

Competition: State Aid

Contribution to the Consultation

Revision of the Guidelines on State Aid for Broadband Networks

Ramon Roca Tió, with DNI 33934095X, in the name and on behalf of the Fundació privada per a la Xarxa Oberta, Lliure i Neutral, guifi.neti (hereinafter, guifi·net, with NIF G64918212 and address for notification purposes at Escoles Antigues de Gurb building, ctra. de Sant Bartomeu, km. 2,6 s/n, 08503 Gurb (Barcelona), hereinafter guifi·net, with contact telephone and e-mail address for the purpose of responding to this consultation.

SET FORTH

I.- Where as the Commission has published for consultation the draft revised Guidelines on State Aid for broadband networks (the "Broadband Guidelines"), and my represented party, starting from the fact that it values the text presented very positively, wishes to make various contributions to it from its extensive experience as an operator in the deployment of radio networks, first, and, in recent years, fiber optic networks (NGNs) in areas of low population density, especially susceptible as subject to the State Aid in question.

The numerical references in this writing are to the paragraphs of the document submitted for consultation

II. That our organization is a non-profit/non-partisan/non-governmental entity that acts as a telecommunications operator duly registered in Spain, and whose purposes may be stated as follows:

- 1 Promote the Human Right of access to the Internet to society without discrimination of any kind and with the will to eliminate the digital divide.
- 2 Promote the model of pooled, open, free and neutral telecommunications networks through coordination mechanisms in collaboration with operating companies that offer Internet services, installers, entities, associations, administrations, volunteers and users of the **guifi·net** network.

- 3 Promote the social and collaborative economic model by strengthening the local economy and the development of local telecommunications operators.

These goals lead us to act in areas with low population density where serious digital divide problems are detected.

Although the activity model of my client has already been known by this Commission, a descriptive report of its trajectory is attached. Our Foundation received in 2015 the European Broadband Award from this Commission for the innovative telecommunications network financing, business and investment model it has implemented.

III.- The contributions that my client wishes to make are based on a series of obvious principles applicable to any state aid, invoked on numerous occasions throughout the document, and which we simply list for clarity:

State aids are instruments to address a market failure. Because of the disruption that all aid causes in the internal market, it must always be considered restrictively, so that the aid is proportionate to the problem it is intended to solve, and provided that it is not possible to obtain the same incentive effects with less aid and less distortions. (29 a) and 127 among many others). Aid may not give rise to additional advantages to recipients beyond those strictly necessary to cover the market failure that justifies it.

Aid must be open to the maximum number of agents in the market, and be contemplated in all its effects and purposes.

The deployment of broadband telecommunications networks is not an objective of the public authorities in itself, but to cover a market deficiency and solve the digital divide between different territories (44), which is not necessarily equivalent to the statistics provided by the member states of "km of optical fiber laid", with which they sometimes seem to want to convey that they have solved the real problems of market deficiency (95))

IV.- On these bases, my client supports the deficiencies that they have detected, according to their opinion, in the practice of granting state aid in Spain in particular, and which we intend to influence so that, in some way, their solution is reflected in the text submitted for consultation.

These deficiencies are largely based on the experience of the aid granted in recent years by the Government of Spain through the New Generation Broadband Extension Program (PEBA), regulated by Order ETD/348/2020 of April 13, its amendment by Order ETD/348/2021 of June 25, and its previous regulations from which the above mentioned Orders (we quote the last one, but it has been repeated several years) which were notified to the European Commission following the procedure provided for in Art. 108 (3) TFEU and were authorized on December 10, 2019 by Decision C(2019)8831.

In any case, our considerations are not limited to the aforementioned PEBA, but should be taken into account by all public administrations, especially at

this time when the level of aid is being multiplied in practice by the Next Generation Funds and, in general, by the attempts to alleviate the economic effects of the COVID 19 pandemic.

V.- With regard to the bidding mechanism for aid, it turns out that the PEBA is currently divided into "concurrence zones" that include the white and gray zones of entire provinces. This procedure requires bidding for very diverse areas within the province, and committing relatively large investments if we consider operators of relative volume, which are automatically excluded from the possibility of applying for the subsidy.

If we look at the awards of PEBAs since this system was introduced (2020), we can see that there are basically only two operators that have access to aid: Telefónica and Adamo, contrary to previous calls with smaller geographic scopes. Local operators committed to their geographical environment simply cannot apply due to lack of capacity to undertake the deployment in a province, although they could do so in a specific municipality or region, with solvency requirements in line with the scope of the tender.

We are dealing with the distribution of State Aid with which EU and, obviously, State regulations must be especially careful in matters of competition, and the number of possible beneficiaries must necessarily be open to the greatest possible number of operators.

