

## **Explanatory note accompanying the proposal for the revision of the Broadband Guidelines**

The purpose of this note is to clarify the objectives and scope of the proposal to revise the Guidelines on State aid for broadband networks (the ‘Broadband Guidelines’).

Performant, reliable and secure electronic communications networks are essential enablers that underpin the digital transformation of the EU. They are a crucial factor for bridging the digital divide connecting remote and sparsely populated regions of the EU and contributing to a more competitive and sustainable economy. The impact of the COVID-19 pandemic on economy and society has accentuated growing connectivity needs for people, businesses and public institutions and underlined the critical role of electronic communications networks for the recovery from the crisis and to foster EU’s resilience.

The current Broadband Guidelines were adopted in 2013. They set out specific criteria for the allocation of public funds to minimise the impact on competition of electronic communications networks deployment in areas that need it most. They seek to ensure that public support leads to modern infrastructure increasing consumer welfare and reducing the digital divide where commercial operators have no incentive to invest, while avoiding crowding-out of private investments, subsidising local monopolies or discriminating certain technologies.

The 2013 Broadband Guidelines were subject to an [evaluation](#) assessing whether they were still fit for purpose. The results of the evaluation are set out in the Staff Working Document (SWD), published on 7 July 2021. The evaluation showed that they had constituted an appropriate framework, supporting Member States to reach the Digital Agenda for Europe and the Europe 2020 Strategy objectives. The evaluation has also shown that the existing Guidelines require some improvements to reflect technological and market developments to best accompany the necessary investments in the coming years in a manner compatible with the internal market. This particularly applies in the context of the recovery from the pandemic. Furthermore, the evaluation showed the relevance of new policy objectives in this context. These include support for the digital transition, contribution to the achievement of the [European Gigabit Society objectives](#), implementation of the [Digital Compass](#). Broadband networks are also essential to achieve sustainability goals. Consequently, the revision will aim to update the current rules by taking into account the continued need to ensure compatibility with the internal market in view of the relevant policies and market developments.

The provisions of the Broadband Guidelines are complemented by the General Block Exemption Regulation (‘GBER’), which lays down *ex ante* compatibility conditions on the basis of which Member States can implement State aid measures without prior notification to the Commission. On 23 July 2021, the Commission adopted an [amendment of the GBER](#) to accompany the new Multiannual Financial Framework and to facilitate certain recovery-related aid measures. The amendment includes provisions on fixed broadband networks, and 4G and 5G mobile networks. The provisions in the GBER concerning broadband networks are not part of this consultation.

The following sections provide an overview of the main changes the Commission considers at this stage of the revision. The text of draft Guidelines proposed for consultation is not definitive and will be reassessed in light of the feedback and evidence received from the present consultation.

### **Proposed changes in the draft text of the revised broadband guidelines**

The revision of the Broadband Guidelines relies largely on the results, evidence and data collected in the context of the evaluation in combination with the Commission’s market experience and experience stemming from its case practice.,

The draft revision includes, in particular, the following changes:

- (i) alignment of the intervention threshold for public support to Gigabit fixed networks with current and expected technological and market developments;
- (ii) guidance on support for the deployment of mobile networks;
- (iii) new category of possible aid in the form of demand-side measures supporting the take-up of fixed and mobile networks (vouchers);
- (iv) guidance regarding an operator's use of its own resources to connect to the publicly-funded infrastructure to provide services outside the area for which the aid was granted;
- (v) adjusting wholesale access obligations to reflect technological progress;
- (vi) clarifications concerning certain concepts, such as mapping, a public consultation and a selection procedure, and a claw-back mechanism.

The purpose of the modifications subject to this consultation is to ensure that the Broadband Guidelines cater appropriately for market and technological developments and the Commission priorities. The proposed modifications aim at reflecting the increasing connectivity needs of end-users and clarifying the conditions under which Member States may grant support, in particular with respect to the existence of a market failure and the performance that the networks must achieve. By clarifying the applicable rules and, in particular, the compatibility conditions that the Commission applies, the revision will improve legal certainty and facilitate the implementation of aid measures, while limiting possible competition distortions to the minimum.

