations¹⁴;*

Annex I footnote 9 *“Best industry practices mean modelling parameters, tools, planning, and error boundaries that are common in planning of wireless communications systems and business, and which can be deemed to be faithful and correct enough by experts in the field if they were to verify the methodology.”*

Annex I footnote 10 *“Such as terrain, building, and clutter when predicting the received signal power.”*

Annex I footnote 14 *“If peak-traffic estimation is not used, the nominal 90% cell load for fixed wireless access shall be used. The higher cell load for fixed wireless access (compared to mobile networks) reflects the expected different usage pattern resulting in higher competition for the use of the shared resources of the serving base station.”*

Paragraph 20i is clear, but we ask that state granting authorities be mandated to procure accurate GIS Surface model data and make available to operators in advance of the mapping exercise as this would enhance operators ability to present accurate maps to the Aid granting authority.

Paragraph 20ii is clear, but we ask that state granting authorities be mandated to procure accurate GIS Surface model data and make available to operators in advance of the mapping exercise as higher quality GIS surface model data would increase the probability / accuracy of the submitted mapping a data.

Paragraph 20iii is not at all clear and could be interpreted a number of ways and we would like clarification from the Commission on the meaning of this paragraph. As it is worded it is open to widely varying interpretation.

Annex I 20iv-v

- iv. *provide the performance per end-user and based on outdoor antennas. If a receiving antenna is shared among multiple end-users, the overall performance should be **considered equally shared among end-users¹⁵**;*
- v. *provide the performance per technology and per operating frequency in case of coverage with multiple technologies¹⁶ and multiple frequencies¹⁷, considering the bandwidth actually available per frequency. **In case of use of unlicensed frequencies, this should be clearly stated.**”*

Annex I footnote 15 *“In fixed wireless access this may be the case for shared rooftop antennas for a multi-dwelling building.”*

Paragraph 20 iv. for clarity we suggest wording *“considered equally shared among end-users”* be reworded to **considered equally shared among connected subscribers**. Performance can be demonstrated based on connected subscribers, with spare capacity to add consumers should they take up the service.

Paragraph 20 v. the manufactures equipment model numbers and associated data sheets should be enough for competent authorities to analyse. Further *“In case of use of unlicensed frequencies, this should be clearly stated”*. FWA operators need to have clarity on how authorities assess networks based on license exempt / light licensed bands. In order to prevent opportunistic behaviours of aid granting authorities should demonstrate what measures combined with license exempt frequency deployments would qualify as sufficiently performant so as not to be overbuilt.

Annex I (21) In line with paragraph (12), operators must consider in particular:

- i. the type¹⁸ of backhaul and its capacity for each base station¹⁹;
-

- ii. for fixed wireless access networks, the number of served and of passed premises present in each calculated grid.”

Paragraph 21i is reasonable as long as there is sufficient time provided by operators to gather and document this data in the mapping exercise.

Paragraph 21ii is hugely problematic for FWA operators, as it is a significant departure from footnote 92 and footnote 71 of 2013 broadband guidelines, where performance was defined (correctly) as been dependent on connected active subscribers, and that the premises passed would be based on those premises who could connect to the network if they so choose. It is reasonable and correct to expect that connected and passed be treated or analysed differently in a mapping process. One is certain (connected) while the other is measured and calculated with best available line of sight and GIS surface model data. The placing of served and passed premises in the one category is disproportionate and imposes an impractical burden on FWA operators. That is it could be interpreted to give aid granting authorities carte blanche to disregard all commercial FWA operators on the basis that 100% of the premises passed cannot be served by presently deployed base station sectors and backhaul which would have been dimensioned correctly to serve the connected subscriber base with some spare capacity. This clause needs to be refined considerably. And due account needs to be taken on the number of other operators in the area, maximal uptake in the market, and the FWA operators market penetration. In other words is it really a proposal enforce commercial non subsidised operators to deploy from day 1 sector equipment and backhaul to serve 100% of the premises passed, regardless of consumer uptake, regardless of competitors. To do so would be disproportionate and be counterproductive as an operator would more efficiently provide to a wider area with more base stations, if they are allowed to establish a minimal performant presence in an area and then target investment and upgrades based on uptake and demand.

