



Submission to the European Commission's
Public Consultation on

**Community Guidelines for the application of State aid rules
in relation to rapid deployment of broadband networks**

Deutsche Telekom AG
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1. Summary

The draft Community Guidelines for the application of State aid rules in relation to rapid deployment of Broadband networks ('the Guidelines') are a timely response to clarify the balance between private and publicly funded broadband investments, in particular against the background of the inclusion of broadband in the EU and Member States stimulus packages and the ambitious policy goals for future broadband networks in Europe.

The Guidelines could provide a welcome progress towards creating regulatory certainty, inter alia through a clear definition of eligible areas for State aid for both "traditional" and Next Generation Access (NGA) networks. They may thus be an important contribution to creating the appropriate framework conditions for large scale private investments in NGA and in traditional broadband.

However, in order to minimize the risk of a distortion of competition in line with established EU State aid principles under the EC Treaty competition law rules and to create legal certainty to foster private investments, the current draft Guidelines should be clarified and tightened in the following main areas:

1. Priority should be given to the creation of guiding principles that encourage private investment, thus reducing the need for State aid. Investment incentives should first and foremost be created by an investment friendly regulatory framework. Furthermore, less intrusive measures like tax incentives should be given the priority.
2. Alternative technologies, such as mobile and satellite, capable of offering speeds similar or even above "traditional" fixed line broadband networks, must be taken into account.
3. As the cost of civil works represents the largest part of total NGA network investment, the costs to private investors could be lowered significantly by fostering access to ducts of all utilities, not only the incumbent's civil works, and allowing for the sharing of investment in civil works among operators. Should nevertheless State aid be necessary in certain regions, it should first and

foremost be focussing on the roll-out of ducts as the least distorting and most efficient measure.

4. State aid should be strictly limited as a measure of last resort to white areas to prevent the crowding out of private investments and a distortion of competition.
5. The Guidelines should provide for safeguards that the definition of “White NGA Areas” will not result in the crowding out of traditional broadband and mobile investments in rural areas.
6. Current state of the art NGA investments must not be devaluated or disincentified through the exclusion of these networks by the chosen bandwidth thresholds in the NGA definition.
7. Operators who have already invested in infrastructure should not be disadvantaged by an asymmetrical treatment. If – in very exceptional cases – the state aid is justified, it must be granted in an open, transparent and symmetrical manner. Any discrimination must be excluded, i.e. first and foremost, that the investor must be selected irrespective of his market position and his status as a former incumbent or newcomer.

2. General remarks: Priority for private investments

Private network operators have undertaken huge efforts in the past to provide European citizens with modern broadband. As the need for the roll-out of high speed broadband networks is high on the political agenda of Member States as well as of the European Commission, the pressure is particularly high on the incumbents being the largest nationwide operators to upgrade their networks and to further close the remaining white spots. Most of the broadband investments - especially in rural areas - are made by the large, nationwide operators. For example, Deutsche Telekom has invested around €300 mio last year to expand traditional broadband networks in Germany. Further, Deutsche Telekom is rolling out state of the art VDSL high-speed access lines which are now available in 50 cities in Germany, reaching around 30% of all households in Germany. Another 1,000 cities are already covered with modern ADSL2+ technologies – thus reaching far into the rural areas of Germany. Deutsche Telekom is still investing today, amidst the current crisis.

The sheer size of the investments necessary in modern broadband networks, both traditional broadband and NGA, makes it obvious that most of the investment has to be afforded by private capital. But in order to stem the huge amounts of investments required, private investors require favourable and stable framework conditions and planning certainty. It is therefore crucial that the Guidelines provide investors with legal certainty that State aid does not devalue past or future private investments.

The Guidelines have to be seen in a broader context of policy responses to the investment challenge for traditional broadband and NGA networks. In order to foster a large scale deployment of these networks, the EU Commission should be focusing on four key areas:

- Investment incentives should first and foremost be created by an investment friendly regulatory framework (including forms of risk sharing amongst operators and reducing ex ante regulation as much as possible). This would be a major task for the forthcoming EU NGA Recommendation. Unfortunately, the second draft published by the Commission will not provide the regulatory incentives for private investments.
- Furthermore, not only regulatory incentives might help to boost private investments: Other types of incentives like (generally applied) credit lines, credit guarantees or tax incentives could also help interested undertakings to stem the investment challenge. Even if such instruments would amount to State aid under Art. 87 para. 1 EC due to their degree of selectivity in favouring, they are less intrusive than direct State payments or investments and therefore, they should be encouraged first of all.
- It should be a priority of the EU to foster demand for broadband services. The public sector can play a very important role in boosting the demand side of broadband infrastructure by favoring services such as E-Government and E-Health towards a complete digitalization of the relationship between the European Citizens on the one hand and public administration and its services on the other hand. It is widely recognized that demand side State aid measures, e.g. those under Art. 87 para. 2 lit. a) EC, are less distortive while being able to provide incentives for private investments. Excluding such measures simply because they may benefit the largest infrastructure investors is not only inappropriate, but

amounts to an illegitimate asymmetrical approach which is not covered by Artt. 87, 88 EC. Therefore, Deutsche Telekom suggests that para. 43 should be deleted or modified accordingly, emphasizing the significance of strictly symmetrical demand-side actions.

