

June 22nd 2009

Response to the Consultation on the Commission's Broadband Guidelines

Introduction

AmCham EU welcomes the European Commission's decision to provide guidelines to the market on the application of state aid rules to broadband networks. As the draft Guidelines accurately note, broadband is of strategic importance to Europe due to its positive impact on growth and innovation across all sectors of the economy, as well as on social and regional cohesion. In this light, broadband deployment is a key component of the European Commission's economic recovery plan. It is thus critical for the Guidelines to provide the market with clarity and certainty. AmCham EU therefore makes the following comments in order to address areas where the Guidelines are unclear and require further explanation.

AmCham EU particularly wishes to stress the importance of ensuring that the Guidelines do not discriminate between technologies. Public funding should be made available to all broadband networks where the state aid criteria are fulfilled, irrespective of the technology employed. Furthermore, it is important to ensure that the Guidelines are consistent with existing policy and regulation—including access regimes—and are sensitive to their potential impact on investment incentives and the markets. They must also guard against artificially accelerating build out in a way that could lead to excessive state intervention in high-speed broadband roll out.

Policy Consistency

AmCham EU appreciates and supports the delicate balance that the Commission is seeking to find amongst a number of important but potentially competing policy goals, namely: maintaining investment incentives for commercial broadband projects while supporting European economic recovery through encouraging a short run boost to infrastructure investment spending, working towards bridging the digital divide while maintaining technology neutrality and avoid tilting the competitive playing field. We are heartened to see that the Commission is seeking to provide Member States with policy guidance in finding this balance.

Moreover, given the material sector-specific (ECNS) regulatory regime in place, AmCham EU recognises the Commission's efforts to acknowledge issues where broadband state aid and sector regulatory policy intersect. However, we do have some reservations regarding the consistency of the draft Guidelines with the ECNS regime.

Firstly, paragraphs 33, 40 and 40 (including footnote 35) of the draft Guidelines refer to inadequate access conditions as a potential trigger for state aid to broadband roll out. We believe that these references should make it clearer that the Commission is contemplating circumstances in which there are technical/technological limitations that preclude the provision of adequate access. This clarification would bring the draft Guidelines in line with existing practices, such as the MANs Decision cited in footnote 35. The language could currently be read to also encompass regulatory failure, suggesting that state aid is an appropriate means of remedying a regulatory failure in relation to access provided by a broadband network operator with market power.

Secondly, paragraphs 38 and 39 of the draft Guidelines raise another access-related policy issue. These paragraphs imply that only network-based competition is able to facilitate the provision of quality services at reasonable prices. It indeed dismisses the utility of service-based competition (and, implicitly, the effectiveness of access and tariff regulation). We believe that it would be appropriate to limit referring to the inability to supply when explaining the availability of service – the sector-specific access regime is intended (and able) to address a broad range of conduct amounting to refusals to supply. We also have reservations as to the appropriateness of state aid as a mechanism to address ‘excessive’ pricing concerns.

Thirdly, paragraphs 45(f) and (g) of the draft Guidelines address the necessary provision of contemplating benchmarking against regulated wholesale prices. Given that state aid should only be provided where commercial investment is not feasible, AmCham EU believes that it is important for the Commission to ensure that the pricing of access to state aided networks does not either distort the investment incentives for commercial funding or undermine access remedies imposed under the ECNS regime.

Investment considerations

As the Commission notes in paragraph 3 of the draft Guidelines, two very distinct types of investments in broadband build out are currently being made: (i) those relating to build out in rural and underserved areas, and (ii) those intended to accelerate deployment of very high or super fast next generation access (“NGA”) networks (including deployments in areas already served by basic broadband infrastructures). AmCham EU believes that it is very important to bear this distinction in mind when assessing state aid to broadband projects.

The roll out of NGA networks is in its early stages in most Member States. As with all network deployments, network operators have prioritised their investments -- it is not, and has never been feasible to upgrade/roll out entire national networks (particularly access networks) simultaneously. It is imperative that the ability of operators to raise commercial funds to support network roll out is not undermined by state intervention that effectively second guess their prioritisation and timing. Great attention need to be paid to ensure that the draft Guidelines do not discourage commercial investment in NGAs. State aid is only appropriate where private investment is not economically viable in a reasonable timeframe.