Annex I 4.2. INFORMATION FOR VERIFICATION PURPOSES – BEST PRACTICES

We understand that “may” would be subject to assessment and consent of the Commission. For legal certainty and ensure rights of stakeholders are respected, and to mitigate against undue burden being placed on SME FWA operators, we would ask that the Commission publish situations in which the Commission agree with aid granting authorities that further verification data requests to FWA operators is warranted.

Annex I 4.3. INFORMATION FOR IN-DEPTH VERIFICATION PURPOSES – BEST PRACTICES

We understand that “may” would be subject to assessment and consent of the Commission. For legal certainty and ensure rights of stakeholders are respected, and to mitigate against undue burden being placed on SME FWA operators, we would ask that the Commission publish situations in which the Commission agree with aid granting authorities that further in-depth verification data requests to FWA operators is warranted.

5.2.2.4.2 Public consultation

Re BBGL (77) “Member States must publish, including on an appropriate publicly available webpage at national level⁶³, the main characteristics of the measure and the list of target areas identified in the mapping exercise⁶⁴.”

BBGL footnote 63 “Letters to known suppliers do not fulfil the requirements of a public consultation which shall ensure openness and transparency towards any interested parties, in the interest of legal certainty.”

A combination of letters to all registered undertakings in a member state combined with the website and advertisement in national newspapers would help ensure that all interested or affected stakeholders are aware of the consultation. Is there scope for a European wide notification of such consultations to improve integration of the market place.

Re BBGL (79) *“In considering the prospective time frame for the deployment of the aided network, Member States must consider all aspects that can be reasonably expected to impact the duration of the deployment of the new network (i.e. the time required by the selection procedure, possible legal actions and challenges, time to obtain rights of ways and permits, other obligation stemming from national legislation and regulation, etc.);”*

We endorse this and would add that there be a roadmap for all the consultations and stages of a state aid process, sometimes it is an issue where an aid granting authority can run multiple consultations in short succession or concurrently with other consultations with the NRA, which can lead to consultation fatigue and lower than ideal participation rates. Aid granting authorities should have special regard for SMEs who are inherently resource constrained and ensure that all mapping exercises and consultations give proportionate amount of time for responses taking into consideration the amount of information being requested from operators.

ReBBGL footnote 66 “A public consultation **may** also include questions to stakeholders as to what wholesale access products they would like to see offered on any newly created State funded network resulting from any public intervention in the future, to inform the design of the measure. This should not prevent access seekers from requesting new forms of access products under an access on reasonable demand’ approach.”

Footnote 66 – suggest that “may” be changed to **must**. A public consultation must invite stakeholders to comment on what wholesale access products (and their preferred conditions of access) the stakeholders would like to see in a stated aided wholesale network.

Re BBGL (80) Credible investment plans must be taken into account in the public consultation only if they would, on their own, provide similar performances with the foreseen State funded network.

To clarify infill connecting premises to an existing network, including sub sectors as required this should be considered existing network maintenance and not a future investment plan, as the operator has infrastructure already deployed and supporting customers at the required performance level.

Re BBGL 82) *“Irrespective of whether the mapping exercise may already have collected information on future investment plans, the result of the mapping exercise must always be verified”*

We endorse this provision, we would add that a mapping exercise can only be considered verified if the results of the mapping exercise and the results of the consultation are published and these two publication steps should precede notification of the aid to the Commission for approval.

Re BBGL (83) *“The public consultation must last at least 30 days. As from the end of the public consultation, the Member State has one year to launch the selection procedure or to*

start the implementation of the project for direct investment models. If the Member State does not launch the selection procedure or the implementation within one year, it must carry out a new public consultation”

30 days for a public consultation in many circumstances is just too short. The time given must take account of SME ISP operators, holiday periods, concurrent or recently concluded or scheduled consultations that the ISP operator may want or need to respond to.

6 COMPATIBILITY ASSESSMENT OF TAKE-UP MEASURES

It is our position that demand side measures should be decoupled from supply side measures to minimise distortion in the market. It is important the vouchers are available for take up through existing operators and not just retail operators using a state aided wholesale network (state granting authorities could introduce arbitrary eligibility criteria which could have the same result as confining a measure to RSPs that utilise state aided wholesale networks).