In particular, State support for the deployment of mobile infrastructure and demand-side measures have so far been assessed directly under the TFEU, using State aid compatibility principles and referring to the Broadband Guidelines by analogy. New provisions will clarify the compatibility conditions that the Commission applies in relation to these measures and will take into account market developments also acknowledged in the new EU connectivity targets, requiring that by 2025 all urban areas and major transport paths be covered by 5G networks and by 2030 all populated areas be covered by 5G as well as increased take-up of fixed and mobile services by end-users.

- **Alignment of the intervention threshold for aid for fixed networks with current and expected technological and market developments**

The proposed Guidelines will facilitate the deployment of performant fixed networks in a targeted and sustainable manner, in areas where private operators are unlikely to invest or to deliver the adequate level of infrastructure for the fast evolving customers' needs, notably in rural and remote areas.

In this context, the proposed modifications consist in setting a new intervention threshold of 100 Mbps download speed with the objective of reaching 1 Gbps download speed. In areas where the existing networks are not able to provide 100 Mbps download speed, the new network will have to appropriately increase (double or triple) download speed and sufficiently increase the upload speed as compared to the existing infrastructure. In areas where there is present or planned at least one network providing 100 Mbps download speed, the new network will have to at least triple the download speed and sufficiently increase the upload speed as compared to the existing infrastructure. In areas in which there are, or are planned, at least two networks providing download speed of above 100 Mbps the new publicly funded network has to provide at least 1 Gbps download speed.

Furthermore, taking into account the evolving needs for enhanced upload speed, the Guidelines provide for the possibility to invest to fulfil demonstrated unsatisfied end-users' need for up to 1 Gbps upload speed.

- **Aid for the deployment of mobile networks**

The proposed modifications include new provisions for the deployment of mobile networks, clarifying the compatibility principles.

The approach leverages on the rules and principles which apply to fixed networks, and follows case practice.

A private beneficiary will be selected through a competitive selection procedure, in line with the principles and the spirit of the public procurement rules and respecting the principle of technological neutrality.

The State intervention will be limited to market failure areas identified through mapping and public consultation based on criteria that Member States consider appropriate to address end-users' needs, in particular speed. The current public consultation gives stakeholders the opportunity to comment on this point. The Commission specifically seeks comments on what should be the relevant criteria and the corresponding values necessary to identify market failure in mobile networks, in particular in terms of speed, whilst mitigating the risks as regards distortion of competition.

To ensure the incentive effect of the State support, the aided infrastructure will not be taken into account to meet the coverage obligations arising from conditions attached to the right to use spectrum. State aid cannot be used to fulfil such obligations as it is unlikely to have an incentive effect, and thus unlikely to be compatible with the internal market. State Aid can, however, be granted to provide a quality of service beyond the requirements provided in such obligations.

The new network will have to ensure significant improvements in comparison to the existing networks in term of mobile service availability, capacity, speed and competition. For instance, 5G standalone networks will be considered as ensuring a significant improvement in comparison with previous generations and 5G non-standalone networks.

Finally, effective, full open access to the supported infrastructure will have to be guaranteed to all access seeker on equal and not discriminatory conditions.

- **Aid in the form of demand-side measures supporting the take-up of fixed and mobile networks (vouchers)**

Various demand side measures are possible to support the take-up of fixed or mobile services. The proposed Guidelines discuss these possibilities, recognizing that some may not amount to State aid, e.g. general measures such as information campaigns or demand aggregation not targeting specific operators. For those measures that amount to aid, the proposed Guidelines will reflect the case practice and codify the compatibility criteria for the two most frequent forms of demand-side interventions, namely vouchers with social character and connectivity vouchers.

Vouchers with social character will be considered as compatible where they encourage consumers in fragile situations (e.g. low-income individuals/families or particular categories of end-users such as students) to procure or maintain fixed and/or mobile broadband services of adequate quality, if certain conditions are met, including compliance with the principle of technological neutrality.

