

Telefónica's contribution to the revision of the Guidelines on State aid for broadband networks

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1. Executive summary

Telefónica welcomes the opportunity to contribute to the revision of the Guidelines on State aid for broadband networks. We consider that the revision is necessary and timely in order to achieve the EU's new and ambitious connectivity targets for 2030, and to ensure a swift and effective allocation of the large amount of public support that will be made available over the next four years.

In particular, Telefónica welcomes that the draft Guidelines (Draft) introduces guidance on State aid for the deployment of mobile networks. We are satisfied with the fact that the Commission has opted for a non-static approach to market failures in mobile networks. We appropriate to have a dynamic reference to end users' needs, using the quality of service of networks in urban areas as an intervention threshold for rural areas.

We also welcome the fact that public support for mobile broadband deployments is extended to active equipment provided that it consists an integral part of a significant upgrade in the capabilities of the network. In our view, subsidising only passive infrastructure would not be sufficient to make the investments commercially attractive in most targeted regions. Along the same lines, we fully agree with the proposals regarding compliance with the step change requirement in mobile networks.

However, Telefónica does not fully agree with the approach that the Draft takes regarding mobile wholesale services. While we agree with the fact that the Guidelines should guarantee the provision of an effective wholesale access by the selected tender, we believe that an obligation of offering "the widest range of wholesale access products" is disproportionate and would introduce undue complexity and costs. We consider that an obligation of the selected bidder to provide a set of *reasonable* wholesale access services at different levels at fair and reasonable prices would be sufficient.

Finally, regarding the proposed changes for fixed networks, Telefónica believes that the suggestion to set ultra-fast broadband (UFBB) as a target, rather than next generation access (NGA), is in the right direction. In fact, establishing the intervention threshold in 100 Mbps is a good starting point in order to meet the Digital Decade targets in 2030. The consideration of customer's evolving needs in the future and the option to update the upload speed required, allows Member States to adapt the scenario to national circumstances on a case-by-case basis. Hence, we believe that the Draft should not foresee public support for projects that would not reach the 100 Mbps threshold.

2. Introduction

The Draft recognizes the value of connectivity as the fundamental building block of the digital transformation, which can only be enabled through investments in fixed Gigabit networks and 5G mobile networks. The Covid-19 pandemic has confirmed that telecommunications networks are essential for the European economy and society. In this regard, Telefónica is fully committed to the deployment of the most advanced fixed and mobile networks to provide Europeans on our footprint connectivity for the needs of the digital era.

Still today, some Europeans in rural and remote areas lack fast-network connectivity and sufficient digital opportunities and skills. The Digital Compass Communication established, inter alia, that all Union households should be covered by a Gigabit network, and that all populated areas should be covered by 5G. On this basis, telecommunications operators are committed to the achievement of the 2030 connectivity objectives. However, private efforts will have to be complemented with public funds to avoid inequalities between urban and rural areas in a decade where connectivity has proved to be the building block of the economy.

State aid is therefore essential to bridge the digital divide in areas where the market still fails to create sufficient incentives for telecommunications operators to deploy next generation fixed and mobile networks in a timely manner. Moreover, State aid is crucial to prevent an additional gap in Gigabit and 5G connectivity between Europeans. The key role of State aid has already been reflected in the past through plans such as the PEBANG in Spain, which not only made it possible to deploy fibre in almost the entire territory, but was also a driver of economic activities and social change.

Hence, Telefónica welcomes the comprehensiveness of the new Draft to couple supply and demand in the telecommunications market, by introducing new sections on mobile, backhaul, and demand-side measures supporting the take-up of fixed and mobile networks. In addition, the Draft holds significant value as a complement to the Communication on Competition policy fit for new challenges, the Digital Compass objectives, the Next Generation EU plan, and the RRF Regulation, according to which Member States are required to devote at least 20% of the allocated funds to foster the digital transition.

The following sections of this paper reflect the specific views of Telefónica on (i) the new framework of compatibility assessment; (ii) fixed networks; (iii) mobile networks; (iv) backhaul; (v) mapping process and time horizon; (vi) demand side measures; and (vii) wholesale access obligations.

3. New framework of compatibility assessment

Telefónica believes that the new framework for compatibility assessment under Article 107.3.c) of the Treaty¹ through the assessment of (i) whether the aid is intended to facilitate the development of certain economic activities; and (ii) the weight of positive and negative effects in terms of distortions of competition, ensures that State aid will be granted only in market failure areas without crowding out private investments.

As the Draft acknowledges, the existence of adequate broadband infrastructure is a prerequisite for enabling connectivity and closing the digital gap. The principles of compatibility of the Draft provide Member States with enough flexibility to justify State aid measures on a case-by-case basis, where aid is the most appropriate instrument, and where networks will act as facilitators of economic activities. In addition, the assessment of positive and negative effects ensures that subsidies will only be granted where private investments will not deliver desirable results in the short/medium term.

