



To: European Commission
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Com Hem's response to the Commission's consultation on its draft Community guidelines for the application of state aid rules in relation to rapid deployment of broadband networks

Background

Com Hem is Sweden's leading cable operator offering interactive digital TV services, high speed broadband services as well as IP telephony. By investing in and upgrading its cable network, which in large parts is fibre based, Com Hem is not only offering its customers high-speed and high-quality services, it also has contributed to the development of competition between the incumbent's copper based access network and alternative access networks. By demanding dark fibre as an important input good in the development of its network, as well as forcing competitors to meet its investments in enhanced capacity, Com Hem fosters the deployment of fibre based networks in Sweden.

Com Hem welcomes the opportunity to comment on the Commission's draft guidelines for the application of state aid rules concerning broadband. As an operator offering services mainly to apartment buildings in densely populated areas, Com Hem has clearly noticed the increasing engagement of public actors and the use of public funds in the urban broadband market.

By operating in areas where several private operators are already active, public broadband actors run the risk of distorting competition and diminishing the private propensity to invest. *In particular, the risk is high if such public operations entail state aid.*

More, it should be highlighted that public organizations often constitute large customer bases (e.g. municipal housing companies and public administrations) in many areas. They are also responsible for granting permits to dig, which is a prerequisite for the deployment of new networks. Thus, public actors play central roles in all parts of the broadband market – both as providers, customers, land owners and sources of state aid – which clearly points at the great influence of their ways of operating.

The community state aid rules concerning broadband are some of the most important tools for minimizing the risk of negative effects of public intervention in the broadband market. In addition to increasing the transparency of the Commission's decision-making process, the draft guidelines will have an important impact on the decisions of a wide range of actors on the broadband market.



For example, for public entities planning or conducting broadband projects that might entail state aid, the guidelines can clarify what factors will be significant for the assessment of the presence of aid as well as of the presumptive aid's compatibility with the common market. The guidelines will also be conducive for national courts applying state aid rules in national legal cases. More, the guidelines will serve as important inputs in national policy-making discussions concerning the overarching role and impact of public actors in the broadband market.

Executive summary

Com Hem would like to put forward the following general view on the community state aid rules concerning broadband:

State aid to broadband projects should focus on areas which are lacking the prerequisites for commercial broadband investments. The objective of the state aid in these cases is to increase social cohesion (equity objective). Given the political objective of bridging the digital gap, it's reasonable that politically governed public authorities and public companies take responsibility for the deployment of networks in underserved areas.

State aid to broadband deployments in cities and urban areas should rarely be justified. The prime objective of the state aid in most of these cases would be to enhance competitiveness. Yet, in "traditional grey areas" and in "grey NGA areas" as well as in "traditional black areas" developing into "black NGA areas", a lack of competitiveness should in principle be managed either by market dynamics or by the regulatory measures taken by the responsible national regulatory agency.

As the Commission states in the draft guidelines, state support to broadband in "black areas", both in a traditional and a NGA scenario, would lead to an unacceptable distortion of competition. Also in "grey areas", both in a traditional and a NGA scenario, the risk of competition distortions are high.

If the use of state aid in "traditional grey", "grey NGA" and "traditional black areas" is approved, it is of utmost importance that the aided network is geared to fulfill its objective – that is to enhance competitiveness. In particular, it's important that the aided network supports the development of infrastructure-based competition, e.g. by offering dark fibre to private operators, since infrastructure-based competition has the greatest effects on both pricing and improvement of services.

On the basis of the general views presented above, Com Hem welcomes the guidelines' proposed safeguards aiming at limiting the distortions of competition, in particular in the NGA scenarios. Yet, Com Hem finds that the Commission's draft guidelines in certain parts could be elaborated further. Complementary to the comments included in the response presented by Cable Europe, to which Com Hem actively has contributed, **Com Hem's detailed comments on the Commission's draft guidelines can be summarized as follows:**

- ***The need for closer follow-up on Member States' fulfillment of the obligation to notify the Commission on public interventions***

The effect of the community state aid rules is largely dependent on the Member States' and the local authorities' propensity to notify the Commission. However, from



a Swedish perspective, there are reasons to question the local authorities' awareness of this obligation as well as the Government's propensity to notify. Com Hem encourages the Commission to closely follow the Member State's fulfillment of their obligation to ensure that all public interventions are compatible with the state aid rules.

