

Position Paper

Bitkom’s comments on the EU Commission’s draft of the revised Guidelines on State aid for broadband networks (Broadband Guidelines)

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Introduction

A revision of the Guidelines is justified to consider the latest technological developments and to take into account the objective of the European gigabit society. However, the realisation of these goals must not lead to a distortion of competition or crowding out of private sector funds in disregard of the overriding principles of state aid control.

The market-oriented approach to the expansion of broadband infrastructure has played an important role in achieving the gigabit targets and will do so in the future as, for example, private investors intend to invest almost 40 billion Euros into privately-funded FTTH/B networks in Germany in the years to come (mid and longer term). Public intervention, through state aid, should therefore only be considered in exceptional cases and play a subordinate role in order not to distort competition. The European Commission must therefore limit the scope of intervention in the new Broadband Guidelines to situations of actual market failure.

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In Bitkom's view, this market failure is defined far too widely in the draft Broadband Guidelines. Furthermore, time horizons for public consultations are too short and mapping rules are not adapted to the practice in the industry resp. at Member State level. In consequence, it will not be possible to tap the full potential of private investment. Instead, public intervention through state aid is facilitated, rather than remaining an instrument of last resort.

As a result, we see the danger of an expansion of state interventions that will distort competition, crowd out private investments and hence hinder gigabit rollout instead of fostering it.

1 Relevant time horizon

The present draft of the Broadband Guidelines stipulates that the time horizon relevant for the assessment of planned private investments may not be shorter than two years. In Bitkom's view, this time horizon is too short. It should be at least three years, as it has been up to now since a market failure with respect to the EU connectivity targets for 2030 cannot be determined simply based on lacking private investment plans for the next two years. For the deployment of a state-financed ultrafast network, at least three years, not two years, should normally be planned. The duration of the process depends, among other things, on the duration of the permit-granting procedure, the size of the area and the technology used. In the case of mobile network construction, the acquisition of mast sites is added to the above-mentioned points, which in many cases leads to a further delay beyond the control of network operators.

More importantly, however, even a three-year time horizon for public consultations cannot be the only tool to identify a market failure in view of the connectivity targets for 2030 and thus justify state aid. State aid measures must therefore not be taken too early.

For some time now, the German market has not faced an investment problem but rather implementation challenges, such as a shortage of civil engineering or permit-granting capacities. Because of limited planning, civil engineering, and licensing capacities, it is impossible to invest all available financial resources at the same time. However, state aid would not solve this problem but would exacerbate the existing problems by providing public funds too early.

To make the roll-out of networks cost-saving and efficient, private investments should be strengthened, and market participants should be given priority where they see the potential for rollout. This is why, in addition to covering a time horizon of no less than 3 years in the framework of the public consultation, an additional safeguard is needed to ensure that the full potential of private investment projects in the "pipeline" until 2030 is granted priority

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over state aid projects. We see two options here: Either let the market carry out its private investment plans completely “unhampered” by public consultations until 2028. Or, if public consultations, and thus state aid projects are to be possible earlier, introduce an additional “pre-assessment instrument” assessing which areas are likely to be covered by private investors, and which areas are unlikely to be covered without state aid. Whereas public consultations may not start before 2028 in areas likely to be covered with gigabit speeds by private investors according to this pre-assessment, public consultations for the latter areas could start earlier than 2028. Such pre-assessments should be carried out by independent bodies, be it scientific institutions or consultancies, mandated by the Member State, and take into account aspects such as household density, topology, existing network infrastructures, rollout unit costs, etc.

2 Recommendation for binding rollout commitments by operators

The recommendation to request binding rollout commitments as a necessary condition for preventing an aid measure is, in Bitkom’s view, disproportionate. It is unclear why private investors should sign commitment agreements when they present credible investment plans. Binding commitments of the kind requested just exist in the case of spectrum obligations. Therefore, in the case of state aid for mobile broadband, the areas covered by spectrum obligations must be filtered out by public authorities *before* the public consultations.

In practice, it will not be possible to combine such commitments with the legitimate freedom of the network operators to extend or modify the rollout plans for various reasons, many of which are beyond their control. To make rollout commitments acceptable to network operators, they would have to include different disclaimers, which in turn questions the added value of the commitments.