Finally, Telefónica welcomes the introduction of an Annex on mapping as safeguards to ensure the correct allocation of public funds. Hence, thorough mapping and compliance with the proportionality sub-criteria in the Draft (i.e. existence of a competitive selection procedure, technological neutrality, the use of existing infrastructure, the grant of wholesale access, and other measures such as claw-back, accounting separation and transparency) provide a layer of legal certainty to confirm that public subsidies will only take place where needed, and under fair and coherent terms.

4. Fixed networks

Telefónica welcomes the approach of the Draft with regards to fixed networks. On the one hand, it maintains the objective of technology neutrality, and on the other, it provides sufficient flexibility to allow each Member State to carry out an analysis of public support needs adapted to the characteristics of its telecommunications market.

As the Commission's Decision SA.35834² states, "a well-targeted State intervention in the broadband field contributes to bridge the 'digital divide' that sets apart areas or regions within a country where affordable and competitive broadband services are on offer and areas where such services are not".

Intervention in grey/mixed areas- market failure

Telefónica values positively the Draft's consideration of mixed areas as eligible for aid (points 58 and 59). While in countries with an incipient deployment of fibre, undertaking the deployment of VHCN in grey areas may not be feasible in the short term, in countries such as Spain, where the threshold of 75% of the population with FTTH coverage has already been exceeded years ago, it is an increasingly frequent scenario. This is especially true in view of the exhaustion of potential white areas eligible for aid.

¹ Treaty on the Functioning of the European Union (referred to in the Draft as 'the Treaty').

² Decision SA.35834 of 5 July 2013, Extension of high speed broadband in Spain (PEBA-NGA), recital 41.

In the current Guidelines there was a delay in the update of areas, resulting in the so-called “islands of coverage”³. The consideration of mixed areas will address this problem efficiently. Regarding the suitability of setting the maximum proportion of premises of grey areas to 10%, we believe that each Member State should set this threshold in order to fit to the circumstances of an individual project. Finally, Telefónica considers that the applicability of mixed areas is more fit for individual projects (municipalities) than for projects of greater scope (regional), where this consideration could cause problems of overbuilding.

Existence of market failure and intervention threshold

Telefónica welcomes the clarifications provided in point 52. We consider that the thresholds of 1 Gbps for download and 200 Mbps for upload speeds are in line with market conditions and user demands. In addition, they will allow Member States to identify eligible areas accurately.

Similarly, provisions included in points 104, 105 and 106 of the Draft considering that future user needs may require higher upload speeds than the 200 Mbps initially proposed (i.e. 1 Gbps) leaves room for intervention in areas where a network providing 1 Gbps download is present. Safeguards should however be considered by Member States to avoid overbuilding and disincentives for private investments. In particular, a clear identification that the needs of users in these areas are not covered by the existing networks in the short/medium term.

Step change

Telefónica does not agree with the Draft’s consideration of a step change for fixed white areas where the final speeds could be below the UFBB intervention threshold of 100 Mbps. In view of the advanced deployment of fibre in most Member States, and considering the availability of alternative technologies such as 5G with performance that in the short/medium term will substantially improve the level of 30 Mbps, the proposal to accept public funding to cover white areas with a fixed solution that does not provide speeds of at least 100 Mbps (point 99a of the Draft) seems to contradict the Digital Decade objectives.

In fact, we consider that the possibility of diverting public funds to provide fixed broadband services with speeds below 300 Mbps would go against the Commission’s general target to cover all households with 1 Gbps speeds by 2030. In the event that a low performing fixed network is subsidised, we believe it would be more economically efficient to consider alternative solutions to wired broadband, such as FWA 5G standalone networks, which could improve the existing performance with significantly lower investment.

Therefore, Telefónica considers that the provisions of point 99 are not aligned with the general spirit of the Draft and the Digital Decade. It risks creating islands of low broadband performance in the future that would lack attractiveness for private operators and create a digital divide between regions within the territory of a Member State. Although the rule of tripling speed could still be suitable, the provision of minimum speeds of 100-200 Mbps should also be mandatory.

³ There existed risks of creating grey areas (generally the centre) and white areas (generally suburban neighbourhoods or outskirts) which, due to their limited size or scattered distribution, did not justify an individual intervention on their own.

5. Mobile networks

Telefónica welcomes the introduction of a section on mobile networks. This development in the Draft is especially significant to ensure that the digital divide is timely addressed. As Telefónica has repeatedly stated, and subject to market specificities of each Member State, telecommunications operators are facing constraints to ensure that their investments in new technologies reach consumers across all territories in Europe.

