

**ABERTIS TELECOM COMMENTS ON THE DRAFT COMMUNITY GUIDELINES
FOR THE APPLICATION OF STATE AID RULES IN RELATION TO RAPID
DEPLOYMENT OF BROADBAND NETWORKS**

June 2009

CONTENTS

1.	Introduction	3
2.	The Commission Policy on State Aid For Broadband Projects	
2.1	Absence of aid: The application of the Market Economy Investor Principle.....	3
2.2	The compatibility assessment under article 87 (3).....	4
2.2.1	Objective of the measure	4
2.2.2	Design of the measure and the need to limit distortions of competition	5
3.	State aid for NGA networks	5
3.1	General Considerations: Supporting the rapid deployment of NGA networks	5
3.2	The distinction between white, grey and black areas	6
3.3.	The specific case of existing (Basic broadband) black areas.....	6
3.4	The public-private cooperation in the deployment and exploitation of NGA networks	7

1. INTRODUCTION

abertis telecom, the leading broadcaster network operator in Spain, welcomes the opportunity to express its views on the Draft Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks which is the object of this public consultation.

This document of the European Commission is intended to provide guidance to Member States, Public Administrations and undertakings on how the European Commission will assess State aid to broadband and Next Generation Access Networks ("NGA"), thereby increasing legal certainty and the transparency of its decision-making practice.

abertis telecom welcomes the approach taken by the European Commission to summarise in a document its practice and policy in applying the State aid rules of the EC Treaty to State measures that support the deployment of traditional broadband networks and specially acknowledges the introduction of a number of issues related to the assessment of State measures to encourage the rapid and timely deployment of NGA networks.

abertis telecom recognises the importance of the rapid deployment of broadband networks and the positive effects it will bring to the growth and innovation in all sectors of the economy and to the social and regional cohesion, and accepts that in certain cases there is a situation of market failure in which State aid may be appropriate, under certain conditions, to achieve objectives of common interest.

These conditions have to be clearly defined, transparent, selective in nature and proportional to produce the minimum distortions in the market, so as not to reduce profitability and crowd out investment by market players.

2. THE COMMISSION POLICY ON STATE AID FOR BROADBAND PROJECTS

2.1 Absence of Aid: The application of the Market Economy Investor Principle (Sections 2.1 – 2.2 of the Guidelines)

As stated by Article 295 of the EC Treaty, "*this Treaty shall in no way prejudice the rules in Member States governing the system of property ownership*". If a Member State places capital at the disposal of an undertaking in circumstances which correspond to normal market conditions, this cannot be regarded as State aid.

abertis telecom agrees on the definition of the Market Economy Investor Principle (MEIP) in relation with the broadband field given by the Commission in its Amsterdam decision and the need for the State to demonstrate thoroughly and comprehensively either by means of a significant participation of private investors in the project or by the existence of a rigorous business plan showing an adequate return on investment that the State is acting the same way as a private investor would do under the same circumstances.

For the services provided by the public network for its own needs, abertis telecom agrees that they fall outside the scope of State aid, as the European Commission has stated in several decisions (e.g. State aid NN 24/2007 Czech Republic).

2.2 The compatibility assessment under Article 87 (3) (Section 2.3 of the Guidelines)

abertis telecom fully supports the balancing test and its application to the broadband network deployment as defined by the European Commission in the Guidelines in relation to traditional broadband network deployment.

As the European Commission recognises, the economics of broadband provision are such that the market will not always find it profitable to invest in it. Density plays an important role in the deployment of the broadband networks, as the demand is higher in places with a higher density of population, but scarce in places lightly populated. This can give rise to a market failure and a gap between urban and rural areas in relation to access to broadband services. abertis telecom accepts that State aid might be appropriate and play a useful role in these cases.

The aid measure has to be aimed at a well-defined objective of common interest, well designed (appropriate instrument, incentive effects and proportionality) and with limited distortions of competition.

