Please note: This document may be subject to change if feedback is received from stakeholders or the European Commission prior to approval of the BDUK umbrella aid scheme and/or in the Commission's approval decision. The Latest Version of this document will be held on the BDUK huddle site.

Please Note: This document is made available by BDUK to communiactions providers for guidance in respect of requests for new wholesale access products. This guidance concerns new network access requests that a communications provider can make to the appointed local broadband supplier once the NGA network has been deployed. In particular, it concerns the basic criteria that BDUK (and potentially Ofcom) would apply in assessing such tests.

BDUK would advise anybody using this document toseek their own legal advice in respect of its content.

Basic test for new wholesale access requests on part-state funded networks

When assessing requests for new wholesale access products under the regulatory (Significant Market Power (SMP)) framework three basic criteria are considered.[1] Although the detailed application may change in light of the public subsidy, these three basic criteria can also be applied when assessing requests for new wholesale access products on part-state funded broadband networks (with Ofcom potentially acting as the arbitrator if needed). The three basic criteria are:

1. **Costs** – all reasonable costs of providing the a new wholesale access products should be met by the access seeker(s);
2. **Competition** – the introduction of the new wholesale access products should deliver sustainable and effective competition in the downstream market(s); and
3. **Purpose** – the new wholesale access products should clearly address the market problem that lead to the original intervention/obligation.

Discussed below is how these tests could be used to assess "reasonable demand" for new wholesale access products for subsidised superfast broadband infrastructure.

Costs

The first test relates to the reasonable costs of the new access product being met by the access seeker(s). In this context the term "reasonable" means:

1. the incremental cost of the new wholesale access product, plus
2. an appropriate allocation of common costs including an allowance for the commercially funded sunk costs associated with the original deployment. Note, for access to subsidised infrastructure (as opposed to access under the SMP framework) only the commercial funding from the supplier would need to be considered, rather than the total cost of deployment. In other words, the public subsidy part would be excluded from the assessment of reasonable costs to be met by the access seeker.

[1] Requests for new wholesale access products include both requests to modify existing network access and requests for completely new forms of network access.

There are two reasons for considering the commercially funded sunk costs:

1. It is possible that some of the costs originally incurred could help support the delivery of the new wholesale access product and;
2. It is possible that some of the costs originally incurred are sunk and so even if the subsidised infrastructure does not directly support the delivery of the new wholesale access product the supplier needs to be appropriately compensated in this situation as it made this 'sunk' investment in response to the original state aid contract requirements.

In particular, just covering the incremental cost of providing a new access arrangement may raise cost recovery concerns for the supplier overall, given there is some commercial funding involved in the deployment. For example, the supplier will be relying on the future revenues of the current wholesale products to make the business case for its own investment in the deployment, based on an x% funding gap (and therefore subsidy). However, if the new access product only includes the incremental cost and demand for access moves to this new product from existing access products (which, according to the business case, do contribute to the commercially-funded common costs), it could result in lower than expected future revenues which are also lower than the provider's costs of investment. This is akin to a higher funding gap than x%, but without a corresponding increase in subsidy. As a result, the overall business case is left short due to the new access product and the supplier is unable to recover its commercially-funded costs.

Therefore it is reasonable for the supplier to receive an appropriate contribution to its commercial costs (but not the subsidy) in light of its own investment into the superfast broadband infrastructure.

The basic approach to costs is therefore to ensure that the suppliers' part of the investment maintains a similar risk/reward ratio with the new wholesale access products as that envisaged at the time of the original deployment/contract.

Competition

BDUK is keen to ensure that the wholesale access products made available on subsidised superfast broadband infrastructure facilitate effective and sustainable competition in the downstream market(s). As such, we would need to be satisfied that any new wholesale access product is compatible with this objective.

Therefore, we consider that any new wholesale access product should be furthering (or at the very least maintaining) the competitive dynamic in the downstream market(s).

Purpose

In the case of a State intervention that has the primary objective of delivering superfast broadband services in those areas where the market has failed to deliver them, the new wholesale access product that the supplier has been asked to provide on the state subsidised network should clearly be intended to support the delivery of superfast broadband services in downstream market(s) and ultimately to consumers. Therefore, only those new forms of network access may be requested where they serve to meet the primary purpose of the State aid intervention, or are to be used to effectively supplement it.