Re BBGL (176) *“Vouchers would not amount to aid with regard to end-users including individual consumers if the latter do not carry out an economic activity falling within the scope of Article 107(1) of the Treaty. Vouchers may amount to aid with regard to end-users if the latter carry out an economic activity falling within the scope of Article 107(1) of the Treaty. However, in most cases that aid could be de minimis, considering the limited value of vouchers.”*

Cumulatively an operator can receive an advantage above de minimis thresholds, and this should be monitored.

Re BBGL (182) and BBGL (194) Eligible fixed or mobile services definition (182)

*“The requirement to avoid any discrimination related to the origin of the products is fulfilled by complying with the technology neutrality principle. End-users must be able to use the voucher to procure the **eligible** fixed or mobile services from any provider capable of providing them, irrespective of the technology used for providing the service. The measure must ensure equal treatment of all possible service providers and must offer end-consumers the widest possible choice of suppliers. ... End-users must have the possibility to consult the online registry to be informed about all operators able to provide the eligible services. All providers capable of providing the eligible fixed or mobile services must have the possibility to be included in the online registry based on objective and transparent criteria (for example, ability to comply with the minimum requirements for the provision of the eligible fixed or mobile services). The online registry may also provide additional information to assist end-users, such as the type of service provided by the various operators.”*

In principle we are supportive of this paragraph however the term “eligible” is not defined and in the event that aid granting authorities engage in opportunistic behaviour to support their own projects existing operators and infrastructure serving a region could be excluded by arbitrary eligibility criteria. This would compound the negative effects of an intervention on the existing operators whose infrastructure is being overbuilt by a measure.

Re BBGL (184) *“Member States **may** implement **additional** safeguards to avoid undue distortion of competition and possible misuse of vouchers by end-users or electronic*

communication operators. Additional safeguards may be necessary to ensure that vouchers will not be used to procure fixed or mobile internet access services where another member of the same household already has a subscription to an adequate service.”

We suggest that the word “*additional*” be replaced with **sufficient** safeguards. The **sufficient safeguards** should be defined and should be mandatory to ensure value for money and minimise undue distortion of competition. We suggest ‘may’ be changed to ‘must’ in this paragraph to ensure avoiding undue distortions of competition is mandatory.

BBGL 7 TRANSPARENCY, REPORTING, MONITORING

Re BBGL (205) *“To enable the enforcement of State aid rules under the Treaty, the information must be available **for at least 10 years from the date on which the aid was granted**. The information must be published in a non-proprietary spreadsheet data format, which allows data to be effectively searched, extracted, downloaded and easily published on the internet, for instance in CSV or XML format. The general public must be allowed to access the website without any restrictions, including prior user registration.”*

Re BBGL (209) *“Member States must maintain detailed records regarding all aid measures. Those records must contain all information necessary to establish that all the compatibility conditions set out in these guidelines are fulfilled. Member States must maintain those records **for 10 years from the date of award of the aid and shall provide them to the Commission upon request.**”*

We suggest amending wording highlighted in bold with **“for at least 10 years or for the entire lifetime of the measure (which ever is longer),”** as it may be necessary to review records to validate compliance of a measure that is still ongoing beyond 10 years (for instance if the aid beneficiary was to depart from the conditions of granting the aid (e.g. access to operators etc). To put our concern in another way how does a stakeholder monitor a competitor who is a beneficiary from year 11 to year 25 of a 25-year project?

Other Transparency rules for consideration

To ensure transparency and to assist interested stakeholders and interested subject matter experts, additional conditions of transparency should be imposed as a condition of granting aid.

Opening the aid beneficiary black box

The current transparency rules surrounding the publishing of the aid amount and aid beneficiary may not be sufficient where consortiums or complex corporate structures exist behind the state aid beneficiary.

For instance, where a consortium of companies win a tender state aided contract and they form a new company which has been designated as the aid beneficiary. As none of the individual companies in the consortium win the contract outright i.e. it was a combination of the companies and their capabilities that won the tender, they remain concealed from view. There is a public interest in knowing how the State aid is divided up between the various consortium members (through percentage shareholding and/or draw down of fees). This is to ensure that any value that is being transferred from the public sector to private persons or body corporate is done transparently.