- The cost of civil works required to build the passive infrastructure for NGA networks has been estimated to represent 50-80% of total investments. Thus the costs to private investors could be lowered significantly by fostering access to civil works, e.g. making available access to ducts of all utilities, not only the incumbent's civil works, and allowing for the sharing of investment in civil works among operators. These measures alone could significantly reduce the need for distorting State aid. Where the necessary civil engineering infrastructure is not in place and this results in non-availability, State aid should first and foremost be focussing on the construction of civil works infrastructure. This could support the timely roll-out of modern broadband networks in rural and remote regions and would at the same time be more efficient and less distortive than State aid for the roll-out of the network or parts of it. State aid for civil engineering infrastructure would target the lowest level of the value chain, allowing for competing network operators to roll-out private networks making use of e.g. publicly funded ducts. Market activities on all downstream levels, including the roll-out of passive and active technology, would not be distorted by the measure.

3. No State aid for “black areas”

We support the Commission's restrictive approach with regard to State aid in “traditional black areas”, where current broadband services are already delivered by competing broadband infrastructures since we share the concerns of the Commission regarding an “unacceptable distortion of competition, and the crowding out of private investors” which could be caused by State intervention in those areas (para. 37). We also strongly support and welcome the Commission's view that State aid is deemed not only unnecessary but even detrimental in “areas where there already exists more than one NGA network or private investors may be in the process of deploying a competing NGA network” (para. 71).

4. State aid in “white areas” as a measure of last resort

According to para. 34 white areas are defined as “areas where no broadband infrastructure exists or is unlikely to be developed in the near term”. Even if all of the possibilities of promoting investment in network rollout described above are taken into account, there will always be areas where the Return on Investment is expected to be insufficient for even one commercially viable investment. In principle, Deutsche Telekom agrees with the Commission that support by public funds for traditional broadband deployment in rural and underserved white areas is a correct policy response. However,

- The Guidelines should further clarify that State aid should be understood as a measure of last resort for only those areas where it is verifiable that all other, less distortive measures will not lead to a private investment decision.
- If State aid is justified in these exceptional cases, it must be awarded to the investor with the best economic offer in an open, transparent and non-discriminatory manner on a technologically neutral basis. It would be inappropriate to exclude or disadvantage investors because of their past or future investments in broadband networks or their market position, also against the background of the investment realities described above.
- Furthermore, the Commission should refrain from favouring more costly technologies, for example, FTTH P2P over G-PON or FTTC technologies, or multi-fibre over other types of approaches contrary to the principle of technological neutrality.

Hence, Deutsche Telekom supports para. 45 especially regarding the aspects of an open tender procedure, best economic offer, and technological neutrality. However, it is equally important that network operators must be allowed to take advantage of their past investments when applying for a notified State aid project. It would be inappropriate to exclude or disadvantage investors because of their past or future investments. We therefore strongly recommend deleting the last two sentences in **para. 45e** (“At the same time, this condition should not end up favouring existing incumbents especially in case where third parties may not have access to this infrastructure. Likewise, in case of “grey areas”, where it is shown that dependence

on the incumbent operator is part of the problem, it may be necessary to allow for more facilities-based competition”).

5. No state aid in “grey areas”

5.1 State aid in “grey areas” would distort competition and crowd out private investments

While State aid is an appropriate measure in areas where no private network roll-out is economically viable, a more restrictive approach is needed in the Guidelines with regard to the use of State aid in grey areas. The draft Guidelines rightly acknowledge that State intervention in “traditional grey areas” and “NGA grey areas” risks crowding out existing or potential investors and distorting competition and conclude that a more detailed analysis is needed.

It would be more appropriate to strictly limit State aid to regions without a traditional broadband (“traditional white area”) or NGA network (“NGA white area”) in place and without a business case for such private investments in the future, as:

- Duplicating a private network will automatically distort competition, as private investors can never compete with a state funded network on an equal footing.
- Grey areas are areas with a viable business case for only one single network. State subsidies for the duplication of a network will thus by definition render both networks immediately unprofitable, due to the density of population and other characteristics which allow only one network to be profitable. State aid in “traditional grey areas” or “NGA grey areas” would thus lead to an economically inefficient supply of broadband infrastructure and downstream services as well. Hidden and distorting rebate policies on downstream services markets could be cross-subsidized by upstream infrastructure aid.
- Furthermore, State aid would prevent private investments in areas where currently no network (either traditional or NGA respectively) exists but would be economically viable. Potential investors would always have to fear that a subsidized parallel network will be deployed in the future, which would ex post

devalue private investments. A rational investor would anticipate this risk and thus discard his investment plans.