Consider in this sense the radical reform that in administrative contracting issues has meant the "new" "Law 9/2017, of November 8, on Public Sector Contracts", transposing into Spanish law the Directives of the European Parliament and of the Council 2014/23/EU and 2014/24/EU, of 26 February 2017" by which the system of dividing administrative contracts was absolutely modified from a tendency to tender very large contracts, to having to justify the awarding body why the contract was not divided into lots, and this by the mandate of the EU to favor the access of SMEs to the public administration market.

In its preamble, the aforementioned PEBA Order refers to reducing the digital divide and "meeting the demographic challenge by promoting new economic activities capable of attracting and maintaining inhabitants in depopulated areas", and the Guideline under consultation itself refers to the "digital divide" on many occasions. With this stated purpose of the subsidy, it is not consistent to establish a bidding method that in practice excludes local operators located in areas of low population density.

The Guideline at 75) expressly addresses this issue when dealing with the size of target areas, but we believe that it should clearly lean towards "small" areas because:

1. The "small" areas can always offer sufficient economic incentives to qualify for aid for any operator, by the simple procedure of bidding for several of them. Consider that these would be operators of a certain size for which submitting several bidding dossiers does not involve a

significant administrative cost. In addition, the possibility of extending the aid areas to other neighboring areas would prevent any problems in this regard (147)).

2. In addressing the issue, Member States are expressly encouraged to take into account economic and social conditions in determining geographic areas (75)). It should be specified that, if one of the reasons for the aid is to alleviate the digital divide by favoring the economic activation of the most depopulated areas, it would be absolutely reasonable to facilitate the access of local operators with a physical presence in the area, establishing bidding zones that are proportionate to their possibilities.

VI.- The method for determining the white and gray areas in which the deployment of the PEBA program is subsidized is based on a mechanism of standardized surveys, with a well-defined format, to operators and municipalities on the existence and characteristics of telecommunications networks deployed by them, or in their territory.

This system has given rise to numerous errors, so that small operators have not responded adequately on many occasions, mainly because their mapping systems have not been adapted to the Ministry's systems, or, in the case of municipalities, simply because of bureaucratic problems. But the undoubted fact is that areas have been subsidized where there was already a broadband network and telecommunications infrastructure capable of providing NGA services.

Beyond the fact that the administrative procedure is effectively complied with, and that certain agents have not provided the Spanish administration with information in the established time and form, what is certain is that reality must always prevail over abstract rules, that the instrument cannot prevail over the objective, and that the general principles of the regulations must prevail over administrative matters.

In addition, there are *de facto* situations in where, due to the lapse of time between the granting of the aid and the effective deployment of the network, which can take up to two years, a situation concerning the duplicity of networks will arise. Some municipalities, often due to the urgency of having an adequate Internet connection because of the pandemic, have chosen to promote a rapid deployment of the network with aid covered by the "de minimis" rule, so that when the operator receiving aid, for example PEBA, begins its effective deployment, there is already an NGN in the municipality. This is obviously a totally undesirable situation for both the operator who first deployed and the second, and for the public authorities granting the aid.

The correction of these mismatches should, in our opinion, be more expressly established in the Guideline. Situations such as the one described above must necessarily give rise to a review of the aid itself to avoid wasting public resources by allocating funds to deployment in areas that are not

white or gray, and in any case apply the figure of the reimbursement mechanism clause (154) and following), and the obligation to take advantage of pre-existing infrastructures (128)).

We insist that the aid must be adjusted to factual realities and not to forecasts that may be conditioned by administrative imbalances.

VII.- In addition to these questions on the distortion of competition caused by the application of the state aid system to the deployment of NGNs in its current terms, we would like to include a general reflection on the current trend of network construction at any cost.

Of course, competition in the telecommunications market in Europe has been based on infrastructure competition, and Spain is the best example with fiber penetration well above the European average. But as in other infrastructures, there is a risk of overbuilding if we count on State Aid.

The aforementioned lack of effectiveness and efficiency of subsidies may lead to the fact that, apart from the statistics on the number of kilometers of fiber optic cables laid, competition is not effective in reality due to the access difficulties that the incumbent operators pose for real access to their networks, knowing that the construction of alternative networks is impossible due to the lack of profitability in certain areas. The existence of a greater diversity of networks is not an absolute guarantee of greater competition, especially if we recognize the role of small local operators as effective competitors in the market, who are the ones who suffer the most from the difficulties of access to the networks of the larger operators.

