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**COMMISSION STAFF WORKING DOCUMENT**

**Executive Summary of the Impact Assessment**

*Accompanying the document*

**Commission Communication**

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

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## 1. PROBLEM DEFINITION

### 1.1. The underlying problem: the funding gap and the need to protect competition

The existence of a high performing broadband infrastructure is considered to be an important factor for economic development throughout the world. High speed internet access enables businesses, especially small ones, to remain competitive and it allows consumers to benefit from many advanced online services that improve their quality of life.

When publishing its Digital Agenda for Europe<sup>1</sup> in 2010, the Commission underlined that Europe needs widely available and competitively priced fast and ultra-fast Internet access. The Digital Agenda restated the objective to bring basic broadband to all Europeans by 2013 and set the objective to ensure that, by 2020:

- all Europeans have access to much higher Internet speeds of above 30 Mbps, and
- 50% or more of European households subscribe to Internet connections above 100 Mbps.

The estimated costs to achieve those objectives are up to EUR 60 billion for the first stage and EUR 270 billion for the second.<sup>2</sup>

While most of the necessary investments to achieve the goals of the DAE, as highlighted above, will be carried out by private companies, there are areas in which market investment is not profitable. Due to the economic characteristics of the industry, private investments alone will not suffice to attain such ambitious coverage goals and governments will have to step in with the smart (and pro-competitive) use of public funds to extend high-speed and very high speed, next generation access ("NGA") network coverage to those areas in which market operators are unlikely to invest on commercial terms. The goal of achieving ambitious infrastructure development targets needs to be qualified in the sense that effective competition shall also take place between and on these infrastructures. Effective competition will help to maximise "consumer welfare", in the form of lower prices and of better and more services for European citizens and companies

To give guidance as to how public investment can reconcile these conflicting goals, the Commission adopted in 2009 the Broadband Guidelines<sup>3</sup>. The Broadband Guidelines aim to contributing to the achievement of the policy objective of broadband coverage by appropriately directing public subsidies. The Guidelines are *complementary* to encouraging private investment via appropriate regulation and to undertake other actions to stimulate insufficient demand. Whenever the other regulatory policies will not succeed in stimulating private investment because of existence of a market failure, public authorities may decide to fund a broadband infrastructure with the aim to achieve the coverage objectives set at European level to spur economic growth and development. The goal the Guidelines want to achieve is to channel public investment in the most pro-competitive way.

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<sup>1</sup> COM (2010) 245

<sup>2</sup> Source: State aid Scoreboard: Report on State aid contribution to Europe 2020 Strategy – Spring 2011

<sup>3</sup> See [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009XC0930\(02\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009XC0930(02):EN:NOT)

## **1.2. Why is Commission action considered?**

The present Broadband Guidelines foresee that they would be revised within three years after entering into force to take into account the main technological and regulatory developments. In particular, since the Guidelines entered into force in 2009, they pre-date the adoption of the Digital Agenda and therefore, the current rules are not fully compatible with the Digital Agenda targets.

## **1.3. Issues identified in the consultation process**

The following issues have been identified to be relevant for the application of State aid rules in the broadband sector:

- *Directing State aid where it is needed: Detailed mapping and coverage analysis*
- *Ensure competition by an effective tender process*
- *Best value for money: define the right criteria for the selection process*
- *Ensure effective wholesale access*
- *Access pricing*
- *Better involvement of NRAs*
- *Relationship between SMP regulation and State aid rules*
- *Framework programmes*
- *Better use of existing infrastructures*
- *Claw-back mechanism to avoid over-compensation*

## **2. ANALYSIS OF SUBSIDIARITY**

EU State aid control is the exclusive competence of the Commission according to Articles 107 and 108 TFEU. If Member States notify aid, but also ex officio, the Commission has to assess the measure under the Treaty.