- While the aforementioned risks hold true with regard to both “traditional grey areas” and “NGA grey areas”, the Commission should in addition acknowledge that the risks of investing in NGA networks are particularly high. There is still uncertainty on the demand for the very high bandwidth services, the price consumers are willing to pay, the technologies that can be used to deliver these services and the competition from existing broadband networks (ADSL2+, Mobile, etc.). Undoubtedly, the deployment of a publicly funded competing infrastructure substantially amplifies the risks for the first mover as public funding reduces the level of risk for the competing infrastructure.

According to the draft Guidelines State aid measures might be compatible in “traditional grey areas” or “NGA grey areas” where the provision of a broadband infrastructure “is still a de facto monopoly provided that (i) no affordable or adequate services are offered to satisfy the needs of citizens or businesses users and that (ii) there are no less distortive measures available (including ex ante regulation) to reach the same goals.” The level of current broadband prices in a specific region is highlighted as one indicator of such market failure. Such an approach is misleading, as:

- State aid is not a legitimate instrument to remedy regulatory shortcomings in a specific sector.
- The Guidelines should acknowledge that price differences as such are by no means a sign of market failure but might just as well be justified by different underlying cost structures in different regions. For instance, topographical disadvantages of a mountain area are perfectly reflected in higher prices of services by a functioning market.
- No legal certainty is provided by the non-defined but essential terms “needs of citizens and business users” and “adequate market conditions” which may trigger State aid.

Basically, the possible roll-out of publicly funded broadband networks in grey areas will most likely lead to the termination of private investments in new or upgrading

existing networks outside of black areas due to the danger of a devaluation of these investments. In this respect, it is extremely important to delete the passages in the draft Guidelines referring to the justification of rolling out publicly financed networks in grey areas.

By concluding that only a more detailed analysis is needed with regard to “grey areas”, the draft Guidelines do not create the necessary legal certainty for investors. The Commission should follow the same approach as for “black areas”, that is, explicitly state in the Guidelines that State aid should in principle be viewed negatively in “grey areas”.

5.2 State aid for “grey areas” is not in line with established EU State Aid principles under the EC Treaty competition law rules

The duplication of an existing network by a publicly funded second network would amount to an asymmetric distribution of state aid, as existing investors are excluded de facto. Due to the strictly symmetrical control approach of all EC-competition rules, any asymmetric distribution of State aid must be excluded. Asymmetrical regulatory instruments are neither covered by Artt. 87, 88 EC (State aid) nor by Art. 82 EC (abuse of dominant positions) or Art. 81 EC (cartels). The symmetric approach is also reflected by European case law.¹

As a general principle, under primary competition law of the EC Treaty all remedies against market failures are to be applied symmetrically. The introduction of asymmetric regulatory instruments is only legitimate under the power of the Community, acting through Parliament and the Council, to legislate on the approximation of national laws under Art. 95 EC in order to remedy diverging national regulatory instruments as obstacles for the internal market.

Furthermore, it is questionable whether the draft Guidelines correspond to the fundamental principle, well established by the jurisprudence of the ECJ, that State aid must never produce a result which is contrary to the provisions of the Treaty².

¹ E.g. ECJ C-7/97, ECR I-7791, 26 Nov 1998, Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG et al., para. 43 ff.

² ECJ C-204/97, Portugal/Commission, judgement of May 3, 2001

This applies in particular to provisions of the Treaty where those provisions also pursue the objective of undistorted competition in the common market³. In fact, as shown below the draft Guidelines are also not sufficiently adjusted to the regulatory framework enacted under Art. 95 of the Treaty, thus causing conflicts, for instance with regard to the principle of technological neutrality .

In the light of the State Aid Action Plan and according to Art. 87 para. 3 EC, as well as under Art. 86 para. 2 EC, any State aid ad hoc measure or general scheme must strike a balance between the distortive effects of State intervention and its beneficial effects to remedy an identified and well defined market failure. In determining that, a qualitative and not a mere quantitative approach should be followed according to the case law of the ECJ, well established long before the State Aid Action Plan of 2005.⁴ As private networks can never compete with publicly financed networks, utmost care must be taken that State aid does not de facto create new State monopolies in grey areas. This would undermine the liberalization of the sector for the last 20 years.