More seriously, a requirement of this kind would most likely lead to a false outcome of the public consultation in many cases. Most network operators would not make such commitments for privately financed investments planned for the next 2 or 3 years. Again, the consequence would be that the value added of the public consultation would have to be questioned because no binding commitments would be received from network operators. Hence, the absence of binding commitments should not be considered a market failure, that would lead to state intervention.

On the contrary: Prevention of crowding-out must remain the very purpose of public consultations. Therefore, they must not be burdened with unreasonable requirements.

3 Conditions where aid may be granted to publicly owned wholesale-only operators without a competitive procedure

The possibility in paragraph 125 of the draft Guidelines of an authority to provide funding for the construction and management of a wholesale broadband network directly or via its own facility (direct investment model) without a competitive selection procedure or even without a public consultation and the finding of market failure, and to allow the authority to provide retail services as a retailer of last resort if a consumer cannot obtain a retail service on the market, is rejected by Bitkom.

Whereas the state has a legitimate interest in good broadband coverage and, in the case of Germany, also a constitutional obligation to ensure that appropriate retail services are provided nationwide, it is more than questionable whether state-owned operators are compatible with the liberalisation of the telecommunications sector.

Should a direct investment model nonetheless remain an option in the final Guidelines, it must be ensured that the subsidised passive infrastructure is not owned by a single, state-wide entity but at the municipal level to limit the distortion of competition that would arise.

A much less intrusive option of government intervention would be a concession or other entrustment by a public authority to a private undertaking to design, build or operate the network, which must be subject to an open, transparent, and non-discriminatory competitive selection process.

In any case, investments in and the operation of the active network level, as well as retail activities, must be strictly excluded in this context. Finally, it must be made clear in the Guidelines that a public consultation must first be carried out to establish whether market failure exists, and thus to avoid crowding out.

4 State aid for backhaul

Paragraph 72 states that “[a] market failure as concerns backhaul network may be present where there is no backhaul or the existing or planned backhaul is not based on fibre [...]”. Yet, this must not preclude a mapping and public consultation as necessary instruments to determine the existence of a market failure, as described in paragraph 73.

5 Mapping and measurement methodology

The recommended method described in the Annex, which is referred to in paragraph 74 of the draft Guidelines as the most accurate method, is far from accurate, but on the contrary far from practical and very prescriptive. The proposed method focuses on an achievable performance under peak load conditions that end-users can rely on. This peak load is identified in the present draft, with regard to fixed networks, as the time when at least 20% of the users are active and transmitting simultaneously at the nominal peak rate. This methodology is likely to lead not only to a distorted picture but also an underestimation of the actual speeds available to subscribers.

We see a risk of artificially inflating the number of eligible areas. The companies in the sector take peak load factors into account when dimensioning the network. However, these are not usually calculated by assuming 20 % utilisation at nominal peak upload and download rates but rather determined by typical use cases for different user groups. For this reason, peak load factors can vary widely across the EU. Therefore, the recommended methodology is not one that network operators use when dimensioning network capacity. The same arguments apply in view of the recommended mapping methodology for mobile networks. Neither the recommended methodology, nor the too narrow options for alternative methodologies defined in paragraphs 4, 5, 9, 10 and 12 of Section 2 of the Annex that paragraph 74 of the draft Guidelines refers to will lead to more reliable, but probably less reliable results compared to nationally proven approaches, contrary to what was intended.

There are processes (to be) implemented in national law in all Member States based on the provisions of Directive (EU) 2018/1972 (European Electronic Communications Code), namely Article 22 on geographical surveys of network deployments, already. Based on this, Member States have or will establish exhaustive mechanisms to map broadband coverage, which may well serve as the basis for a mapping exercise in the context of state aid measures. In addition, in the context of the public consultation coverage data can be updated. Therefore, there is simply no need to establish any additional necessary procedures via an annex to the Guidelines.

In this context, it should also be taken into account that Article 102 EECC requires operators to create transparency about essential performance characteristics of broadband connections in the form of a contract summary, for which the network operators must also be liable vis-à-vis the customers. Art. 4 of Regulation (EU) 2015/2120 also already provided for transparency on the bandwidths available on broadband connections.

For these reasons, the technically or theoretically maximum achievable bandwidths at the address should rather be the recommended method - as this is an easy-to-handle method.

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The Commission should therefore completely refrain from making any (additional) specifications on mapping in the context of the revised Guidelines.