## **3. OBJECTIVES**

The general objective of the Broadband Guidelines, as explained in the context part of the Report and in the Guidelines themselves, is to increase growth and consumer welfare by wide and rapid deployment of fast and ultra-fast broadband networks in a competitive market landscape. This general objective can be further specified into the following specific objectives:

1. Bringing infrastructure to under served areas:
  - i. aligning with the DAE
  - ii. Accelerating NGA roll-out
  - iii. Avoiding duplication of infrastructure
2. Avoiding undue competition distortions
  - i. mimicking the market mechanism through tender process

- ii. increasing transparency
  - iii. ensuring open access
  - iv. reducing aid to the minimum
3. Minimising administrative burden
- i. encouraging Framework programmes
  - ii. streamlining regulatory and state aid obligations
  - iii. improving NRA involvement

#### 4. POLICY OPTIONS

As mentioned above, rapid deployment of broadband networks is not sustainable without public funds. With this perspective the following three options have been set out.

##### 4.1. **Baseline Scenario: Option 1: prolonging the existing Guidelines for three more years**

The current Guidelines bind the Commission to carry out the revision process within three years from their adoption. After carrying out the revision as envisaged, the Commission could conclude that no change is needed from the current text, which has been consistently applied in the past three years with satisfactory results.

##### 4.2. **Option 2: Amendment of the Guidelines to ensure a rapid and competitive deployment of broadband infrastructure**

The evaluation of the current policy highlighted a number of issues for which fine-tuning may be suggested without completely upsetting the approach followed in the existing Guidelines. Different sub-options are possible:

*First sub-option (minimum level): improve the use of resources*

This sub-option includes: adapting the rules for access to publicly financed infrastructure, clarifying the rules for public tendering, stricter rules for the use of existing infrastructure, involvement of NRAs in the implementation, more transparency (including ex post reporting), a lighter claw-back mechanism.

The current Guidelines foresee, as a quid pro quo for the subsidies received, an obligation to provide effective wholesale access on the subsidised network. This provision can be fine tuned by requiring a neutral and open infrastructure for ultra-fast networks, which tend to have the characteristic of natural monopolies, while for more remote areas the access obligation can be subject to a proportionality test.

To ensure competitive markets, a number of other amendments concern the selection of the most economically advantageous offer (regarding the geographical coverage and the effect on competition), wholesale access and access pricing. To ease the administrative burden on the granting authorities, it can be foreseen to increase the thresholds for projects to include a claw-back mechanism from 1 million Euros to 10 million Euros.

The existing Broadband Guidelines require that Member States consult the relevant NRAs if they grant aid to broadband networks. Under this option, in the new Guidelines the position of NRAs can be clarified and strengthened.

The current Guidelines put strong emphasis on transparency in State aid broadband schemes, yet the relevant provisions are kept at a general level without detailed specifications. This can be improved by (a) including more details on the content of the transparency obligations, (b) including a requirement for Member States to keep a centralised database of infrastructures and of tenders.

*Second sub-option (intermediate level): Adapt the Guidelines to technological progress*

The second sub-option builds on the first one but in addition includes adaptation to technological developments. The current Guidelines define NGA as mainly wired based technology. As the performance of technological platforms (cable mobile, satellite etc) is constantly improving, the definition can be refined to include other platforms, as long as they can exhibit NGA capabilities.

The existing conceptual framework of the Guidelines (basic/NGA networks, white/grey/black areas) will not be changed. Yet, the principle behind the conceptual framework can be made more explicit by introducing the notion of “*step change*”.

*Third sub-option (advanced level): Align the Guidelines with the Digital Agenda*

The third sub-option includes the measures discussed for the less ambitious sub-options (1) and (2) and adds a specific additional compatibility section for ultra-fast networks.

With a view to support the Digital Agenda targets, the additional section introduces the possibility to publicly finance NGA infrastructure in black NGA areas, provided that strict conditions and important pro-competitive safeguards are respected. To preserve the incentive to invest, private investments need to be protected against being overbuilt with publicly financed infrastructure.

#### **4.3. Option 3: A more radical amendment of the Guidelines by putting DAE objectives first**

A third option is that of radically changing the approach followed so far and modify substantially the current Guidelines in order to meet the need to accelerate as much as possible broadband rollout and the achievement of the DAE targets. It is important to note that even a radical amendment cannot go as far as overhauling completely the existing approach (as regards the target areas, for example) because it would run against the general objective of keeping markets open and not crowding out private investments.