We would furthermore like to stress that the case law quoted in the Guidelines with regard to “traditional grey areas” (FN 35 of the Guidelines) refer to situations where only leased line services were provided prior to the roll out of the publicly funded network. Mere leased line services, however, cannot be equated with existing access broadband infrastructure (e.g. xDSL networks or cable). It would be misleading to draw from these specific cases conclusions about the compatibility of State aid in “grey areas”, where one broadband infrastructure (e.g. xDSL or cable) is available to all businesses and consumers in the respective region. Leased lines are a different market as also acknowledged by the Commission in its market definition.

6. More gradual approach towards “White NGA Areas”

In order to reach the Commission’s goal of achieving 100% high speed internet coverage for all citizens by 2010, investments in traditional broadband networks in rural areas will still be required. While the Commission has a point by stating that “in the longer term NGA networks are expected to supersede existing basic broadband

³ CFI T-197/97, Weyl Beef Products/Commission, judgement of January 31, 2001.

⁴ Case 47/69 France v. Commission p.487 par.23

networks” (**para. 61**), the Commission should also note that the roll-out of NGA networks is in a very early stage in most of European countries. It is therefore difficult to already define a “NGA divide”. It would be highly unrealistic to assume that NGA networks will be rolled out immediately and everywhere, even if there is a business case for private investment. Instead, intermediate steps are necessary, which will differ from region to region, depending on multiple factors such as geography and population density.

Therefore, the Guidelines need to address the delicate relationship between upgrading of traditional networks and public funding of NGA networks. The definition of “NGA white areas” should not be a static, simplistic “NGA yes or no” question, but should take into account the potential of intermediate bandwidth growth.

- For “white NGA areas” which are “traditional black areas”, i.e. areas where current broadband services are being delivered by competing broadband infrastructures (xDSL and cable networks), the draft Guidelines provide for the needed legal certainty for existing operators. According to the draft Guidelines, no State intervention should in principle be necessary in these areas as sufficient incentives to upgrade current traditional broadband networks to NGA exist.
- However, the draft Guidelines do not sufficiently take into account the risk of publicly funded NGA networks crowding out private investments in “white NGA areas” which are “traditional grey areas”. The sole restriction to prevent an excessive use of State aid in areas with one basic broadband network is provided by the respective Member States` task to demonstrate “that the broadband services provided over the said networks are not sufficient to satisfy the needs of citizens and business users” and “that there are no less distortive means” (**para. 68**). However the Guidelines neglect, as a matter of principle, the effect that private investors will not invest in traditional broadband networks in less populated and rural areas if they must fear that, after their investment has irreversibly been made, it will at a later stage be devaluated by the roll-out of a superior, publicly financed NGA network. The Guidelines must therefore ensure that private companies´ investments in traditional broadband networks helping to bridge the digital divide today are

not de facto devaluated tomorrow by the roll-out of a publicly financed NGA network.

Downstream “open access” obligations to publicly funded networks cannot compensate the crowding out of upstream infrastructure investments, i.e. the substitution between existing DSL networks and publicly financed, superior NGA networks, as suggested in para. 74 of the draft Guidelines. The upstream infrastructure investment of an existing operator will always be devaluated by the roll-out of a State subsidized NGA network, irrespective of whether the existing operator is granted downstream access to the new publicly financed network or not.

In cases where traditional broadband has just or will be upgraded in the near future (e.g. to ADSL2+) the Guidelines should provide for special safeguards to avoid a devaluation of these investments for example by:

- Allowing contractual arrangements with local or regional authorities limiting the ability to roll-out substituting publicly funded NGA networks before the initial investment has been recovered, or
- Allowing network operators that have invested in traditional broadband networks in the past, to take advantage of their investments when applying for a notified NGA State aid project in the future. This advantage only reflects investments and investment risks taken in the past and not any sort of unduly advantage. The draft Guidelines should be amended respectively (para. 45e and para. 74).

7. Need for a revised definition of NGA Networks

According to para. 48 of the draft Guidelines, a NGA network is defined as involving laying fiber to existing street cabinets offering downstream bandwidths of a minimum of 40 Mbps and 15 Mbps upstream and upgrading current cable networks to deliver speeds “up to and beyond 50 Mbps” using the DOCSIS 3.0 cable modem standard.

The definition of a NGA network in the draft Guidelines appears limiting as regards both bandwidth and access technologies and should be revised respectively. The Commission should take into account that:

- The draft Guidelines do not give any explanation why the specific bandwidth thresholds have been chosen. The current definition of NGA in the Guidelines would exclude modern, highly capable VDSL networks currently deployed by many operators. Such a definition could thus massively put at risk private investments in VDSL, as the safeguards against distorting state aid for NGA networks developed in the draft Guidelines would not apply to VDSL.
- The NGA definition should be technological neutral and not exclude any particular technology, including mobile solutions.