2.2.1 Objective of the measure (Section 2.3.2 of the Guidelines)

Abertis telecom considers that the definition of white, grey and black areas given by the European Commission to traditional broadband network deployment has proved as effective to limit the distortion of competition.

abertis telecom agrees that in cases of areas where traditional broadband networks are currently not available and where there are no plans for the near future ("white areas"), Member States may intervene to pursue regional cohesion and economic development objectives. In cases where there are at least two broadband network providers and the services are provided under competitive conditions, there is no need for State intervention, as this would distort competition and the crowding out of private investors.

In cases of areas where there is only one broadband network operator ("grey areas"), abertis telecom recognise that the users may not necessarily be adequately served (either because of the high prices with relation to those offered in more competitive areas, the low SLA or the unavailability of certain services) and there are only little prospects that alternative operators would build an alternative infrastructure.

abertis telecom agrees with the European Commission that in these situations the compatibility assessment has to be carried out in detail, as the State aid might adversely affect the network operator already established in the area. Only in cases in which no affordable or adequate services are offered to satisfy the needs of customers and there are no less distortive measures available the aid may be considered as compatible with the common market.

2.2.2 Design of the measure and the need to limit distortions of competition (Section 2.3.3 of the Guidelines)

Once the broadband coverage is deemed insufficient by the European Commission, it has to assess if the State aid is an appropriate policy instrument or there are other more suitable instruments.

abertis telecom shares the European Commission vision on the conditions that have to be met for the aid to be considered as compatible with the common market.

With relation to the proportionality principle, abertis telecom wishes to stress the importance of the technological neutrality. As the broadband services can be delivered on a multiplicity of host infrastructures (wireless, wireline, satellite and mobile), the Commission has to take into account that a State aid measure does not favour one technology over the rest unless it is an objective justification.

Another important issue for abertis telecom is that the granting of the aid should be subject to an open tender process and that wholesale access should be offered by the selected bidder to third operators.

Abertis telecom agrees that in order to avoid excessive wholesale prices by the selected bidder, the Aid scheme may impose benchmarking pricing principles or in the absence of published prices, on prices set or approved by the NRA. In any case, it should be taken in consideration that the bidder has to be granted a fair return for any investment it may have incurred, otherwise, no bidder would be interested in the development of the broadband network.

3. STATE AID FOR NGA NETWORKS (Section 3 of the Guidelines)

3.1 Supporting the rapid deployment of NGA networks (Section 3.1 of the Guidelines)

abertis telecom welcomes the European Commission approach to consider the peculiarities of the NGA networks in relation to traditional broadband networks.

Even if the traditional broadband networks have been a key component for the development, adoption and use of information and telecommunications technologies, nowadays the development of new advanced telecommunications services and the convergence of different technologies and infrastructures have made traditional broadband networks insufficient to provide certain advanced telecommunication and audiovisual services that exists at present and will emerge in the future.

Nonetheless, with respect to the European Commission definition of NGA network for the purpose of the Guidelines (paragraph (48) of Section 3.1), we consider that it should also consider networks based on evolving technologies able to provide services delivering speeds higher than those specified in the said paragraph, including Wirelan and Wireless technologies.

Abertis telecom agrees that with the rapid deployment of NGA, the economics of the NGA network model discourages the deployment of NGA networks not only in

sparsely populated areas, but also in certain urban zones as the main issue is not density of population, but costs.

That is why direct intervention of the Public authorities may be necessary to avoid a new digital divide in relation to the deployment of NGA networks.

Abertis telecom shares the favourable view of the European Commission towards the possibility of approving the intervention of public administrations in areas where investments by existing broadband network operators in such networks would take several years to arrive because they are financially less attractive than certain major urban zones.