Therefore the third option will remain within those limits by proposing to introduce in the text new concepts and definitions as well as new requirements for the compatibility test. In particular: the DAE targets would be incorporated in the Guidelines concepts, the access obligation requirements would be reduced, the proportionality requirements would be eased.

## 5. ANALYSIS OF IMPACTS

Bearing in mind that the Commission does not have the choice not to intervene in the sector (i.e. not performing the state aid assessment of the measures in question) and that there is already a consistent case practice and Guidelines in place, only the variation of the relevant impact factors of each option will be pointed out

### 5.1. **Option 1: Baseline scenario: prolonging the existing Guidelines for three more years**

This option has the advantage of celerity but would not address all the specific objectives pursued by the revision exercise. Moreover, nearly all stakeholders and Member States have – to various degrees – argued in favour of adapting the current Guidelines. Thus, this baseline option of merely prolonging the current Guidelines has not been supported in the consultation process.

### 5.2. **Option 2: Amendment of the Guidelines to ensure a rapid and competitive deployment of broadband infrastructure**

This option builds on the current policy of the Commission and gives an immediate follow up to the issues arising from regulatory and technological developments, case practice, stakeholders consultation and expert reports. In general, the existing conceptual approach of the Guidelines would be kept, thereby reaping the benefits of consistency and legal certainty.

*First sub-option (minimum level): improve the use of resources*

Several measures proposed under the first sub-option support specific objectives related to the avoidance of distortion of competition. Improving and clarifying the conditions for access to publicly financed broadband infrastructure has the benefit of further improving the pro-competitive nature of the approved measures. Better access conditions generate more competition on the network and thereby a larger variety of services at lower prices. Incumbents are generally not in favour of stricter access rules, as they argue that obligations under State aid should be aligned to regulation. Alternative operators instead favour better access conditions as it would allow them to compete on existing infrastructure. Consumers would benefit from these measures as a better implementation of the Guidelines would lead to a more competitive broadband infrastructure.

With regard to the involvement of NRAs, this option leads to adding a few specifications to better detail the role they are expected to play in the State aid procedure. Such role implies neither assessment nor discretionary policy decisions.

A better use of existing infrastructure would improve the availability of broadband networks and would allow focussing available resources on areas where such infrastructure is lacking.

As regards the specific objective of reducing the administrative burden, this sub-option provides a mixed result. A more extensive involvement of NRAs could entail certain additional administrative costs for both the governments and NRAs themselves. However, that administrative cost would be limited. Also the transparency measures will have mixed results regarding the administrative burden. On the one hand, it is a limited burden on administrations which have to publish information on a website. On the other hand, the availability of such data reduces

searching cost to private investors (incumbents and alternative operators) and it reduces administrative costs for other administrations. The benefits of increased transparency should outweigh the administrative burden arising from it.

Clarifying the rules on the use of existing infrastructure in the tender procedure for state aid, should offer to alternative operators better access to such infrastructure when preparing their own bids.

*Second sub-option (intermediate level): Adapt the Guidelines to technological progress*

Being cumulative, the impact of the second sub-option is the same as the one of the first sub-option with an incremental effect from a new NGA definition.

Broadening the NGA definition has two effects on competition. On the one hand, it will increase the number of platforms and operators which can participate in a public tender for state-funded NGA networks. This should increase the competition in the tender and thereby potentially reduce the necessary aid amount. On the other hand, different technologies have different qualitative performances, including the technical ability to grant access. If a platform is selected which, for technological reasons can only provide inferior access, the competitive impact of the new infrastructure is reduced.

The broadening of the NGA definition has several effects on broadband roll-out. First, it may increase the areas which are considered to be NGA "grey" or "black". Second, it will encourage private investment in these technologies as they would be better protected against being overbuilt by another publicly funded NGA network. As a result of the first effect, granting State aid may no longer be granted in certain areas. Whether that has an effect on overall public investment in NGA networks is uncertain.

