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EUROCITIES comments on European Commission's draft Broadband state aid guidelines

EUROCITIES

EUROCITIES is the network of major European cities. Founded in 1986, the network brings together the local governments of over 130 large cities in some 34 European countries. EUROCITIES represents the interests of its members and engages in dialogue with the European institutions across a wide range of policy areas affecting cities. These include: economic development, the environment, transport and mobility, social affairs, culture, the information and knowledge society, and services of general interest.

EUROCITIES website: www.eurocities.eu

EXECUTIVE SUMMARY

EUROCITIES has worked to raise awareness of the role of local authorities in facilitating network roll-out through our Broadband Manifesto.¹ We therefore welcome the initiative by the European Commission to open a consultation on the draft Broadband State Aid Guidelines published on 19 May 2009. We have a number of concerns from the perspective of Europe's big cities.

As broadband and Next Generation Access (NGA) networks are a basic part of city infrastructure and increasingly the basis for growth and welfare, the rapid deployment of these networks is crucial for cities. The draft guidelines presented do not yet provide adequate guidance for European cities on how to ensure roll out of open access Fibre to the Home (FttH) throughout their territory. Nor do they provide for enough scope to put pressure on incumbents to roll out NGA, instead requiring that governments prove that roll-out is not guaranteed. The risk we run is to create a situation where the public sector fails to support actively the needed expansion of sustainable broadband infrastructure.

As concerns NGA, EUROCITIES also believes that it is important to move beyond the classical distinction between rural and urban areas. Market development and investments by Telecom operators have shown that this is no longer the prevailing distinction. Many cities have large populations of socially excluded often facing multiple deprivation, and can face a massive and yet hidden 'digital divide'. These areas are even less likely to be attractive for NGA deployment. We therefore believe that universal NGA roll-out in cities is in no way guaranteed by market players and there is a strong need to allow more scope for public intervention in urban areas.

Following from this, our specific concerns are:

- The definition of Next Generation Access (NGA) networks provided by the guidelines lacks consistency (paragraph 48) and provides for a very limited definition. EUROCITIES advises the Commission to clearly define the capability of full fibre access networks as networks providing 100/100 Mbps simultaneous up/download speed and consequently to include Fibre to the Home (FttH) to existing homes and buildings in the definition that is provided.
- Paragraph 49 should specifically point out the increased impact that NGA deployment can have on more general public objectives of social cohesion and economic development.
- Paragraph 51 should clearly state that there is a risk of a new digital divide, particularly in deprived urban areas. Paragraph 52 should furthermore include provisions that acknowledge the fact that the main barrier to NGA deployment is increasingly the high initial investment costs.
- Paragraph 55 should allow for governments to introduce measures that coordinate costs in Multi-Dwelling Units (MDU's). As many of the competencies are the responsibility of local governments, all measures falling under paragraph 55 should be implemented in coordination with local authorities.

¹ EUROCITIES Broadband Manifesto, 2005, available at www.eurocities.eu .

- Paragraphs 63/64/70/73 should not consider a mere announcement of investments as sufficient proof of actual investment being made. Rather, it should only be possible for operators to pre-empt government initiatives through actual business, rather than by mere investment announcements. The guidelines should allow only concrete investments to be taken into account. We also advise that the guidelines should provide a detailed catalogue of requirements to be considered as sufficient proof of investment.
- Similar to the definition of NGA provided in paragraph 48, paragraph 74 should also include FttH to existing homes and buildings.

INTRODUCTION

Basic infrastructure for broadband and NGA networks is comparable to the road and water infrastructure for which the public sector is responsible. Such infrastructure is the foundation for growth and welfare.

EUROCITIES would like to acknowledge the initiative taken by the European Commission to publish these draft guidelines. However, the draft guidelines seem to contradict their main purpose, outlined as being the "... rapid deployment of broadband networks". At present, the draft document does not provide guidance to European cities on how to ensure the roll-out of open access Fibre to the Home (FttH) throughout their territory. Furthermore, it does not seem to give much scope to put pressure on incumbents to roll-out NGA's, instead requiring governments to prove that roll-out is not guaranteed.

We fear that this will lead to uncertainty and could impact negatively on the potential for investment by the public sector. The guidelines proposed by the European Commission could lead to a situation where the public sector fails to take responsibility and actively support the desirable expansion of a sustainable broadband infrastructure. The need for government to support such developments has been recognised more and more over the last months.²

As the final guidelines will be a central part of the EU's broadband strategy, the risk is that they will result in a lack of broadband infrastructure with consequent market failures, demands for more regulation etc. We believe it is important for the EU to take a new position when designing a broadband state aid policy, especially with a view towards investments in Next Generation Access Networks (NGA) based on fibre-optics.