As noted above, it is also important for the access regime contemplated by paragraphs 45(f) and (g) of the draft Guidelines to be consistent with the ECNS regime that it will parallel. In particular, the pricing should not create distortions that render it impossible for NGA network operators designated as having significant market power to raise funds on the market. Such distortions could indeed render ever more NGA projects unable to raise funds and subsequently lead them to require an increasing amount of state funding.

We would also suggest that the Commission modify its “best economic offer” criteria to include a quality assessment. We do not believe that a pure “lowest bid” approach would provide the ability to choose the most appropriate and sustainable technology. Given the medium to long-term nature of communications network technology choices, a balanced cost-quality assessment would be more appropriate.

Finally, while paragraph 45(e) of the draft Guidelines makes it rather clear that the Commission’s intention is to avoid favouring “incumbent” network operators, paragraphs 52, 72 and 73 refer to existing network operators when they should perhaps refer to existing infrastructure. It is important for the market to understand that the Commission is promoting the use of existing infrastructure and not of incumbents.

The push to ‘build now’

The draft Guidelines appear to be focused on an unusually short timeframe. For example, paragraphs 5 and 7 refer to achieving a higher level of broadband coverage “in a more timely manner” and supporting the “rapid and timely” roll-out of NGA networks. Paragraph 52 provides that aid may be appropriate where investments “would take several years to arrive because they are financially less attractive than certain major urban zones”, and paragraph 55 characterises aid as accelerating the investment cycle.

AmCham EU wishes to stress that a state should only aid projects when commercial investment is not feasible. Feasibility in this context should be assessed in relation to market-driven investment timeframes. Overly short timeframes only artificially (and unnecessarily) increase the level of state participation. State aid should be the last resort, not an accelerator pedal.

While it is important to appreciate the equity considerations that the Commission identifies in paragraph 33 of the draft Guidelines, we believe that it is important to distinguish between build out in rural and underserved areas, on the one hand, and NGA build out on the other. Consumers in rural and underserved areas that are denied broadband access are in a materially different position than that of consumers in areas slated for NGA build. The equity case for the former is much stronger: sufficient time has elapsed for it to be clear that commercial build is not feasible. By contrast, it is far from clear that there has been a market failure for a NGA build. It is, quite simply, too early to tell.

Definition of NGA and Scope of Section 3

The current draft Guidelines are unclear in relation to the precise scope of the term Next Generation Access. For example, paragraphs 48(ii) and 50 and footnote 35 suggest that in addition to applying to access networks, the draft Guidelines also apply to regional core networks. The term NGA networks usually refers to both fixed and wireless broadband, and tends to be divided between different backbone or 'core' networks (NGNs), which are distinct from NGAs and tend to be understood as being the link between the operator's core network and the end customer (e.g. fibre to the home or FTTH). The Commission should clarify whether the intention is to include core networks within the scope of the Guidelines.

In its description of NGA networks, under Section 3, the Guidelines defines them as broadband networks, *mainly* fibre-based or advanced upgraded cable networks; footnote 44 in Section 3 refers to broadband satellite and mobile network technologies (albeit excluding them from the scope of Section 3). Notwithstanding the serious mischaracterisation of mobile technology in that footnote (see below), the scope of the definition of NGA in Section 3 would therefore be consistent with the usual understanding that NGA networks are based on fibre, copper upgrades, as well as wireless (fixed and mobile) and other infrastructures. Yet, if this is the case, then the Guidelines are wholly discriminatory, as they favour NGA wireline broadband and specifically exclude wireless mobiles. This would fly in the face of the technology neutrality principle (in addition to distorting market analysis in those markets where both wireline and wireless broadband exists) and other European broadband policy imperatives.

AmCham EU presumes that this cannot be the intention of the Commission and that Section 3 of the draft Guidelines aim to provide specific guidance for state aid rules to wireline NGAs. However, the Guidelines need to be clearer on this point and the Commission's definition of NGA must be more coherent. The Commission should thus clearly state that, without prejudice to the fact that wireless technologies may be also considered NGAs, for the purpose of Section 3, the Commission intends to clarify state aid rules as they apply to wireline broadband.

In addition the Commission should ensure consistency with its ongoing regulatory assessment of NGAs, which refers to NGAs as wireline and not as wireless. As such, AmCham EU questions whether it is advisable for the Guidelines to state, under paragraph 48, that the definitions within Section 3 are without prejudice to the market definitions under the regulatory framework for electronic communications. This provision risks creating considerable confusion as to which definitions should apply.