Abertis telecom recognises that the considerations set in Section 2.2.1 (MEIP) of the Guidelines should also apply *mutatis mutandis* with regards to State aid interventions in the field of NGA network deployment and agrees that the Member States and NRA should play an important role out of the scope of the State Aid rules with measures such as to ease the acquisition process of rights of way, require the network operators to coordinate their civil works and share part of their infrastructure (not only to telecommunication operators but to all operators in all sectors, such as gas and electricity utilities, transport, etc.).

3.2 The distinction between white, grey and black areas (Section 3.3 of the Guidelines)

Abertis Telecom considers that the distinction between "white", "grey" and "black" areas is still relevant for assessing the compatibility of State aids, although it requires a more refined definition, as the European Commission states in the Guidelines.

With respect to Black NGA areas, Abertis telecom considers that there is no need for State intervention in areas where there already exists more than one NGA network or private investors may be in the process of deploying competing NGA networks in the near future.

We also agree on the position of the European Commission regarding white and grey areas.

3.3. The specific case of existing (Basic broadband) black areas (Section 3.4.4 of the Guidelines)

Abertis telecom acknowledges that although in these areas there is a competitive situation regarding basic broadband networks, investors might not be interested in investing in the coming years in NGA networks due to the high costs of deployment. In such cases, State support may be necessary in order to promote a rapid deployment thereof.

Basically Abertis telecom shares the European Commission approach in assessing the compatibility of the State aid with the common market the same way as for grey areas (point 70 of the Guidelines).

Regarding the design of the measures and the need to limit distortion of competition Abertis telecom supports the European Commission approach and considers that the beneficiary of the aid should provide third parties with wholesale access, but deems that access obligations including the right to use ducts and/or street cabinets in order to allow third parties to have access to passive infrastructure should only apply in accordance with ex ante regulation applied by the NRA.

Abertis telecom finds crucial that in cases of deployment of fibre-based networks, the architecture of network benefiting from State aid should support all different types of network access that operators may seek.

Abertis telecom considers that more clarification is needed in relation to the extent the European Commission will give to the definition of access to passive infrastructure.

3.4 The public-private cooperation in the deployment and exploitation of NGA networks (Section 3 and in particular paragraph (74) of the Guidelines)

Abertis Telecom considers that the delicate situation in the economy, which affects most sectors thereof, may impact the rapid deployment of NGAs, as operators need to invest large sums of money in infrastructures whose the returns will only come after several years (around 15 years in Spain according the Spanish NRA "*Study on the viability of NGA network deployment in Spain*", may 2009).

Bearing this in mind, abertis telecom considers, on the one hand, that private operators (especially non incumbent) may find it difficult to raise the funds needed to deploy NGA in the next years and, on the other hand, that State Members may also be limited in their capacity to invest in a public NGA.

A solution might come through public-private partnership, in which an NGA may be constructed and exploited by the Public Administration to respond to its needs (self provision) and the extra capacity of the network would be available to provide high bandwidth connectivity to the wholesaler market under an open access scheme and as a neutral operator, without entering the retail market.

This project might be carried out through an open tender to select the telecommunications infrastructure provider, who will be responsible for the construction and exploitation of the network through a concession contract for a reasonable time and the network property will become public at the end of the concession period.

In order to avoid distortion of competition in the wholesale market in the grey and black areas, the project would be subject to the Fully Distributed Cost (FDC) model to correctly distribute the fibre network costs and investments among self provision and wholesale and a separate accountability for this latter market may be established. Furthermore, the operator should respect the Market Economy Investor Principle in the wholesale black areas.

The project would have to be assessed under the European Commission State aid rules and limited state support would be required in grey and white areas.

In these public-private partnership projects related to NGAs, abertis telecom considers that if the beneficiary operates the network in the retail market, we agree that it should be obliged to open its passive infrastructure but alternatively, if it only operates in the wholesale market, it should only be obliged to provide active infrastructures services, in order not to penalise in excess the beneficiary as its business plan could be jeopardised and at the same time discourage the roll-out of alternative infrastructures.