The fundamental problem regarding expansion of next generation infrastructure is that its current spread is already insufficient compared to the needs. Many factors exist that could hinder the fast and timely roll-out of NGA needed to allow access for everyone and create powerful centres of economic growth and innovation.

The section dealing with state aid for NGA seems to be based on an underlying distinction between rural areas and "urban zones" (see e.g. paragraph (52), (58)) and the two models of 1. low population density/high capital cost vs. 2. high population density/low capital costs, are similar to the categorisation of investment environments for conventional broadband cases that has been applied by the Commission in the past.

However, as pointed out in paragraph (51) of the draft guidelines, market development and investments by Telecom operators prove that this is no longer necessarily the prevailing distinction. Despite the supposedly thriving economy of conurbations, there can be a massive and yet hidden 'digital divide'. Many cities have large populations of socially excluded people often

² See e.g. the Digital Britain interim report which recognised the importance of "useful models for development of broadband beyond the plans of major telcos" (http://www.culture.gov.uk/what_we_do/broadcasting/5631.aspx/); or the recent announcement by the Australian government to invest Aus\$43 billion (appr. 25 billion Euro) in the next 8 years to build a 100Mbps+ FttH network covering 90% of all Australian homes.

facing multiple deprivation.

Many of the exchanges in these areas have no unbundled services as only the incumbent supplier is offering first generation broadband. This means that even though the exchanges are, technically, available for unbundling, in practice there is still a monopoly. Consequently, in many cities the costs of these rather basic services are still too expensive for many poorer people to afford.

For this reason, it is unlikely that these areas will be financially attractive to Telecom operators for the deployment of NGA's, as the investment environment is even more uncertain than for basic broadband. Universal NGA roll-out in cities is therefore in no way guaranteed by market players, and new types of digital divide could develop. This is in particular true when dividing conventional narrowband or broadband access from NGA access, which will eventually enable a new generation of services across the society & economy and might exclude those who only have access to basic speed broadband or narrowband internet. We therefore believe that there is a strong need to allow more scope for public intervention in urban areas.

SPECIFIC COMMENTS

Paragraph 48

1. The definition of an NGA provided in the draft document assumes that available bandwidths delivered by way of upgraded copper networks using VDSL and Docsis-3 technologies are equivalent to the available bandwidths supplied over a full fibre access network. Clearly, however, an access network allowing for 100/100 Mbps and more (up and down simultaneously per household) is in a different class, allowing for entirely different services, as well as being "future proof". EUROCIITIES advises the Commission that in the absence of such full fibre access networks, city governments should be allowed to grant state aid to ensure full fibre networks are built.

2. Furthermore, this paragraph excludes FttH to existing homes and offices. However, existing residential buildings in deprived areas (whether rural or urban) are less likely to be renovated, and these areas are less likely to see new constructions because of lower overall economic attractiveness. Therefore, the paragraph seems to be inconsistent with the wider objectives of social and regional cohesion set out in paragraph (1) of the draft guidelines. Secondly, the overall intervention and coordinating role given to public authorities in paragraph (55) would make an inclusion of FttH within the scope of the guidelines necessary and logical, to allow the overall objectives of the EU Broadband policy to be achieved. EUROCIITIES therefore strongly suggests that this definition is extended to FttH to existing homes and offices.

Paragraph 49

3. There is no reference whatsoever to other technological capabilities that are inherently present in 2 out of the 3 options outlined in paragraph 48: both cable and fibre networks are capable of supporting a broadcast stream which allows for Digital Video Broadcasting (DVB) encoded digital TV to be delivered. Copper networks do not have these capabilities. In addition, no reference is made to the new dimensions of connectivity and services that can be run on NGA. We believe that the paragraph should underline the greater impact that NGA deployment can have on more general public objectives of social cohesion and economic development. EUROCIITIES recommends that

such references are included to showcase the important market shift and new developments that lie ahead.

Paragraphs 51 / 52

4. As is pointed out by the Commission³, market behaviour and investments by Telecom operators prove that increasingly, the main barrier to invest is not population density but rather initial costs of investments and uncertain market take-up. As stated within the draft guidelines, broadband network operators argue that rolling out a fibre-based network is a very expensive and risky investment and is only safe in areas where market take-up can be assured. However, many cities have large populations of socially excluded people, often facing multiple deprivation and often concentrated in certain districts.

5. Consequently this can also result in uncertain investment environments for Telecom operators to deploy NGA, as the residents might not be able to afford NGA access or services. NGA roll-out in cities is therefore in no way ensured by market powers. Certain urban neighbourhoods as a result would face considerable risk of a new digital divide, if the rationale behind the European Commission's Broadband state aid rules is not changed. EUROCITIES would propose to amend paragraph 51 & 52 as follows.