- ***Making the Market Economy Investor Principle assessment more predictable***
Partly due to the limited amount of public interventions notified, the access by external parts to business plans and data for decisions of public entities involved in broadband investments, including public companies such as city networks and housing companies, is of great importance. Com Hem suggests that the Commission elaborates what responsibility rests upon the public entities to make business plans and other relevant bases for investment decisions easily accessible and well known. More, the Commission needs to further specify on what basis the soundness of a business plan should be assessed. Com Hem suggests that the Commission enumerates a set of standard requirements and elaborates on the components that should be taken into account when assessing the adequacy of a proposed return on investment.
- ***The need for a review requirement***
Due to the fact that many cities and municipalities are hybrid areas, i.e. containing "white" as well as "grey" and "black subareas", it is of great importance that state aid approved for "white" or "grey areas" only is used in the designated areas. Com Hem suggests that the Commission, in addition to the detailed mapping exercise requirement, includes a review procedure requirement on the authorities and undertakings using state aid.
- ***High risk for arbitrary assessments of future as well as historical investments***
The opportunity given to public authorities to decide on a broadband investment in a "traditional black area" on the basis of an assessment of "the historical pattern of investment" opens for arbitrary assessments that in turn would affect market actors' behaviors. More, the basis for the proposed assessment of investments likely being made "in the coming [5] years" (the "average period") is highly unclear. Com Hem suggests that the proposed provision (point 73) is deleted. If not deleted, it should together with points 63-65 and footnote 53 at least be supplemented so as to take into account the wide range of market and business factors affecting an operator's decision to deploy a NGA network. The proposed "average period" should be deleted.
- ***Limiting the distortion of competition***
The assessment of the design of a state aid measure in a "grey NGA area" should take into account the presumptive effects on the prerequisites for infrastructure-based competition. Com Hem suggests that "dark fibre/unlit fibre" is included in the list of wholesale access alternatives. Regarding the safety measures in the case of state aid to "traditional black areas", Com Hem suggests that the Commission explains how the "last mile restriction" is to be translated into a NGA-scenario. In the case of state aid to a publicly owned company acting in a "grey NGA area", Com Hem suggests that restrictions are introduced to the public network's operations. For example, publicly owned networks receiving state aid should not act on the retail level.



Detailed comments

The need for closer follow-up on Member States' fulfillment of the obligation to notify the Commission on public interventions

In point 53 (p. 15), the Commission writes that “any public intervention seeking to support the provision or acceleration of NGA network deployment must ensure that it is compatible with the State aid rules”.

Com Hem notes that the effects of the state aid rules to a large extent are dependent on the Member States' fulfillment of their obligation to notify the Commission. Article 88 EC requires Member States to inform the Commission in advance of any plan to grant state aid. Since the same article stipulates that the Commission has the exclusive right to assess a proposed state aid's compatibility with the common market, it is of great importance that the Commission actually is given the opportunity to analyse all broadband projects that entail state aid. The responsibility for gathering information on such cases and notifying them to the Commission rests upon the Member States.

From a Swedish perspective, the function of this process can be questioned. Under Swedish law, local authorities must inform the Government of potential state aid measures. Thereafter, it's the Government's responsibility to pre-notify the Commission. Yet, there're reasons to question the local authorities' awareness of their obligation to inform the Government of possible state aid cases, thus limiting the Government's possibilities to notify the measures to the Commission.

At this moment, there are circa 140 publicly owned broadband networks in Sweden, operating and investing in rural as well as in urban areas. To Com Hem's knowledge, the Commission hasn't been notified any possible broadband related state aid measures conducted in Sweden.

Even though Com Hem cannot present data on all broadband investments made by local authorities and publicly owned network undertakings in Sweden, Com Hem finds it unlikely that none of the public investments made have entailed or risked entailing state aid.

Among other factors, Com Hem bases this assessment on a recent judgment (February 2009) by the Administrative Court of Appeal of Stockholm. The legal case dealt with a decision made by the City of Stockholm to approve a plan of action to invest in broadband connection to the broadband network for tenants in the municipal housing companies in Stockholm. The Administrative Court of Appeal found that all four criteria of Article 87(1) EC were met, and thus that the broadband project should have been reported to the Commission in advance.

Since the City of Stockholm had decided to carry the project forward, and approve the investment, without reporting the plans in advance to the Government which in turn should have notified the Commission, the Administrative Court of Appeal concluded that the reporting obligation and prohibition on execution in Article 88(3) EC had been disregarded. Since the pre-notification requirement in Article 88(3) was disregarded, the decision constituted granting of illegal state aid and hence was as such also in breach of the Swedish Local Government Act. Accordingly, the Administrative Court of Appeal nullified the City's decision to approve the broadband investment.