Finally, the definition of “premises passed” (as an element for determination of a market failure) based on the requirement of a connection and activation period of four weeks contained in paragraph 10 of the Annex is also inappropriate. It disregards the fact that the activation period depends mainly on factors outside the control of the network operators. Not only do they face difficulties in locating and getting hold of the landowner and caretaker to agree on network installation modalities on private property. In addition, worldwide supply shortages and bottlenecks in the availability of electricians have exacerbated the situation. For these reasons, the proposed timeframe of four weeks is far too short. However, this does not mean that an extension of the timeframe would eliminate the inadequacy of the definition. Also in terms of the costs benchmark (not exceeding average activation cost), arbitrary specifications are made in Annex I that appear to be completely detached from what is standard market practice. This starts with the fact that the draft speaks of “activation [sic!] fee”, a term which usually does not refer to the costs of connecting a building or premise to a network. Such costs of turning a “passed” building or premise into a “connected” one are (at least partially) borne by the building owner and customary in the market.

If a market failure were to be identified based on the questionable definition in the draft guidelines, this would trigger a 100% state aid overbuild of the existing network up to the same point, i. e. up to the boundary of the private property, and no further.

Therefore, the definition of “premises passed” in paragraph (10) of Annex I is way too restrictive. The definition would unduly exclude a large number of premises for which there is actually a supply capability on the basis of existing infrastructure.

6 Step-change regarding fixed networks

The draft Guidelines incomprehensibly mix the categories of intervention thresholds, step change-requirements, and target bandwidths to be met by the new subsidised network. In Bitkom’s view, these should be considered strictly separately. While intervention thresholds need to be set in a way that carefully assesses market failures and limits distortions of competition as much as possible, the step change requirements should reflect technological developments, take into account the Commission’s 2030 connectivity targets and ensure that state-funded fixed networks are future-proof.

This planning certainty is not given with the draft Guidelines presented. In particular, the step change requirements for bandwidth increases in white spots could lead to the rollout

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of subsidised networks with bandwidths even below that of ultra-fast networks and which are far from being upgradable to gigabit speeds. The Commission's approach is confusing in that all households are to be offered connections upgradable to gigabit speeds (by 2025), yet, with the new Guidelines, state-subsidised networks do not have to deliver these speeds required by the Commission's own connectivity targets.

7 Intervention thresholds regarding fixed networks

The proposed criteria for assessing market failure in white, grey, and black ultra-high-speed areas are not consistently set out in the draft Guidelines. In particular, the additional criteria for determining market failure run the risk of overly neglecting the extent to which the private sector can meet the EU connectivity targets and the needs of end-users, and of over-extending the scope for public intervention. These regulations would be at the expense of private investment and infrastructure-based competition. The proposed definition of a market failure in terms of minimum down- and upload speed for both grey and black areas would counteract the careful assessment needed to identify market failures and would crowd-out private investment in an unacceptable manner.

Increased upload speeds of up to 1 Gbit/s, as i. a. mentioned in the context of the step change requirements for black areas, will be demanded by few users in the near future. However, according to the draft Guidelines, even if a gigabit capable network already exists, state intervention may be possible to guarantee symmetric gigabit upload speeds. Bitkom sees this very critically. To date, as well as in the foreseeable future, the need for higher upload speeds is significantly lower than for download speeds. Even with the rising use of home office applications during the COVID19 pandemic, i. e. video conferencing, currently offered upload speeds sufficiently fulfil users' needs. Telecommunications operators have in the past and will in the future adapt their offered upload speeds to customers' requirements – and if need be, also upgrade their networks accordingly. Hence, there is no need for the suggested “enhanced upload speeds” regime.

More generally, the thresholds of 1 Gbit/s download and 200 Mbit/s upload are more suitable for defining a step change and as requirements for the subsidised networks in the event of state intervention, but not for assessing market failure. In practice, these thresholds are otherwise likely to frequently lead to the identification of market failure in grey or even black areas, even though one or more ultra-fast networks are already available there that can deliver download speeds of well over 100 Mbit/s.

State intervention should remain the exception and not become the rule. The thresholds proposed in the draft, however, could have exactly that effect: state intervention in large parts of the territory of the member states.

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For this reason, we suggest setting intervention thresholds in the Guidelines, which take into account recent decision practice (SA.54668 and SA.52732).