Who owns the companies that own the aid beneficiary?

There is a concern that beneficiary SPVs can be set up to receive State aid and then the corporate structure behind the aid beneficiary is opaque. We think it is appropriate that the beneficial owners of the aid beneficiary should be known, (and the beneficial ownership of the beneficiary should be transparent as far as possible (to the individuals who have ownership)).

Tracking Payments to suppliers.

If there is a significant portion of public finance contribution, for example a declared 50 % state aid intensity project, it is in the public interest to know that the private investors are contributing sufficiently to the project.

Mandatory reporting of payments from the aid beneficiary to suppliers that reach a reasonable threshold over a specified period of time either the same period as the intervals between draw down of aid or quarterly / annually (aligning the reporting /publishing with other existing publishing mandates). This should be regularly reported so that the public and interested parties can have greater confidence in the appropriate use of the aid. There should be special obligations on reporting payments between the aid beneficiary and any company that is part owned by the beneficial owners of the aid beneficiary. For (a simplified) example, if there was a requirement for 70 % state aid intensity for a given intervention. It would be useful to detect the following type of anomaly.

- Day 1 Private company injects 30 million to the Aid beneficiary Company e.g BigBroadbandCo.
 - Day 2 Government pays 70 million to Aid beneficiary Company e.g. BigBroadbandCo.
 - Day 3 Owners of Aid beneficiary, BigBroadbandCo. form another company. e.g. AnotherHoldingCompany Ltd.
 - Day 4 BigBroadbandCo. company pays 20 Million in fees/expenses to AnotherHoldingCompany Ltd.
-

- So at the end of year1 what might look like 70% state aid intensity may actually be 87.5% state aid intensity. (70m from Public, and 10m (NET) from private)



BBGL 8 EX POST EVALUATION PLAN

Re BBGL (212) *“The ex post evaluation requirement may be waived for aid schemes that are an **immediate successor of a scheme covering a similar objective and geographical area that has been subject to an evaluation**, delivered a final evaluation report in compliance with the evaluation plan approved by the Commission and has not generated any negative findings. Where the final evaluation report of a scheme is not in compliance with the approved evaluation plan, that scheme must be suspended with immediate effect upon request of the Commission.”*

We do not understand how a successor aid scheme could target the similar geographic area, with a similar objective. Surely each scheme would require its own ex post evaluation plan? There is also a risk where a government could introduce a scheme in a situation where there is a low risk of crowding out any private operator, but with second and subsequent schemes the risk may be higher even though the population / geography covered looks similar. Ex post evaluation can assist all parties by keeping the aid under monitoring and review and reduce the risk of opportunistic behaviours of aid granting authorities. To put it another way if it is considered worth while to intervene in a market then the intervention should be subject to ex post evaluation.

9 FINAL PROVISIONS

Re BBGL (219) *The Commission will apply these guidelines to all notified aid measures after the guidelines are published in the Official Journal, even where the projects were notified prior to that date.*

Notified aid as referenced in paragraph 219 appears to be ambiguous, also referencing any historical cases https://ec.europa.eu/competition/state_aid/register/user_guide.html. It would appear that any historically approved aid is classified with an N letter. We would be concerned because any already approved aid that was notified to the Commission appears to be registered as notified aid also. We would be concerned that any complaints that are made against a given measure should on the principle of legal certainty use the rules that were in force at the time of the decision of the Commission.

Further there is a specific reference to unlawful aid in Paragraph 218 and there is no reference to how for instance approved aid complaints would be dealt with.

While we understand the Commission would not attempt to retroactively change rules when assessing a case clarity would be welcome assure legal certainty for all stakeholders.

Re BBGL (221) *“The Commission proposes to Member States, on the basis of Article 108(1) of the Treaty, the following appropriate measures:*

- a) *Member States must amend, where necessary, their existing aid schemes in order to bring them into line with the provisions of Section 7.1. of these guidelines within twelve months after their publication in the Official Journal of the European Union;...”*

Any increase in the area of transparency gives all stakeholders visibility and understanding of aid measures and how they are being applied and any step that would increase transparency on aid measures would reduce the moral hazard for opportunistic behaviours by aid granting authorities and this would be most welcome.