The City of Stockholm has appealed the judgment to the Supreme Administrative Court, even though it has revoked its decision to approve the investment. In the same time, the City of Stockholm has commissioned the municipal housing companies to continue the deployment of the questioned broadband network.

From Com Hem's perspective, it is likely that some of the other broadband investments made by public undertakings and approved by local authorities, have entailed state aid and should have, similar to the Stockholm case, been notified to the Commission. Therefore, Com Hem, being aware of that the suggestion falls outside the immediate scope of the draft guidelines, encourages the Commission to closely follow the Member State's fulfillment of their obligation to ensure that all public interventions are compatible with the state aid rules.

Making the Market Economy Investor Principle assessment more predictable

A central part of the four criteria test is whether the public investment is made on market terms. In point 19 (p. 5), the Commission writes that "the conformity of a public investment with market terms has to be demonstrated thoroughly and comprehensively either by means of a significant participation of private investors or the existence of a sound business plan showing an adequate return on investment."

According to Com Hem, the key part of the quoted sentence is "demonstrated thoroughly and comprehensively". As regards the term "demonstrated", Com Hem emphasizes the term's connection with the issue discussed above.

Partly because of the limited amount of public broadband investments being notified by Member States and/or local authorities to the Commission, it is of great importance that external parts can access the bases of investment decisions and assess whether the Commission should be asked to require further information from public authorities on these investments. The accessibility of business plans is particularly important when investment decisions are made in publicly owned undertakings, such as city networks and housing companies, since these public entities are less transparent than e.g. local assemblies.

Hence, Com Hem encourages the Commission to define the meaning of the term "demonstrate" in the guidelines. Com Hem suggests that the Commission elaborates what responsibility rests upon public entities to make business plans and other relevant bases for investment decisions easily accessible and well known. Com Hem also suggests that the Commission inquires what additional requirements could be placed on public entities planning broadband investments to inform a relevant local political assembly and/or a designated national authority, e.g. the NRA or the National Competition Authority.

As regards the terms "thoroughly and comprehensively", Com Hem emphasizes the necessity to define the factors that together would point at the soundness of a business plan. Com Hem suggests that the Commission, in the guidelines, enumerates a set of standard financial requirements that should be met by a business plan to be assessed as "thorough" and "comprehensive". Further, Com Hem suggests that the Commission elaborates what parameters are relevant for the assessment of the adequacy of a proposed return on investment, e.g. in relation to the part of the infrastructure at which the investment aims and in relation to the planned use of the infrastructure.



The need for a review requirement

On the issue of limiting the risk of distortions of competition in the case of state aid to “white” (both traditional and NGA) and “grey” (both traditional and NGA) areas, the Commission refers to its previous decision-making practice and emphasizes, among other conditions, the detailed mapping and covering analyses. In point 45(a) (p. 11-12), the Commission writes “a detailed mapping exercise and a thorough consultation exercise (...) serve also as an essential tool for defining the existence of “white”, “grey” and “black” zones”.

In Com Hem’s understanding of the quoted sentence, the Commission’s objective is to secure that the state aid in question has the *correct aim*. However, this safeguard does not address the issue of the *correct actual use* of the aid.

For example, due to the fact that many cities and municipalities are hybrid areas, i.e. containing “white” as well as “grey” and “black subareas”, there is a risk that state aid aimed for a “grey area” is diverted to a “black area”. This presumes that the undertaking receiving the aid, e.g. a publicly owned city network, operates in both subareas.

To limit the risk of such incorrect use of state aid, Com Hem suggests that the Commission’s detailed mapping exercise requirement is supplemented in the guidelines with a review procedure requirement. Such a provision would require authorities and undertakings proposing to use state aid to include a review procedure in the investment plan. The review should be conducted within an appropriate time frame and demonstrate that the designated areas have received the approved state aid.

High risk for arbitrary assessments of future as well as historical investments

On the issue of existing, “traditional black areas” in a NGA scenario, the Commission notes that existing network operators should have the incentives to upgrade their networks to NGA networks, and that state intervention in such areas therefore in principle should be unnecessary. Com Hem welcomes this principle.