In particular, the regulatory pressure on the networks in terms of access obligations, and the decreasing revenues of operators resulting from a very competitive environment, have left operators with less capacity to timely deploy networks outside coverage obligations attached to spectrum licenses -usually linked to urban areas of more than 10,000 inhabitants-. The business case in these regions is particularly challenging, as they present lower income per capita and higher investment costs per consumer. Rural areas are also characterized by the fact that 5G deployments are generally not needed to increase capacity for existing services, and therefore will not take place in the absence of new applications, which in turn are hard to envision given the lack of a consolidated business environment.

In sum, the profitability of 5G investments in these areas is highly uncertain whilst possible externalities are large, bringing social benefits that go well beyond the expected direct revenues for mobile operators. State aid is, as a result, needed to tackle market failure areas and to ensure that nobody is left behind in the digital transformation. On this basis, Telefónica welcomes the non-static approach to market failure for mobile networks, giving Member States the opportunity to develop a case-by-case analysis of failing areas in terms of quality of service and users' evolving needs.

Market failure

Telefónica considers that, when assessing the existence of a market failure, it is appropriate to make the assumption that the objective of the public support is to provide consumers in target rural areas with mobile services (i.e. education, industry, work, basic services such as health or banking, leisure-related applications) that are similar to those provided in urban areas.

The intervention threshold should be the performance of mobile networks of a consumer in an urban area (measured in terms of maximum achievable speeds/peak time conditions). As a result, when the average quality of service of the mobile network of an urban consumer in a Member State is not replicable by market forces to consumers in rural areas of such Member State in the short term, there should be scope to demonstrate a market failure. It is important to analyse this replicability of the services in the rural areas in the short term, otherwise, it may lead to a new gap on 5G. Nonetheless, Telefónica would welcome further clarifications and examples on the concepts of quality of service and users' evolving needs.

Additionally, Telefónica believes that public support should be extended to active equipment provided that it does not consist of merely incremental upgrades but constitutes integral part of a significant upgrade in the capabilities of the network. Thus, Telefónica welcomes point 66 of the Draft, in conjunction with footnote 71.

Step change

Telefónica believes that the transition to each new mobile generation is incremental. Therefore, we welcome the introduction of points 108 and 109 of the Draft. We agree with the consideration that hybrid systems are usually more performant than their predecessors, ensuring significant improvements. In addition, Telefónica views positively the fact that the Draft is not strict and detailed when referring to technologies, offering a sufficiently open approach to future developments in mobile (e.g. 6G), and avoiding a new revision of the Guidelines in the near future.

6. Backhaul

Regarding the compatibility assessment for backhaul, we note the requirement that a step change can be demonstrated if the new network at least doubles download and upload speed (point 110 of the Draft). Telefónica considers that this requirement is too ambiguous, and suggests that there should also be a requirement to at least reach the level of performance and reliability of fibre.

7. Mapping process and time horizon

Regarding the process to identify eligible areas likely to present a market failure (p 5.2.2.4) and the public consultation process (5.2.2.4.2) to perform the mapping and coverage analysis, Telefónica considers that it is appropriate to (i) have a flexible time horizon and (ii) reinforce the credibility of the information on deployment forecasts of operators.

The time horizon applicable to different technologies (fixed vs mobile) is not always equivalent. While for fixed networks, a minimum of 3 years may be appropriate, for mobile, some flexibility might be advisable to adjust to national circumstances.

On this basis, Telefónica welcomes the introduction of a minimum 2-year time horizon in point 19(l) of the Draft. In fact, it provides Member States with enough flexibility to adapt their plans to the specific reality of their markets. Additionally, the Draft is aligned with policy objectives such as the Next Generation EU plan and the Recovery and Resilience Facility, which require finalization of State-funded investments in digital infrastructure by 2026. Hence, this time horizon ensures that there is not a significant delay between urban and rural areas in order not to create a new 5G gap.

Regarding the credibility of the coverage information provided by operators in the mapping phase of the public consultation (points 84-87), we believe that it is of utmost importance to prevent mere expressions of interest by a private operator that do not finally crystallize but block the possibility of State aid. If this happens, the deployment of VHCN networks will be stalled, jeopardizing the achievement of the Digital Decade 2030 objectives. Thus, provisions in point 88 are appropriate.

8. Demand side measures

Telefónica acknowledges that the digital transformation of the economy is not only an effort of telecommunications operators. The society needs to be ready to adapt to the new technologies. Therefore, we welcome the introduction of demand-side measures to enhance the digital uptake of consumers and businesses with limited economic means.

It is however important that the measures oriented to foster the demand side are consistent in each Member State to guarantee the efficiency of the application of the public funds.

9. Wholesale access obligations

As noted in section 5, Telefónica welcomes that mobile access networks are explicitly included in the Draft as eligible for State Aid. Telefónica considers that an effective wholesale access to State funded networks is an indispensable component of the State Aid measure. This service enables third parties to compete with the selected bidder and therefore, prevents the subsidized areas from becoming service monopolies, with the consequent detriment to the end user welfare.