(51) As with so-called 'first generation' roll-out of basic broadband networks, State, municipal and regional authorities justify their support for a rapid roll-out of fibre networks on the grounds of a market failure or cohesion objective. If for the roll-out of basic broadband infrastructure, examples of state interventions have mainly related to rural communities/areas (low density, high capital cost) or areas which are economically underdeveloped (low ability to pay for services), this time the economics of NGA networks model is said to discourage deployment of NGA networks not only in sparsely populated areas, but also in certain urban zones. In particular, the main issue affecting the rapid and wide deployment of NGA networks, appears to be costs and to a lesser extent density of population. Without direct public intervention, there is therefore a high probability of excluding certain disadvantaged groups of the population, which does not guarantee take-up of deployed NGA networks.

(52) [...] Thus, Member States may wish to foster NGA network developments in areas where investments by existing broadband network operators in such networks would take several years to arrive because ~~they are financially less attractive or~~ deployment costs are too high relative to expected revenues and market take-up. ~~than certain major urban zones~~. In certain cases, Member States may decide to invest by themselves or provide financial support to private operators in order to obtain NGA network connectivity, or earlier than anticipated, in order to ensure that employment and other economic opportunities are leveraged as quickly as possible.

Paragraph 55

6. One of the major obstacles to a cost-efficient and fast roll-out of NGA's that deploy FttH is the in-building ducting and wiring, from the street level to the apartment. This is not limited to

³ Draft Broadband State Aid guidelines, p. 14.

telecommunications, but also applies to upgrades of other utilities. As the ownership of individual apartments is different, and the decision-making process can be very difficult, only one dissident in a multi dwelling unit (MDU) can block improvements meant for everybody. Measures that make deployment in these cases easier for all private/public parties and all utilities should be included in paragraph (55). Such measures, as pointed out in paragraph (55), equally do not need to involve state aid within the meaning of Article 87(1).

7. Furthermore, many of the competencies related to utilities, public works and constructions can be found on the local government level. EUROCITIES would suggest an amendment that would ask Member States to work in coordination with local authorities in this regard:

(55) [...]Member states may decide in accordance with EU's regulatory framework for e-communications, for instance, to ease the acquisition process of rights of ways, require that network operators coordinate their civil works and /or share part of their infrastructure. In the same vein, Member States may decree that for any new constructions (including new water, energy, transport or sewage networks) and/or buildings a fibre connection should be put in place, and be allowed to put in place measures that coordinate costs in multi dwelling units (MDU's). Where applicable, this should be done in coordination with local authorities.

Paragraphs 63, 64, 70 & 73

8. It seems that the provisions introduced within these sections lack essential clarity on how they can give the needed flexibility to governments to actively support the fast roll-out of NGA networks. Public authorities may grant aid in areas without NGA's, but as soon as any operator declares the intention to upgrade to NGA within the next 5 years, such aid becomes incompatible State aid distorting competition (see paragraph 65 for (black) areas with 2 NGA networks, and paragraph 64 for (grey) areas with 1 incumbent planning to become an NGA and a potential NGA entrant).

9. Without any guidance on how to demonstrate "[carrying] out the necessary infrastructure investments in order to have covered by then a substantial part of the territory and of the population concerned thereby"⁴ or, in the case of grey NGA areas, prove that "the existing or planned NGA network is not or would not be sufficient to satisfy the needs of citizens and business users in the areas in question"⁵, any operator can claim a roll-out in the next 5 years on paper, effectively blocking any initiative. If, for example after 2-3 years, the operator claims to be forced to delay by unforeseen circumstances, government has to prove that the operator will not roll out in 5 years from that moment on before action can be taken.

10. Apart from a number of criteria related to market situation and network access in grey NGA areas⁶, no further detailed information is provided on how proof of non-investment can be provided by governments or how a sufficient and binding demonstration of investment can be made by operators. At present, this constitutes a major loophole in the argumentation of the draft document. It is effectively a free (no obligation, no costs, no commitment) blocking trigger which

⁴ Draft Broadband State Aid guidelines, p. 17 footnote 53.

⁵ Draft Broadband State Aid guidelines, p. 18 paragraph (70).

⁶ Draft Broadband State Aid guidelines, p. 18, paragraph (70).

can be used by any operator almost indefinitely to block any initiative from a municipality or government.

11. An announcement of investments should not be sufficient as proof for actual investment being made. Rather, it should only be possible for operators to pre-empt government initiatives through actual business, than by mere investment announcements. EUROCITIES requests that the guidelines be clarified so that only concrete investments are taken into account. We also advise that the guidelines should provide a detailed catalogue of requirements to be considered a sufficient proof of investment.

Paragraph 74

13. Similar to the definition of NGA in paragraph 48 of the document, paragraph 74 excludes a certain part of the topology. It would seem highly contradictory that aid is acceptable under State aid rules for some parts of the topology, but not for others. EUROCITIES advises that aid is made extendable to the last mile, by definition. If the last mile is upgraded, the existing operators should of course be able to benefit from the upgrade.