*Third sub-option (advanced level): Align the Guidelines with the Digital Agenda*

This option balances the risk of crowding out private initiatives in profitable areas with the need to encourage fibre rollout: public funds will be allowed in such areas only if it is proven that existing private investments merely concern marginal and temporary improvements, while the subsidies aim at encouraging a substantially new infrastructure. In the public consultation incumbent and cable operators have argued that their investments in upgrading their own infrastructure may be jeopardised by the public intervention. While such investments may not be too capital intensive and not imply new infrastructure development, nevertheless they need to be protected to avoid unduly altering the market mechanism. The public consultation suggested that a "competition check" may be a good solution to mitigate these effects.

### **5.3. Option 3: A more radical amendment of the Guidelines by putting DAE objectives first**

This option would allow to reduce the amount of state aid necessary, as the profitability of the funded network would increase (the aid beneficiary would be able to exclude competitors using the newly built infrastructure).

However, it is not obvious that this more lenient approach would actually lead to increased investment in NGA and ultrafast NGA. As most of the infrastructure is built by private investors, the latter may decide to hold back on such investment if

the perceived risk of later being "over-built" by state funded infrastructure is increased (the crowding out effect). Second, public money would be used to finance dominant operators (or even monopolies).

The option of incorporate the DAE quantitative targets in the Guidelines definitions would have the benefit of increasing consistency of EU documents and would more directly adapt the Guidelines to the Digital Agenda. It would also introduce a very clear-cut division which would increase stakeholders' understanding (in particular small local authorities) as regards the objective of the public intervention they undertake. However, this approach would also entail substantial drawbacks. First, the approach is currently untested and neither the Commission nor the national/local authorities have experience with it. As a consequence, it could generate uncertainty among stakeholders. In addition, the assessment may actually be more complicated: introducing three categories ("basic", "slow NGA" and "ultra-fast NGA") instead of currently two, many more possible combinations would have to be assessed. Specific compatibility conditions for the different categories would have to be applied. Moreover, quantitative definitions bear the risk of being quickly outdated, which would require another revision of the Guidelines in a short period of time, while binding the Commission to their application while they are in force.

Limiting access obligations to what would be imposed under sectoral regulation, would have the likely impact of reducing investment costs and necessary aid amount per project. Additionally, as regards existing operators, in particular incumbents, it would reduce their cost and increase legal certainty. However, the risk is high that investments might not materialise at all, that public funds would help to create or strengthen dominant positions and that public authorities may fund with taxpayers' money the rollout of "closed" NGA architectures. This would restrict future competition on the subsidised infrastructure with consequent increasing prices and decreasing quality.

Abandoning the involvement of NRAs in state aid process would overcome the problems indicated by some Member States as regards the formal entitlement of the NRAs to intervene in State aid cases and reduce the administrative burden. On the other hand, it would entail a loss of control over how access conditions and tariffs are set on subsidised networks, a potential loss of consistency.

Relaxing the public consultation requirement and/or the tender requirement has the advantage of speeding up the planning of the measure and the timing for granting authorities to be able to implement their measures. On the negative site, commercial operators might hold back/postpone their investments due to enhanced public intervention in this area, public and EU monies might be misused or not effectively used. The Commission could face a high number of complaints and litigations.

## 6. COMPARING THE OPTIONS

Options	Effectiveness	Efficiency	Coherence
Baseline: Prolonging the	-	+/-	-



existing GL			
Option 2: Revising the GL			
Sub-option (1)	+	+	+/-
Sub-option (2)	+	+	+
Sub-option (3)	++	+	++
Option 3: Radical overhaul of the GL	-	-	+

## 7. MONITORING AND EVALUATION

All Member States that adopt aid schemes covered by the Broadband Guidelines shall submit annual reports on such schemes to the Commission. In addition, a specific evaluation on the effectiveness of the State aid broadband measures cannot be carried out because the basic set of data on the measures is not available. Therefore the new Guidelines proposes that a basic set of data –as the name of the aid beneficiary, the aid amount received, the aid intensity and the technology applied – shall be published on a central website and made available for the general public. Furthermore, the new Guidelines introduce a light ex-post reporting obligation.