Connectivity vouchers that foster the take-up of a specific category of services for which there is lack of demand may address both consumers and business end-users. Connectivity vouchers will be considered as compatible where they promote the take-up of fixed and mobile services of adequate quality, if certain conditions are met, inter alia, if the schemes are limited in time, proportional and technologically neutral.

For both types of vouchers, an online, open, transparent registry of eligible suppliers (or an equivalent alternative method) from which consumers and businesses can freely select their service provider will have to be put in place to guarantee the openness, transparency and non-discriminatory nature of the measure.

- **Guidance regarding an operator's use of its own resources to connect to the publicly-funded infrastructure to provide services outside the area for which the aid was granted ('private extensions')**

The proposed modifications aim at clarifying that private extensions by access seekers are allowed. In case of the aid beneficiary, such private expansions are allowed unless in the mapping and the public consultation it is demonstrated that this would create a severe distortion of competition. A severe distortion of competition could arise if e.g. (a) the private extension leads to an adjacent area which is already served by at least two networks providing speed comparable to the state funded network or (b) there is at least one comparable infrastructure in the adjacent area which has entered into operation less than 5 years before the state funded network enters into operation. If either (a) or (b) is fulfilled, the private extension into the adjacent area could be allowed only two years after the state subsidised network enters into operation.

- **Adjusting wholesale access obligations to reflect technological progress**

The current Broadband Guidelines require effective wholesale access to State funded fixed networks (including full physical unbundling and 'virtual' unbundling) to strengthen competition and to avoid the creation with public funds of regional monopolies.

However, the cost of granting such access might increase the final amount of aid granted. In order to reduce costs, the proposed Guidelines provides some exceptions and differentiates the types of the wholesale access products to be offered by subsidised fixed access networks depending on the competitive situation in a given intervention area. In this context, in areas with limited competition, less-stringent access obligations will apply, i.e. Virtual Unbundled Local Access – VULA - instead of physical unbundling. By way of contrast, in competitive areas, the practice of the current guidelines will remain unchanged and full and effective physical access will always have to be offered.

For interventions supporting mobile access networks, the State funded network must offer the widest range of wholesale access products, including among others bit-stream 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. Effective access may include access to components of the network that have not been publicly funded but that are necessary in order for the access seeker to provide its services.

For interventions in backhaul networks, the State funded network must ensure bit-stream access and access to poles/masts/towers, ducts and dark fibre.

- **Clarifications and further guidance on certain concepts such as: mapping, public consultation, selection procedure, wholesale access pricing, claw back mechanism**

## **Mapping**

The new Guidelines will include a new annex providing guidance on how to carry out the mapping exercise both for fixed and mobile access networks. The methodology is primarily based on the extensive experience gained by the Commission in assessing broadband cases. It is also based on the work carried out by BEREC in cooperation with the Commission for the development of guidelines to 'assist NRAs on the consistent application of Geographical surveys of network deployments' ; on 'BEREC guidelines on Very High Capacity Networks' and on previous projects carried out by DG CNECT in cooperation with DG COMP on mapping of broadband networks.

## **Public consultation**

The proposed Guidelines aim to provide additional guidance and clarifications as regard the way to carry out a public consultation. In particular, the proposed Guidelines clarify the timeframe for a public consultation (at least 30 days) and the timeframe within which Member States have to launch a selection procedure or to start the implementation of the measure in case of direct investment models. They provide a methodology for the assessment and monitoring of future private investment plans..

**Open selection procedure**

The proposed Guidelines consider the use of environmental or energy related requirements among the qualitative criteria. The modifications aim to clarify that qualitative criteria could also refer to environmental and energy criteria which reflect the established policy objectives.

**Wholesale access price**

The proposed Guidelines clarify the scope of application of the various methodologies (published price, regulated price, cost-based price). They also codify case practice concerning cases in which no adequate benchmark or regulated product exists and clarify the role of the aid amount in determining the wholesale price.

**Claw back mechanism**

The proposed Guidelines clarify the rules of claw back mechanism and lower the threshold for its application (reduced from EUR 10 million to EUR 5 million).