In its current form, the draft does not make it clear that Section 3 is effectively a subset of Section 2. AmCham EU suggests that, in order to ensure certainty, paragraph 7 of the draft Guidelines should be amended to clearly state that the principles set out in Section 2 apply to all broadband technologies on a technology neutral and non-

discriminatory basis, allowing fixed and mobile wireless as well as other networks to benefit from state aid, while Section 3 solely provides more specific guidance regarding wireline NGAs. In particular it must be made clear that the focus of Section 3 is not about limiting aid to wireline broadband networks nor about articulating a policy favouring NGAs over other broadband technologies. As such, footnote 44 should also be deleted from Section 3, otherwise the Guidelines could be interpreted as meaning that satellite and mobile technologies are excluded.

Technology Neutrality

Paragraph 45(d) of the draft Guidelines accurately states that broadband services can be delivered 'on a host of network infrastructures' and that Member States should not favour any particular technology or network platform, absent objective justification. AmCham EU welcomes the restatements of the principle of technology neutrality and non-discrimination in paragraph 45(d) and elsewhere.

However, AmCham EU believes that the draft Guidelines must be accurate in characterising technology for fear of misinterpretation or discrimination. While technology neutrality is specifically endorsed, the current draft of the Guidelines gives the impression that the European Commission favours certain technologies over others. Most notably, footnote 44 states that satellite or mobile network technologies are not currently "capable of providing very high speed symmetrical broadband services". Yet, existing and future mobile technologies such as 3G, WiMAX and LTE will increasingly offer speeds comparable to fixed broadband (see e.g. McKinsey report, *'Broadband for the Masses'*, February 2009). It is particularly important for the Guidelines to acknowledge this fact since failing to recognise the current capabilities of such technologies would not only imply ineligibility for aid under the Guidelines but also result in discriminatory market assessment if a comparable broadband infrastructure is dismissed. In addition, the very utility of policy guidance will be impaired if no attempt is made to 'future proof' the Guidelines.

Technology Specificity

AmCham EU recommends the Guidelines include a characterisation of technologies that is clear, accurate and consistent. Under paragraph 45(d) the draft Guidelines refer to different types of available broadband infrastructures, making a distinction between wireless, satellite and mobile. This is not entirely accurate and it is important to note that wireless broadband encompasses a wide range of both fixed and mobile technologies, such as 3G, LTE, WiMAX and to some extent WiFi. In addition wireless technologies can offer a fixed wireless broadband service competing with wireline broadband. It is critical that the Guidelines both accurately describe the technology but also appreciate their inter-relation. The Guidelines should therefore clearly acknowledge that, in regions where both fixed and wireless networks are available, the complementary and competing nature of broadband delivery will be part of the market analysis. Not doing so would create a significant potential for interpreting the Guidelines as being discriminatory and for erroneous market analyses.

In mischaracterising wireless—whether fixed, mobile or nomadic—and in seeking to eliminate satellite or mobile, the draft Guidelines are creating a significant inconsistency with the European Commission’s own broadband policy which, according to the Council, the ERG, the RSPG, etc, is inclusive of both wireline and wireless broadband.

Finally, we would caution against making policy guidance technologically-specific. While the Guidelines are intended to be reviewed in three years, previous debates in this sector (over universal service access speeds and the scope of broadband markets defined under the sector-specific regulatory regime) have highlighted the need to “future proof” policy in the sector as much as possible.

Conclusion

As noted in the draft Guidelines themselves, the European Economic Recovery Plan (EERP) forms the backdrop of the Guidelines, notably regarding the policy imperative of providing “100% coverage of high speed internet by 2010”. AmCham EU believes that it is important to ensure consistency between the Guidelines and the EERP, as well as other EU policy initiatives. The EERP acknowledges that broadband encompasses both wireline and wireless (fixed and mobile technologies), as fibre deployment alone will not achieve these goals within a reasonable timeframe and reasonable cost. Wireless broadband is critical if the EU is to meet the EERP goals, especially in rural and underserved regions.

In the light of the above, AmCham EU insists that the Guidelines must ensure the absence of discrimination between technologies and platforms that public funding has made available to all broadband networks fulfilling state aid criteria.

Moreover, AmCham EU maintains that the draft Guidelines should be consistent with existing policy and regulation (including access regimes), be sensitive to their potential impact on investment incentives and the markets, and guard against artificially accelerating build out in a manner that leads to excessive stated funding of roll out.

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