Yet, in point 73 (p. 19) the Commission writes that “Member States can rebut such an argument by showing that existing broadband operators do not plan to invest in NGA networks in the coming [5] years by demonstrating also that the historical pattern of the investments made (...) in response to users’ demands was not satisfactory”.

In Com Hem’s view, the provision in point 73 contains two parts. In the first part, the Member State is to show that existing operators “do not plan to invest in NGA networks in the coming [5] years”. This part connects to the provisions laid out in points 63-65 and in footnote 53 (p. 17), where the Commission proposes that [5] years should “correspond to an average period needed for the deployment of a next generation access network covering a town or a city (...) an operator should be able to demonstrate that within a coming period of [5] years it would have carried out the necessary infrastructure investments in order to have covered by then a substantial part of the territory and of the population connected thereby”.

From Com Hem’s perspective, the description of an operator’s decision to deploy a network assumed in the quoted footnote and the related points is all too simplistic. Most importantly, the Commission’s proposal fails to take into account how the size of a relevant area, the population density and the assessment of demand influence the deployment decision by an operator.



More, the Commission's model does not take into account whether the hypothetical town or city entail one type of area (entirely "white", "grey" or "black"), or if it's a hybrid area, containing "white", "grey" and "black subareas". All these factors influence an operator's decision to deploy a NGA network, and should therefore be taken into account when an external part assesses the likelihood of such a deployment. Therefore, Com Hem finds the introduction of a given "average period" inappropriate.

The second part of point 73, in which the Member State is to demonstrate "also that the historical pattern of investment made (...) in response to users' demands was not satisfactory", also falls short of showing on what basis the analysis should be made. As such, the provision opens for arbitrary judgment by the Member State.

For example, it is unclear how the Member State is to proof its assessment of users' historical demand. It is further unclear on what basis a Member State is to rule out the past investment decisions (decisions to invest as well as decisions not to invest) made by private operators. It is highly questionable if Member States possess the competence needed for such an evaluation.

In sum, point 73 opens for arbitrary assessments that in turn would affect market actors' behaviors. Com Hem suggests that the proposed provision is deleted. If not deleted, point 73 as well as points 63-65 and footnote 53 should be altered so as to take into account the wide range of market and business factors affecting an operator's decision to deploy a NGA network. The proposed "average period" should be deleted.

Limiting the distortion of competition

To limit the distortion of competition in the case of state aid to "grey NGA areas", the Commission proposes in point 74 (p. 19-20) that the operator receiving state aid should be required to provide wholesale access to the subsidized network. Com Hem welcomes the Commission's proposal and emphasizes that the objective of state aid measures in the majority of "grey NGA" cases is to enhance competitiveness.

In view of that objective, Com Hem stresses that the design of a state aid measure in areas where private actors operate should take into account the aid's effects on the prerequisites for infrastructure-based competition. If possible, the aid should strengthen infrastructure-based competition. Given the importance of dark fibre as an input good in the development of NGA networks, Com Hem suggests that dark fibre is included as a wholesale access alternative in the guidelines.

To further limit the risk for distortion of competition, Com Hem points at the possibility to include requirements not only on what the aided operator should do, but also on what the aided operator should not do. Com Hem notes that the higher in the value chain a state aided network is operating, the higher is the likelihood that the operator competes directly with broadband actors operating on market terms, and thus the higher is the risk for distortion of competition.

Therefore, Com Hem suggests that it is included in the guidelines that state aid to a "grey NGA area", in particular if it's granted to a publicly owned network company, should include a restriction on the aided network's operations, meaning that the aided operator should refrain from operating on the retail level.



In point 74 (p. 20), the Commission writes that for “existing (basic broadband) black areas (...) the aid should not cover the last mile access segment, that is the segment connecting the end user’s or business premises to the Main Distribution Frame”. In Com Hem’s understanding of the quoted sentence, the Commission’s objective is to minimize the risk for distortion of competition on the infrastructure level (access network) as well as to facilitate the investments by existing operators in their access networks.

On the basis of such an understanding, Com Hem welcomes the Commission’s devotion to limiting the distortion of competition as well as fostering infrastructure-based competition. Yet, point 74 only refers to a scenario in which the aid is used for the deployment of a traditional copper-based network. For example, it is unclear how the proposed limitation would be applied in a Fiber-to-the-Cabinet scenario or a Fiber-to-the-Home scenario. Simply put, what does the term “last mile segment” refer to in these cases?

Com Hem therefore encourages the Commission to clarify how the proposed restriction would be applied in a scenario in which the subsidized network is deployed with different NGA structures.

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