

Comments of the EFTA Surveillance Authority on the draft Community Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks

The EFTA Surveillance Authority (the “Authority”) welcomes the proposal of the Competition Directorate-General to provide guidance to stakeholders on the assessment of state aid projects in the broadband sector. The Authority recognises that, in view of the significant level of public investment that may be necessary in certain areas within Member States to deploy traditional broadband and Next Generation Networks (“NGN”), the draft Broadband Guidelines are intended to provide more legal certainty and facilitate swifter state aid decision-making procedures.

Given that the majority of projects do not fall neatly within existing rules, the Authority recognises the difficulties that have been faced over the last five years in assessing broadband cases. The Authority also recognises that in drafting these new guidelines there is a fine line between providing clarity for Member States and the industry, while at the same time maintaining sufficient flexibility to deal with unusual cases and to “future proof” Commission policy.

The Authority is aware that Member States have expressed some frustration regarding the timescales for implementing broadband projects. Such projects involve significant and time consuming capital investment, preceded by often lengthy and complex public procurement procedures. Member State authorities (and even citizens) understand and accept the time delay inherent in those respects, but often find it difficult to accept that state aid approval should also be necessary and sometimes complain that this is unnecessary bureaucracy.

It is imperative therefore that the Commission (and of course the Authority in so far as EFTA States are concerned) continues to learn from the experience of assessing broadband cases, so that notifications relating to NGN can be dealt with as expeditiously and as accurately as possible. The true test of the new guidelines will therefore be the extent to which existing “traditional” broadband cases can be assessed quickly, and the extent to which the principles developed to date can adapt to new developments in technology and the NGN.

The Authority wishes to make the following additional, more specific, comments:

1. We suggest, given that it is an issue that has already been identified by Member States, that it would be useful to clarify whether the considerations concerning services of general economic interest, and in particular the applicability of *Altmark* jurisprudence, are also applicable to NGN.

2. In so far as the issue of a profit sharing clause is concerned, the Authority supports the Commission's view that this is necessary in the best interests of minimising the distortion of competition and protecting the public purse. Whilst it could be argued that the bidding mechanism inherent in a public procurement exercise could (and indeed, in theory, should) take into account the possibility of windfall profits and therefore force prices down, the fact that so few realistic bids are (in the Authority's understanding) received suggests that this is unlikely. In many of these cases much of the risk is taken by the Member State, and care is required to ensure that third party contractors do not therefore receive a disproportionate reward. The Authority considers that it is sensible therefore that profits beyond a reasonable percentage should be shared. The Authority acknowledges that some Member States will be concerned that this may, however, impose an unnecessary bureaucratic burden upon contracting authorities. This, in the Authority's opinion, depends on the size and duration of the project. For smaller, "one off" projects based on a simple procurement or grant principles, this may be a reasonable concern, and ascertaining and subsequently monitoring the internal rate of return of the (aid beneficiary) contractors engaged may be very difficult. However, for the larger scale and duration projects based on Public Private Partnership structures (and the formation of Special Purpose Vehicles) a profit sharing mechanism should be straightforward (and indeed should be central to the thinking of Member State authorities).
3. The Authority would welcome clarification on the Commission's reasoning for the apparent discrepancy between the draft Broadband Guidelines and the common regulatory framework for electronic communications networks and services, Directive 2002/21/EC (the "Framework Directive")¹:
 - It appears that the Commission expresses a preference for multi-fibre and point-to-point technology (paragraph 74, point 4 of the Broadband Guidelines), whereas Article 8 of the Framework Directive requires technological neutrality.
 - In the context of market analysis (the definition of the relevant product and geographic market) under the Framework Directive, it could be argued that the three different areas specified in the draft Broadband Guidelines (black, grey and white) pre-suppose sub-national market segmentation. We question whether this should be consistent with the strict criteria on assessing sub-national markets set out in the Commission's comments pursuant to Article 7(3) of the Framework Directive in the seminal case of the UK analysis of the market for wholesale broadband access.²
 - Whilst the Authority understands, given the state support involved, why the Commission seeks to impose open access obligations upon the aided infrastructure or service for at least 7 years, the Authority questions how this will inter-relate to (potentially different) regulatory obligations that may be imposed by national authorities following market analysis of the relevant market under the Framework Directive.

¹ OJ 2002/L 108/33

² Case UK/2007/0733, letter of 14.02.09.

- Finally, we would be grateful for clarification on how the Commission considers that the division of competences between different parts of Member State authorities, specifically the state aid granting authority on the one hand and the national regulatory authority on the other, should be addressed under the Framework Directive.