An effective guarantee of competition, especially in rural areas or areas with low population density, will never be obtained by promoting the duplication of infrastructure unnecessarily (which would be wasteful in this type of area, increasing the cost for all) but rather with effective access and without entry barriers to existing infrastructure. This is a fundamental aspect to pay attention to, because otherwise, and although it may not be appreciated in the short term, in the medium and long term the aid can serve to increase concentration, reduce competition, which ultimately will harm to free competition, the costs and difficulty of access for the citizen, and it will only be able to be reversed with even more aggressive regulations.

In fact, we frequently observe situations in which, at the end of the day, it is highly questionable that the open access and non-discrimination requirements are met. Let us mention some examples we've observed:

1. Creating economic access barriers impossible for small operators (which can be introduced in various ways, such as requiring a minimum number of users, a minimum economic volume, or introducing variables indexed at a distance), or as we have also observed, directly causing price discrimination according to the interests of the incumbent, even below regulated prices.

2. The incumbent provides better prices, even than the regulated ones, based on your commercial interests, thereby causing discrimination.
3. They end up offering "incomplete access", that is, without reaching the home but a cabinet, demanding that the rest of the investment be undertaken by third parties who, furthermore, will not receive any type of compensation or hold any right for the investment that is required of them to complete the network.
4. That the conditions of access to third parties are not even communicated clearly, explicitly and publicly.

VIII.- Social and connectivity bonds can be an appropriate instrument to counterbalance the excessive concentration of aid described in the previous points, but for this purpose, special care must be taken in aspects such as those described in Points 198 and 199 of the draft. In our opinion, it is even possible to go further, in the requirements of Point 199, i.e. that for vertical operators, the requirement to open the infrastructure to third parties should be mandatory, not only for those who hold 25%, since meeting this condition does not entail any additional difficulty, and the risk of aid serving to reinforce or create a dominant position is very significant and difficult to repair, especially in territories with difficulties in reaching a critical mass. Likewise, and in order to avoid concentration, special attention should be taken into account to ensure that the procedure does not favor the same suppliers, especially those already benefiting from other types of aid, and to give the beneficiary a real option to choose the supplier, thus promoting healthy competition. To this end, it is necessary that this type of instrument be conveyed in such a manner that it is accompanied by the necessary and important dissemination among potential beneficiaries, especially users; that it is up to them to choose the supplier and that, even so, it will not condition their ability to change supplier.

IX.- In view of the situations described in the previous points, in which situations are described that are doubtful, to say the least, with respect to the true fulfillment of the real objectives of the aid (promotion of competition and promotion of access to the Internet in the most needy areas), the mechanisms of Transparency, Reporting and Supervision, as well as the EX POST evaluation plans included in the draft Guidelines (Sections 7 and 8) are of special interest.

The risk of missing real and effective EX POST verification instruments is very important, since in those cases where we believe that aid has probably been used for these purposes, the damage has already been caused and it is very difficult to repair, and occurs in a very asymmetric context between the parties, resulting unpunished in practice, so it should eventually be considered not as a cause for termination of aid, even as a reason to justify the im-

position of reparations b2202ConsultationStateAidUE_engv1.pdf those who have made this type of fraudulent use.

It would be particularly important that this be implemented in such a way that these procedures are carried out by independent agents, and that they pay special attention to the effects ultimately caused by the aid in aspects such as those listed below:

- Decrease in competition due to concentration, situations in which public aid has been fraudulently and unilaterally allocated to overbuilding with the objective of, de facto and by way of fait accompli, compromising or resulting in the disappearance of otherwise sustainable alternatives.
- Verification that complete, real and effective open access has finally been implemented, so that regardless of who has received the aid, it has benefited the entire population and the entire sector instead of just one beneficiary, paying special attention to the fact that for access to the infrastructure built, no entry barriers have been created that expel pre-existing agents or prevent the creation of new ones, for example:
 - By establishing unacceptable minimum economic conditions or costs indexed to distances instead of actual users, all of which are very sensitive aspects when one wants to ensure that NGNs cover the maximum land area, thus including remote and sparsely populated areas (not only seeking a high percentage of the population).
 - That open access is accompanied by reasonable and proportionate access to the backhaul.
 - Open access conditions become available and public.
 - That the committed investments are really completely executed and reach the households, that is, they do not merely consist of a deployment to the cabinet, are adjusted to real costs and have been effectively accompanied by the promised co-investment required for access to the grants. així com estar disponible per cooperar per elaborar amb més detall qualsevol cosa del'esmentat.

X. That we are expressly at your disposal for any clarification you may consider convenient regarding the content of this contribution to the communication to the Commission of the Guidelines on State Aid to Broadband Networks, as well as be available for cooperation to elaborate in more detail anything of the aforementioned.

Gurb on February 11, 2022