8 State aid for mobile networks

Bitkom welcomes the fact that the revised draft Guidelines contain guidance on state aid for the deployment of mobile networks.

In principle no state aid may be granted for the rollout of mobile networks in areas where coverage obligations are imposed on mobile operators in the context of frequency allocation procedures. In any case, coverage overlapping from subsidized sites onto areas subject to spectrum obligations must be considered irrelevant if they are inevitable for technical reasons. Otherwise, there is a risk of insoluble demarcation problems and the goal of addressing a market failure as comprehensively as possible will be missed. Best would be to initiate state aid projects only once the time period for spectrum obligation fulfilment has elapsed. It would then be very straightforward to identify remaining underserved areas eligible for state aid projects.

The draft Guidelines suggest that for publicly funded mobile network elements *“the widest range of wholesale access products, including among others bitstream access, access to poles/masts/towers, and, as they become available, those access products necessary to exploit the most advanced features of 5G and future mobile generations networks.”* should be available.

Footnote 97 cites “Roaming, Multi-Operator-Access- Network (MORAN), Multi-Operator Core Network (MOCN), network slicing” as forms of access warranted by the guidelines. These requirements, respectively recommendations appear to aim at maximizing access obligations irrespective of efficiency and proportionality considerations, thereby opening the way for access requirements which are disproportionate, unsuitable, or outright technically unfeasible.

Instead, national authorities should aim for a market consensus where an effective and efficient point of access to publicly funded mobile network elements is located.

Aid beneficiaries such as tower companies are generally not in a position to grant active access such as “roaming” and should not – and cannot – be forced to do so. Passive access preserves existing infrastructure competition in mobile, leading to better performance for end-users.

The Guidelines should explicitly recognize that all EU mobile markets are characterized by infrastructure competition on a national scale in retail markets as well as in wholesale markets for passive and active access to mobile networks, providing consumer benefit in terms of high quality, broad choice of services etc. While publicly funded infrastructure may overcome a specific identified market failure in a certain area, it should not alter the sustainably

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competitive market structure, but instead enable nation-wide players to extend their network reach further to better serve citizens and businesses.

The draft Guidelines instead appear to be modelled after the open access rules for fixed networks, with detrimental consequences for investment incentives. For example, a “network slice” is a software-based virtual network that is not and cannot reasonably be limited to publicly funded sites. In fact, it does not “square” with the concept of access to publicly funded infrastructure in the first place. It is a service specifically offered by a mobile network operator, or a third party, to fulfill a specific demand, e. g. for quality of service of a business user. It is unclear how – or indeed why - public funding for a specific mobile site or subset of sites could result in an access obligation for a ‘network slice’ which would require service-level guarantees across the entire MNO network. In a more general sense, access on the active level of mobile networks is technically extremely demanding and costly – as the experience in the context of the grey-spot sharing with MOCN (German example) has shown. If access requirements are too broad, this might make an aid scheme too unattractive for MNOs to participate and could negatively affect existing investment as well as significantly distort competition.

9 Vouchers

In addition to the two main types of vouchers the draft Guidelines outline, vouchers for alternative technical broadband solutions such as fixed-wireless access, satellite or radio relay, can be a necessary and cost-efficient solution for homeowners in underserved, isolated locations – in particular those addresses where there is no network rollout planned mid-term in the vicinity. The final Guidelines should therefore also outline this scenario.

Bitkom represents more than 2,700 companies of the digital economy, including 2,000 direct members. Through IT- and communication services alone, our members generate a domestic annual turnover of 190 billion Euros, including 50 billion Euros in exports. The members of Bitkom employ more than 2 million people in Germany. Among these members are 1,000 small and medium-sized businesses, over 500 startups and almost all global players. They offer a wide range of software technologies, IT-services, and telecommunications or internet services, produce hardware and consumer electronics, operate in the digital media sector or are in other ways affiliated with the digital economy. 80 percent of the members’ headquarters are located in Germany with an additional 8 percent both in the EU and the USA, as well as 4 percent in other regions of the world. Bitkom promotes the digital transformation of the German economy, as well as of German society at large, enabling citizens to benefit from digitalisation. A strong European digital policy and a fully integrated digital single market are at the heart of Bitkom’s concerns, as well as establishing Germany as a key driver of digital change in Europe and globally.