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Broadband Delivery UK (BDUK)

National Broadband Scheme for the UK

Guidance: Wholesale Network Access

1. Introduction

- 1.1 Local broadband projects that are part of the rural broadband programme will be subsidised to varying extents by funding from DCMS, as well as other UK and potentially EU public sources. In almost all cases the funding for these local broadband projects will give rise to State aid.
- 1.2 This BDUK document provides draft guidance to local bodies and other stakeholders on the general and specific wholesale network access requirements that will apply to suppliers in direct and indirect receipt of State aid. This document should be read in conjunction with our other detailed guidance dealing with the complementary elements to these conditions and that apply to part-state funded networks. In particular, reference should be made to (i) the general condition applying to the supplier in instances where , a third party makes a new request for wholesale access¹, and (ii) the pricing rules that constrain the supply of specified active and passive access products².
- 1.3 Collectively, these access requirements are central in promoting effective and sustainable retail competition in the supply of superfast broadband services to residential and business consumers in rural areas. They do this by ensuring that suppliers in receipt of State aid make a wholesale route available to alternative providers, on a non-discriminatory basis, to enable them to offer competing superfast broadband services to retail customers. By requiring equality of wholesale network access the supplier is prevented from exploiting its monopoly position through anti-competitive (price and non-price) practices thereby ensuring that consumers receive genuine choice of retail services at fair prices.

¹ *Basic test for new wholesale access requests on part-state funded networks*, at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/120697/State_Aid_Guidance_for_new_wholesale_access_requests.pdf

² *Guidance on benchmarking and other access pricing*, at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/120692/State_aid_Guidance_Benchmarking.pdf

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- 1.4 Given the key role that wholesale network access conditions play in promoting effective and sustainable competition where local and community bodies seek approval under the UK's umbrella State aid scheme (the National Broadband Scheme for the UK), the projects submitted for State aid approval will need to demonstrate that they have incorporated the full set of general and specific wholesale network access conditions in supplier contracts.
- 1.5 These wholesale network access conditions apply for a minimum term of seven years.
- 1.6 The wholesale network access conditions that apply under the UK's umbrella State aid scheme are those conditions that are deemed necessary to meet State aid requirements under EC law. These requirements have been explicitly designed to meet those State aid requirements and are legally separate to the requirements specified under the UK/EC regulatory framework for communications.
- 1.7 The approach to wholesale network access conditions set out in this document has been developed by BDUK in light of ongoing feedback from the European Commission. These conditions are to be reflected in its Broadband Delivery Framework call-off contract, but additionally BDUK would also require other local or community bodies operating outside of the Broadband Delivery Framework to be guided by these principles in order to seek approval under the UK's umbrella State aid scheme.

2. General network access conditions in the UK's umbrella State aid scheme

- 2.1 The supplier is required to meet requests for network access made by third parties. The supplier is further required to not unduly discriminate in the network access that it provides to a third party.
- 2.2 The supplier is also required to meet all reasonable requests for new forms of wholesale network access³ that are made by a provider during the seven year period of the State aid contract. A competing communications provider can rely on these requirements in support of a legitimate access request should that request be disputed. In assessing requests for new forms of network access we would expect to apply three basic 'tests' that are set out in BDUK's proportionality analysis.⁴ In particular, we would expect to refer to these basic tests in order to assess whether an alternative provider has made a "reasonable demand" for access to the supplier. This approach, including the costs recovery principles, is analogous to that applied in the regulatory environment.
- 2.3 The supplier is required to publish a reference offer for the network access it offers on State subsidised infrastructure, where that access differs to the network access that is offered under ex ante regulation. The supplier is further required to notify Ofcom/BDUK of the charges and terms and conditions applying to any specific network access that it provides on the State subsidised network, where that access differs to the network access that is offered under ex ante regulation. Furthermore, the supplier must notify relevant parties that are using any specific product of changes in the charges or terms and conditions.

3. Specific network access conditions in the UK's umbrella State aid scheme

³ New forms of wholesale network access include requests for modifications to existing network access and requests for completely new forms of network access

⁴ *Op cit*, *Basic test for new wholesale access*

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- 3.1 Active and passive network access: A supplier that is in direct receipt of State aid is required to make available two specific wholesale access products: an active (bitstream) wholesale access product and a passive (e.g. ducts and poles, or dark fibre) wholesale access product. The availability and conditions of use relating to these products will be detailed in State aid reference offers that will be published by the relevant supplier. The supplier's pricing of these products is dealt with in separate guidance.⁵
- 3.2 Use of regulatory remedies: Additionally, BDUK will require suppliers to provide such forms of wholesale access as Ofcom mandates as a regulatory remedy pursuant to a full market review in the product and geographic markets where the subsidised infrastructure is situated. If Ofcom mandates other forms of wholesale access in this way, access would be required on all existing and future infrastructure in receipt of public subsidy under this aid scheme.
- 3.3 New ducts and pole infrastructure: In those instances where a supplier constructs new State-subsidised physical infrastructure to facilitate the provision of superfast broadband to residential and business customers the supplier is required to build and offer that infrastructure on an 'open access' basis. Specifically, where State aid is used to provide New Duct and New Poles⁶ for the purpose of delivering superfast broadband it must be offered on an equality of access basis to all communications providers seeking to use that infrastructure for whatever purpose; dimensioned in such a way as to offer effective shared access to at least three other competing infrastructure providers; and designed and dimensioned in a manner that is capable of accommodating and supporting reasonably foreseeable alternative technologies.
- 3.4 Existing duct and pole infrastructure: Furthermore, the supplier must ensure the effectiveness of those access conditions relating to New Duct and Pole infrastructure carry across the entirety of each of the NGA white intervention areas where it promotes NGA competition. To this end, suppliers using existing infrastructure to meet BDUK's NGA deployment objectives must offer similar passive network access (i.e. without usage restriction) on that infrastructure to reduce the barriers to entry for any committed NGA investor that is legitimately seeking to deploy competing wholesale infrastructure. In particular, where the NGA business case for a wholesale competitor only becomes viable where the primary NGA deployment takes place in conjunction with business connectivity services (leased lines) then the provider will have the ability to utilise the supplier's existing duct and pole infrastructure in the intervention area for both NGA and leased line purposes.

⁵ Op cit, *Guidance on benchmarking*

⁶ New duct is that subsidised physical infrastructure located underground that is installed for the purpose of meeting the objectives of BDUK's National Broadband Scheme for the UK, where no existing duct infrastructure exists and where the duct deployment will have individual length of 1.0km and have deployment costs of £50,000 or greater ("New Duct"). New Duct includes that physical infrastructure deployed for the purposes of providing both access (from the local exchange or relevant point of presence to end-user premises) and backhaul (from the core network to the relevant point of presence). New poles is that subsidised physical infrastructure located overhead that is installed for the purpose of meeting the objectives of BDUK's National Broadband Scheme for the UK, where no existing pole infrastructure exists and where the poles will be deployed over a distance of 1.0km and have deployment costs of £50,000 or greater ("New Poles"). New Poles includes that physical infrastructure deployed for the purposes of providing both access (from the local exchange or relevant point of presence to end-user premises) and backhaul (from the core network to the relevant point of presence).

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- 3.5 In this latter scenario, the committed NGA investor should recognise that – as an indirect beneficiary of State aid – it may itself be required to offer wholesale bitstream access to further downstream retail competition. BDUK would consider whether the imposition of a wholesale active access requirement on third party providers using passive infrastructure access would promote effective competition in superfast broadband retail markets.

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