Having said that, Telefónica considers that the implementation of the wholesale access obligations should be different in fixed and mobile networks because of the different nature of these markets.

Fixed markets have traditionally been, and still are, markets with one operator declared as SMP by NRAs, as it is the case for Telefónica in Spain. Wholesale access obligations are part of the remedies imposed to these operators. In those cases, there are usually regulated reference offers with the terms and technical conditions of the access service. These offers can include a regulated price either imposed by the NRA through a cost orientation procedure or controlled by the NRA under an economic replicability test.

As a result, in the case of access to State funded fixed networks, the wholesale service(s) is (are) already implemented and there is also a regulated price that may be considered as a reference to set the price for access to State funded networks.

On the contrary, there are no wholesale obligations laid down under the sectorial regulation on mobile networks. Mobile markets are competitive markets in most Member States, both at retail and wholesale level. Indeed, the Recommendation from the European Commission on relevant markets susceptible to ex ante regulation does not include the market of wholesale mobile access since 2007⁴.

An evidence of the high level of competition in these markets is the existence of a large number of mobile virtual operators (MVNOs). There are several models for MVNOs: (i) thick MVNOs, where they have high independence of the mobile network operator (MNO) or (ii) thin MVNOs where they act as resellers. Many mobile operators have network sharing agreements, which allow certain types of passive or active sharing of costs in the network. In the future, network

⁴ The wholesale market for access to mobile services (market 15) was included in the Commission Recommendation 2003/311/EC of 11 February 2003

slicing may be a way to allow access to mobile networks and could be considered as a potential way to access broadband services in a subsidised mobile network. In all the cases, wholesale services are based on commercial agreements. These agreements include the type of wholesale access and the associated price. It is important to note that prices for the wholesale mobile access are not regulated in most Member States beyond a requirement to be “fair and reasonable”.

In light of the above, Telefónica considers that the Guidelines should establish that wholesale access products should be provided in the least burdensome way and allow time for commercial negotiations in the first instance to address the related issues. Thus, the Draft should guarantee the provision of an effective wholesale access by the selected tender, but at the same time, should avoid extending the access obligations disproportionately. For this purpose, the selected bidder should provide a set of *reasonable* wholesale access services at different levels and should have the possibility to suggest alternatives in case it cannot provide, or it is not proportionate to provide in terms of costs, the specific service required by the access seeker.

Along the same lines, as opposed to fixed access products, the prices of mobile services to be offered by the selected bidder should be based on the principles of fairness, reasonability, and non-discrimination, avoiding the introduction of further obligations such as cost orientation that could lead to a wholesale market distortion.

In order to reflect in the Guidelines the points raised in the previous paragraphs, we would suggest that the obligation included in point 139 and footnote 97 to provide “the widest range of wholesale access products” should be substituted by an obligation to provide “a reasonable set of access products”.

It may happen that the wholesale service includes access to components of the network that have not been publicly funded but are necessary for the provision of the access. In those cases, the price for the access should be consistent with prices at other levels and should be agreed between the parties.

In case the subsidized network requires a relevant upgrade or increased capacity of existing infrastructure to provide access, the Guidelines should include further clarification with regards to which party is responsible for financing these costs.

Additionally, we would suggest that point 150 c), that forces Member States to demonstrate disproportionate costs for each access product before granting an exception, should be substituted by an obligation to simply prove the existence of alternative reasonable access products. It will reduce the burden for Member States and allow a more efficient procedure.

In addition, we note that it is difficult to concretely envisage the type and level of wholesale access to subsidised mobile networks that may be sought by access seekers, particularly with regards to 5G and future mobile generations. We therefore suggest removing the period of 6 months between granting a wholesale service and the start of retail operations. As noted, before, in the particular case of mobile, there is no defined wholesale access service and therefore it is very difficult to grant a specific service in advance.

In the case of fixed networks, it took several years to agree on the wholesale service in some Member States. This is the case of Spain. The wholesale access service over fibre that Telefónica was obliged to provide under market 3b/2014 (NEBA service) at central level was defined by the access seekers. This was a very lengthy process because alternative operators had to agree on an interface and network operation different from the ones implemented by Telefónica.

Therefore, taking into consideration the difficulties to agree on a wholesale service a priori that fits for the different access seekers, the Guidelines should not include an obligation to grant a specific wholesale service before the start of retail operations. Otherwise, users will not benefit timely from better connections if there is an unjustified delay in the provision of retail services.

In order to reflect in the Guidelines the points raised in the previous paragraphs, we would suggest to specify in point 135 that the obligation to grant a wholesale access service at least six months before the launch of retail service is limited to fixed services.